

Brownfields Redevelopment Receives Boost Under the BUILD Act

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Redevelopment of environmentally-damaged property has seen steady growth in North Carolina and nationwide.

The attraction to dense, urban communities offering work/live/play opportunities and away from suburban living has provided profitable opportunities to resurrect older, derelict buildings on properties which redevelopment is complicated by the presence of hazardous substances, pollutants or contaminants under federal

and state Brownfields programs. Under the North Carolina Brownfields Program, properties with soil and groundwater contamination can be redeveloped without full cleanup of the property if certain site-specific land use restrictions and other measures to protect facility inhabitants and the public are implemented. Brownfields properties can offer a less expensive way to relocate or grow while also satisfying consumer demand for sustainable development practices and craft communities.

Brownfields Redevelopment

Brownfields projects have long provided win-win opportunities for prospective developers and communities. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), commonly known as "Superfund," imposes strict, joint and several cleanup liability on owners and operators of property contaminated by hazardous substances. However, different levels of protection from such liability have become available over the years through statutory revisions, like the Brownfields Revitalization and Environmental Restoration Act of 2002 signed by President George W. Bush, by creating exceptions to environmental cleanup liability.

Redeveloping contaminated properties under a Brownfields program allows developers – those that are not parties responsible for the contamination – to complete projects without the onus of cleaning up a property to unrestricted use standards by negotiating the terms of cleanup and redevelopment under a Brownfields Agreement with the U.S. Environmental Protection Agency ("EPA") or the administrator of a state Brownfields program such as the North Carolina Department of Environmental Quality ("DEQ"). The community in which a Brownfields property is redeveloped benefits from job creation; increased tax base; revitalization of blighted areas; preserved green space and historic places; improvement of disadvantaged neighborhood quality-of-life, often with affordable housing and related retail shopping opportunities; and, environmental cleanup activities or set asides with community benefits.

The BUILD Act

New changes to CERCLA broaden the Brownfields Program. The latest protections come under the Brownfields Utilization, Investment, and Local Development Act of 2018 ("BUILD Act") signed into law in March 2018 as part of the bipartisan

Consolidated Appropriations Act of 2018. Embedded in the massive omnibus spending bill, the BUILD Act revisions expand how exceptions to liability can be met, and the number of Brownfields redevelopment sites can be increased.

First, the BUILD Act increases the funding limit for Brownfields remediation grants from \$200,000.00 per site to \$500,000.00 per site, based on the anticipated level of contamination, size, or ownership of the sites. In unique circumstances, that amount can increase to \$650,000.00 with approval by the Administrator of the EPA. Municipalities often rely on Brownfields grants to assess and remediate problem sites in their jurisdiction to identify economic opportunities and attract developers.

Increased funding coupled with a new ability to use grant funds to defray up to five percent of certain administrative costs will help reach more troubled properties.

Second, municipalities now can acquire blighted property for redevelopment without the specter of inheriting cleanup liability. Under CERCLA, liability of the owner attaches when the property is transferred. Previously, CERCLA exempted a unit of State or local government from cleanup liability only if it acquired title involuntarily. The BUILD Act revises the definition of "owner or operator" to exempt governments from liability by removing the requirement that property ownership results from involuntary acquisition of title. Now ownership or control can occur through "seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which government acquires title." Such expansion provides redevelopment certainty for governmental entities without the risk of an obligation for cleanup.

Third, tenants now have liability protection available directly. Under CERCLA, tenancies and leases are a type of contractual relationship that can be excluded from the category of "affiliated with" a potentially responsible party that triggers liability. Prior to the BUILD Act, tenants had to rely on the landlord's qualification as a bona fide prospective purchaser ("BFPP") of the property the tenant occupies to avoid liability. There are steps required under CERCLA to establish BFPP status, initiated by all appropriate inquiries into the previous ownership and uses of the property (i.e., conducting a Phase I Environmental Site Assessment), but often a landlord/owner would fail to satisfy later requirements, thus exposing tenants to joint and several liability. The only protection available to tenants was for the EPA to exercise "enforcement discretion" for tenants that conducted their own "all appropriate inquiries" prior to lease commencement under agency guidance issued in 2012.

Now tenants have the option to establish BFPP protection directly to avoid joint and several liability with the landlord. Tenants can still rely on a landlord's status as BFPP. However, tenants can take control and obtain their own BFPP independently by conducting all appropriate inquiries prior to leasing and by demonstrating compliance with all additional CERCLA BFPP requirements, including exercising appropriate care with respect to hazardous substances found at the property. Tenants have a defense to CERCLA liability separate from the landlord as BFPP rather than relying on EPA's enforcement discretion.

North Carolina Benefits

The BUILD Act has highlights beneficial to North Carolina Brownfields opportunities besides the provisions above.

Those experienced with the North Carolina Brownfields Program process will be familiar with questions on the application focused on what public benefits will result from the property's redevelopment, including environment-friendly technologies and designs the prospective developer plans to utilize in its redevelopment strategy, such as Leadership in Energy and Environmental Design (LEED) Certification; green building materials; green landscaping techniques; energy efficient designs, materials, appliances, machinery; renewable sources of energy; and recycling or reuse of old building materials. Projects that address these components particularly interest the State.

Now grant applications for Brownfields funding will include consideration of whether projects will address waterfront sites or facilitate a clean energy project. Applications for grants are ranked by certain criteria. The BUILD Act identifies projects adjacent to a body of water or federally designated flood plain projects, and those that generate renewable electricity from wind, solar, or geothermal energy or that incorporate energy efficiency improvements, such as projects for combined heat and

power or district energy system, as those that may be ranked.

An additional benefit for North Carolina goes to the 95 counties outside of Durham, Forsyth, Guilford, Mecklenburg, and Wake counties through the availability of Small Community Technical Assistance Grants. This section of the BUILD Act provides technical assistance grants to assist small communities, Indian tribes, rural areas, and disadvantaged areas to carry out activities related to Brownfield redevelopment grant audits. "Disadvantaged areas" are those communities with an annual median household income less than 80 percent of the statewide annual median household income, and "small communities" are those with a population of not more than 15,000 individuals. These areas and communities often have blighted properties eligible for Brownfields redevelopment, but they lack the municipal resources of a larger town or city to attract and assist prospective developers.

Conclusion

In an era of fracture, tribalism, and unprecedented federal government shutdown, the BUILD Act is a small, agnostic beacon of hope and opportunity for the development and construction industries in North Carolina. New benefits under the BUILD Act coupled with existing North Carolina statutory property tax exemptions for Brownfields projects is encouraging, and DEQ is open for business.

Ed. Note: A previous version of this article referenced President G.H.W. Bush signing the Brownfields Revitalization and Environmental Restoration Act of 2002. The act was signed by President George W. Bush. We regret the mistake.

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