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Municipal improvements of brownfields properties through court-supervised proceedings - by John Dorsey

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In a real estate market where developable properties situated to accommodate major land developments are limited in supply and highly competitive, municipal improvement of brownfields properties, particularly those involving a prior mill building or industrial use, through specialized court proceedings presents municipalities unique opportunities to improve environmental conditions and transition these properties into repurposed, economically productive projects. Brownfields properties are classified as real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

In the ordinary course, the availability of federal and state grants and similar funding mechanisms provide resources to address historically contaminated brownfields properties. Notwithstanding the availability of these resources, municipalities often face obstacles in leveraging resources for brownfields properties that have experienced a level of abandonment.

A specific example includes actual abandonment of a brownfields property. Here, an owner has openly abandoned involvement with the property. The title of the brownfields property has a last recorded ownership interest, however, the owner has actively and openly divested itself of any meaningful interest or activity in connection with the brownfields property. In turn, the municipality cannot assess the environmental condition of the brownfields property, which impedes public health and safety considerations and any meaningful planning for potential future land use.

Alternatively, there is constructive abandonment. This is where an owner has a level of involvement with the brownfields property but ultimately proves to be non-responsive in addressing the environmental condition of the brownfields property. In turn, the municipality may have some level of understanding of the environmental condition of the property but has incomplete data, which practically leaves the municipality in a similar position as actual abandonment.

Another example is non-compliant ownership in the face of known brownfields contamination rising to the level of presenting a public nuisance. Often, this is coupled with financial constraints or other issues impacting the developability of the brownfields property, leaving a distressed asset.

Usually, municipal participation plays an important role in the environmental site assessment and remediation process, either as a landowner, potential grant applicant and/or a supporting project partner. In turn, municipalities can at times assist brownfields properties by leveraging grants specifically allowing for municipal involvement in the site assessment and remedial process.

In circumstances of abandonment of a brownfields property, court-supervised proceedings can offer unique tools for municipalities to improve the environmental condition of a brownfields property fitting into one of the above-categories, unlocking the first step towards putting the property back into economically productive use. In Rhode Island, the law allows certain parties, including a municipality, to seek the court's appointment of a fiduciary, known as a Receiver or Special Master, to take over the affairs of a brownfields property in order to work with stakeholders, including the municipality and regulators, to implement a plan to advance assessment and/or remediation where

no other adequate remedies are available to address the condition of the brownfields property. In doing so, the court-supervised process can unlock several practical solutions to these complex issues.

A specific example includes the option of a municipality working with the court-supervised process to perform an environmental site assessment, then proceeding through a court-supervised sale process to a third-party who ultimately develops the brownfields property.

Another example is the municipality conducting an environmental site assessment and then investing in the remediation of specifically defined environmental issues impacting the developability of the brownfields property.

The municipality can then work through the court-supervised process to have the brownfields property marketed and sold with protocols providing for redevelopment. In this situation, court-supervised proceedings can also grant the municipality a priority lien attaching to the property for the cost of remedial activities, providing the availability of recovery through the court-supervised sale process.

Alternatively, the municipality can work with the court-supervised process to conduct an environmental site assessment and ultimately seek authority from the court to assume site control of the brownfields property. The primary benefit of this process is that the municipality can mitigate risk by first undertaking a site assessment in the context of a court-supervised proceeding, prior to assuming site control. From there, the brownfields property can be incorporated into the municipality's land use plan as a benefit to the public.

In addition, a municipality can seek to utilize the court-supervised proceedings to conduct an environmental site assessment and then assist the process in pursuing grant funding for remediation activities. This strategy is effective for sites that have significant contamination and require a long-term, multi-phased remediation plan. This process also leaves open flexibility for the long-term disposition of the site, while taking steps to immediately start to improve the condition of the brownfields property.

The above strategies implemented through a court-supervised proceeding can assist municipalities in improving the environmental condition of sites that would otherwise remain stagnant and non-compliant, while significantly encouraging economic growth and re-development of these brownfields properties.

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