

Developers and environmental risk: Put a PPA in your pocket

By Phyllis E. Bross

It will come as no surprise to experienced environmental law practitioners that in New Jersey, acquisition of contaminated land can mean liability for new landowners. Unless they qualify for the governmental innocent landowner defense, or have acquired the property by devise or succession, the average prospective purchaser/redeveloper is concerned about accepting title to environmentally compromised real property.

Therefore, with liability often the most critical risk to be addressed at less-than-pristine sites, I encourage the use of Prospective Purchaser Agreements (PPAs) to minimize liability risks and allow redevelopment projects to succeed. In a prior incarnation, I was the deputy attorney general who helped create New Jersey's PPA Program, which allows purchasers to secure a contractual covenant not to sue. Now in private practice, my role is to help redevelopers address liability risks through PPAs.

Management of PPA program

The PPA program at the New Jersey Department of Environmental Protection (NJDEP) is managed by Susan B. Boyle, a former assistant commissioner in the agency's Site Remediation Program. A member of NJDEP's Office of Brownfield Reuse, Boyle helps purchasers secure PPAs swiftly and relatively painlessly, often necessitating only one or two meetings with her in Trenton. One refreshing aspect of a PPA contract is the absence of unnecessary governmental red tape, as state PPAs are neither delayed by formal notification procedures nor by the routine involvement of government lawyers. Unless there is a policy question, an outstanding enforcement matter, or a critical legal issue to resolve, securing this covenant can be seamless. In fact, once a cleanup/redevelopment project is deemed by NJDEP as PPA eligible, the Office of Brownfields Reuse can typically finalize the PPA in a matter of weeks, sometimes days, as long as applicants are diligent in submitting necessary information.

Origin

The state created the PPA to encourage cleanup and reuse of brownfield sites, even before New Jersey had a brownfield statute



in place. PPAs are issued pursuant to NJDEP's general enforcement and settlement authority, and are used to waive the state's rights under the Spill Compensation and Control Act, and the Water Pollution Control Act, to otherwise demand that purchasers conduct cleanup of pre-acquisition contamination, due to their land ownership status. In 1996, when New Jersey entered into its first PPA, that covenant helped pave the way for closure and remediation of a severely contaminated landfill site in Elizabeth. Today, a thriving shopping mall is located at that site. See, Bross, "The Greening of New Jersey's Brownfields," *Fordham Envir. Law Journal*, Vol IX, Symp., No. 3, 1998, at fn 91. Since then, NJDEP has continued to use PPAs to draw cleanups, and to provide comfort to developers where NJDEP has made a policy decision not to pursue them as owners with respect to pre-acquisition contamination. This practice has both encouraged environmental cleanups and resulted in the profitable reuse of many formerly abandoned or underutilized properties, including brownfields.

Although that first PPA was in the form of a judicial consent decree utilized to resolve an actual lawsuit, PPAs are now administrative contracts used to settle purchasers' potential liability, no longer requiring a case or controversy as a precondition.

NJDEP is charged with the awesome responsibility of protecting the state's environment and public health, and protection of that magnitude can be quite expensive. In its wisdom, the agency has used this innovative contract over the past decade to elicit assistance from the private sector. Because NJDEP has discretion to perform a cleanup, to direct hazardous substance dischargers to do so, or otherwise arrange for a cleanup, NJDEP encourages private parties, through its

voluntary cleanup program, and also where appropriate through PPAs, to partner with NJDEP in accomplishing remediations. Due in great part to the tireless efforts of the agency's Office of Brownfield Reuse, which today is administered by Kenneth Kloo, NJDEP can rely on redevelopers, local and county governments, and others to help devise protective cleanup strategies and link cleanup activities to planned reuses for properties, whether a site is to be residential, commercial or recreational property, or to be preserved as open space. The Brownfield Office is only too glad to share its wealth of expertise with developers on issues such as environmental assessment grant eligibility and cleanup cost reimbursement. And, for those fortunate prospective purchasers looking for a measure of cleanup finality and liability limitation, that office also offers PPAs.

Understanding that resolution of liability can be integral to whether a particular redevelopment project will succeed, NJDEP regularly helps purchasers over their liability hurdles. Performance of environmental "due diligence" in New Jersey — required prior to land acquisition if a new landowner is to ever prove its innocence with respect to historical site contamination — is a preliminary assessment (PA) and if necessary, a site investigation (SI). Most purchasers will not think twice about performing a PA/SI before taking title to any property, in order to set the stage for innocent landowner defenses. Sophisticated purchasers are now enlarging their project budgets to also include the cost of a PPA.

■ PPAs as part of the practice

Entities planning to acquire property, especially for redevelopment pursuant to a partnership between local or county government, should consider applying for PPAs as a routine practice. In fact, where a redeveloper is able to secure a multi-party PPA from NJDEP, protections can be secured not only for the private redeveloper, but also for ultimate end users of the project improvements, as well as for any governmental entities who may be holding interim title to the property.

Prospective purchasers/developers may not always be certain where to start when the property to be redeveloped is contaminated. Environmental cleanups take time, and good redevelopment deals cannot always wait. However, someone must remediate a property if it is to be redeveloped, and those who ignore that fact are ignoring their own potential liability. New Jersey law contains excellent landowner defenses, including a third-party "developer defense," as well as defenses enacted to shield innocent landowners from natural resource damage liability exposure, and the requirement to remediate off-site contamination. However, neither purchasers who perform their own cleanups, nor those who acquire property following another person's remediation efforts, can be certain they will be able to sufficiently invoke defenses to defeat the extent of liability inherent in land ownership. The possibility a defense won't work — and therefore more cleanup required by the purchaser in the future — is one that smart developers do not favor.

Moreover, by its very nature, a statutory defense necessitates a lawsuit. These take time, and time is money for developers. In addition, cleanup activity is required of purchasers in order for them to avail themselves of most innocent landowner defenses in

New Jersey. Given that not all purchasers plan to perform cleanup work as part of their redevelopment projects, securing a PPA contract can often be a breath of fresh air.

In addition to statutory innocent landowner defenses, for those who do complete remediation and those who then acquire or lease remediated property, our legislature provides a measure of cleanup finality through a statutory covenant not to sue, issued by NJDEP at the conclusion of any remediation. Where an entity is covered by that covenant, they are admittedly protected from future remediation obligations imposed by NJDEP, even if additional contamination is later discovered, and even if NJDEP's cleanup standards change in the future.

The problem, however, is the statutory covenant not to sue provides no cleanup finality whatsoever for those liable for the subject contamination. Again, because ownership status can mean liability for a purchaser at the moment title passes, despite the post-cleanup covenant not to sue, the best place to begin — even for purchasers volunteering to conduct their own cleanups — is to fill the liability protection gap with a PPA contract.

Many purchasers who have been working with their municipalities and have a redevelopment plan in place backed by community support for their project, and have already invested a great deal in the property by the time they consider a PPA, are happily surprised to find the Office of Brownfield Reuse will take the time necessary to answer their non-legal questions and, if possible, issue a PPA. Knowing they may not be able to expend the time and resources it would take to complete a remediation to arm themselves with innocent owner defenses, or protection under the statutory covenant not to sue, informed purchasers are seeking this contractual protection.

■ Cost

Naturally, nothing as helpful as a PPA is without cost, and purchasers do pay consideration for their PPAs. As a bargained-for exchange between NJDEP and those purchasers who certify their innocence with respect to pre-acquisition contamination, the PPA contract provides an early, pre-cleanup covenant not to sue. The monetary consideration, known as a PPA "settlement premium," is paid to settle purchaser's potential landowner liability to NJDEP. Interestingly, although NJDEP will require a cleanup commitment from some entity before issuing a PPA, unlike landowner defenses which require purchaser's own cleanup activity, a prospective purchaser can secure PPA protections without making any kind of cleanup commitment. Therefore, paying consideration for the comfort that NJDEP will not sue, especially where it is another entity who has committed to perform the remediation, simply makes sense. Monetary consideration is set on a case-by-case basis under the PPA program. Similar to premiums for PPAs issued by the U.S. Environmental Protection Agency, NJDEP considers certain factors before setting a premium, using its settlement discretion. New Jersey PPA premiums have ranged from \$10,000 or less (when the PPA program was in its infancy), to more than \$100,000 in a few rare instances involving major projects. Most however, have been made available for \$50,000 or less. Before approaching NJDEP to request a PPA, purchasers should be prepared to discuss the premium aspect of their case, understanding NJDEP may consider such factors as

the size and condition of the subject property, former land uses, planned reuse, and the cleanup schedule for the project.

Purchasers applying for PPAs sometimes want NJDEP to agree to permit them to take over an existing cleanup. While NJDEP is clearly not required to allow cleanup takeovers, the agency will at times elect to do so, especially if current remediation efforts are failing, and the purchaser plans to promptly accomplish the cleanup pursuant to NJDEP oversight. Purchasers planning to volunteer to take over remediation activities should plan for the additional time it may take to negotiate a change in remediators.



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Not every developer will feel the need to seek a PPA: Where a redevelopment budget is especially tight and difficult cost-cutting decisions must be made, some may elect to forego PPA protections. Also, because the typical PPA does not address natural resource damages — it neither protects purchasers from suit for such damages nor requires them to address

damaged or lost natural resources — some may view a PPA as a somewhat incomplete covenant not to sue.

In conclusion, although impossible for prospective purchasers to completely eradicate all risks of environmental liability, given the profit potential of successful brownfield and other redevelopment projects in New Jersey, more and more purchasers are investing the time and resources necessary to secure a PPA.

Whether a developer's investment in risk management is to be the cost of an environmental insurance policy, an indemnification agreement, and/or a PPA, the cost of limiting liability, and increasing cleanup finality, is a cost well paid. With no defense providing a purchaser absolute assurance that NJDEP will not at least attempt to secure a cleanup from purchaser of all contamination at and emanating from the newly acquired property — even where purchaser has not discharged the contaminants — a prospective purchaser agreement can be extremely worthwhile. PPAs are offered by the Office of Brownfields Reuse, in the spirit of the state's brownfields legislation, to provide interim, early liability protection as cleanups proceed along toward redevelopment. Unlike defenses, which require proofs and often completion of remediation, and unlike statutory cleanup finality provisions, which typically require cleanup completion and which do always shield a purchaser, the innovative, pre-cleanup, contractual covenant not-to-sue known as a prospective purchaser agreement can go a long way in helping developers manage their liability risks. —●