Anatomy of a Successful Brownfield Redevelopment Project: How Did They Do It?

By Keith B. Walker

When you are representing a client considering purchasing a very large and highly contaminated property with multiple owners, intending to develop the site with residential use, where do you start? Where will it end? Further, between those two points, how do you prevent the project from becoming mired in delays related to obtaining closure from the regulatory agency with oversight?

In the midst of a thus far remarkably successful remediation of a huge brownfield in Santa Fe Springs, California, Patricia J. Chen, an environmental attorney with Fulbright & Jaworski L.L.P., and Nancy Beresky, the Principal Hydrogeologist with Waterstone Environmental, Inc., took the opportunity to answer these and other questions in their presentation for the Los Angeles County Bar Real Property Section, entitled "Anatomy of a Successful Brownfield Redevelopment Project: How did They Do It?"

The site at issue was a 55-acre oil field property that had been in use for approximately 100 years, and which was divided into approximately 250 lots owned by over 60 different entities. Environmental issues associated with the site included crude-impacted soil related to historical oil production operations, over 80 former sumps (which contained crude oil and drilling mud with heavy metals, and which all needed to be re-abandoned in accordance with current standards), miles of underground piping associated with the oil production operations, soil contaminated by the former presence of

continued on page 7

Anatomy of a Successful Brownfield Redevelopment Project: How Did They Do It?

continued from page 6

recycling operations and machine shops at the site, the site's location within a methane zone, and groundwater impacted by off-site sources. In addition, it was anticipated that residential structures would be built in close proximity to at least 25 of the soon-to-be re-abandoned oil wells. Fortunately for the developer seeking to redevelop the site, however, nearly all of the contamination was related to soil.

As set forth by Nancy Beresky, the immediate issues for the developer with respect to the redevelopment of the site included whether it was economically feasible to remediate the site to a residential, as opposed to commercial, standard, the projected timeframe for remediation, how many occupants could eventually reside at the site, and sundry issues related to the tax base, traffic, and the ability of the school system to provide educational facilities. With respect to the large liabilities associated with the contamination at the site, Patricia Chen detailed several viable options for the developer with respect to minimizing the extent of its potential liability. These options included entering into an agreement under the California Land Reuse and Revitalization Act of 2004 (also known as "CLRRA" or "AB 389; Health & Safety Code section 25395.60 – 25395.105), participating in the Voluntary Cleanup Program with the Department of Toxic Substances Control ("DTSC"), entering into a Prospective Purchaser Agreement in conjunction with DTSC, making use of bona fide prospective purchaser defenses, entering into the Site Designation Process, and availing itself of the protection offered under the Polanco Redevelopment Act ("Polanco"; Health & Safety Code section 33459-33459.8).

Ultimately, the development of the site proceeded under Polanco, based on several considerations as explained by Ms. Chen. First, there was an active Redevelopment Agency ("RDA") interested in seeing the site developed. Second, in order for the project to remain economically feasible, timing was a serious concern and, in contrast with several other of the above-listed options, development under Polanco would proceed relatively quickly. Next, provisions of Polanco afforded the developer much more control over the remediation activities, which provided much needed certainty in the context of dealing with the responsible party for the contamination, that had continually shown itself to be uncooperative. Finally, not surprisingly, the developer wanted to pursue the responsible party for costs, and Polanco allowed for the recovery not only of remediation costs but also attorney fees.

Although Ms. Chen acknowledged that the cost recovery issues have not yet been resolved, proceeding under Polanco has enabled a highly expedited cleanup of the large, complex, contaminated site. Specifically, over the course of just over approximately two years, the feasibility study was performed, the Phase II subsurface investigation was completed, and nearly all of the remediation was performed. Further, during this time, the developer was continually able to submit and receive communication from the California Office of Environmental Health Hazard Assessment ("OEHHA"), which communication continually served to provide the developer with comfort in regard to the level of health risks at the site, in the context of the proposed development with residential use.

According to Ms. Chen and Ms. Beresky, however, the most important key to keeping things moving was constant communication with the oversight agencies, the city of Santa Fe Springs, the RDA and, most importantly, the community. For instance, the developer and RDA held more than twice the amount of community meetings as required under the California Environmental Quality Act. This communication enabled them to maintain the support of the public while working through the investigation and remediation phases of the site's development, which involved the presence of hazardous materials on land eventually destined for residential occupancy. Without such communication, it seems quite possible that the community, in the face of uncertainty regarding the extent of the problem and the progress of the remediation, could have bristled at the notion of residential development and continually impeded the progress towards completion.

In addition, the developer entered into a Memorandum of Understanding with OEHHA, whereby the developer agreed to pay OEHHA a required hourly rate for its review of the health risk assessments for the site, with the agreement that OEHHA would provide comments on reports within ten days of receiving them. This strategy proved to be a "brilliant" move, Ms. Beresky asserted, because it provided the consultants with the ability to adjust remediation strategies in near real-time and constantly re-evaluate the most effective ways of moving forward. The expedited communication with OEHHA, in turn, gave the environmental consultants the ability to constantly keep DTSC and the California Regional Water Quality Control Board informed of the progress at the site, which enabled the developer to keep participation by those agencies to a bare minimum, while the oversight was handled by a Certified Unified Public Agency.

Also, although it was much more expensive, Ms. Beresky assigned only very senior environmental consultants to work at the site; a minimum of twelve years of experience on brownfields was required. According to Ms. Beresky, staffing with only the most competent personnel garnered a much higher level of credibility with the regulatory agencies, the city council, and the community, and produced a very high level of efficiency and effectiveness in regard to the investigation and remediation activities. Another practice which greatly added to Waterstone Environmental, Inc.'s success in remediating the site was its intensive analysis and use of pre-existing data regarding the condition of soil and groundwater at the site. In fact, in projecting (prior to the commencement of remediation activities) the amount of contaminated soil that would need to be excavated from the site, Ms. Beresky stated that Waterstone Environmental Inc.'s estimate proved to be 94% accurate. Without such an in-depth analysis of the previous data, Ms. Beresky predicted that further sampling, which would have taken time and incurred additional cost, would have been necessary.

Finally, Ms. Beresky and Ms. Chen explained that, continually, the most conservative parameters were chosen with respect to the remediation standards. They felt that by proceeding according to such conservative parameters, they were able to maintain support for the project such that the efficiency in keeping the project moving outweighed the additional burdens associated with complying with the higher standards, and really cut down on the amount of consideration and re-consideration of the remediation and subsurface investigation plans by the regulatory agencies.

In regard to advice to other developers seeking to follow the example set at Santa Fe Springs, Ms. Chen outlined several important considerations. First, she counseled that securing an indemnity from the seller of the property is of the utmost priority. Second, not surprisingly, she advised strict adherence to the requirements for establishing the bona fide purchaser defenses under CERCLA, especially with respect to performing "All Appropriate Inquiry" and ensuring that the environmental assessment of a property comply with the new American Society for Testing and Materials 1527-05 standards (which differ in several important respects from the 1527-00 standards). Third, she suggested an in-depth analysis of the various mechanisms for minimizing liability, such as entering into a CLRRA agreement, the Voluntary Cleanup Program, or Polanco, with a heavy emphasis on timing considerations associated with each option. Next, Ms. Chen asserted that environmental insurance options be explored in detail, includ-

continued on page 8

Anatomy of a Successful Brownfield Redevelopment Project: How Did They Do It?

CONTINUED FROM PAGE 7

ing without limitation the potential purchase of pollution liability insurance covering claims arising from pollution conditions, for cleanup costs, bodily injury, property damage, and legal defense costs, as well as the potential purchase of cost cap insurance to provide protection in the event remediation costs spiral wildly out of control.

Although both Ms. Chen and Ms. Beresky cautioned that the concerns in taking on a site such as the one in Santa Fe are legion, and that there are many ways for such projects to go wrong, their message was definitely one of hope; they explained, at length, that it can be done.

In a World Awash in Capital, Where is the Smart Money in Real Estate Headed?

CONTINUED FROM PAGE 5

ket will in some way affect he commercial real estate market because when there is any effect of on the consumer confidence there is a trickle down effect to potential tenants of commercial properties.

The final part of the session comprised of a checklist of investing in a new country. Mr. Gold's discussed some of the factors to be considered are the political climate of the country one hopes to invest in together with the legal regime. There has to be some recourse on how to withdraw ones investment should the need arise. Other factors include investing in markets with growing populations, where mortgage financing is available and great local partner with whom one can partner with. Lastly, investments should begin with smaller investments, major cities in Europe and Asia and high quality assets. Mr. Newman ended the session with stating his ideal project in a new market is one with a great group of people to work with and value adding projects

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