

# Insights & Updates

Winter 2002

MOEHRKE, MACKIE & SHEA, P.C.



## **Brownfields Redux**

On January 11, 2002, President Bush signed into law the Brownfield Revitalization Act during a visit to the Millennium Corporate Center, an office complex and retail and commercial center constructed at the former Schuylkill Iron Works site in Pennsylvania. The project will create more than 3,000 jobs. Over the next five years EPA will have \$1 billion to help states reclaim Brownfields sites.

Long before Brownfields became a part of the vocabulary, entrepreneurs and their lawyers were structuring real estate and business deals to avoid and allocate actual or potential liabilities associated with contaminated properties. However, managing the ultimate “deal killers” – the fear of strict, joint and several liability under federal and state Superfund laws – remained a significant roadblock to buyers, sellers and lenders. Without Superfund reforms and government incentives to encourage redevelopment in prime urban and commercial areas, many players walked away from dirty property.

Developers now have new tools to engage in Brownfields redevelopment: liability relief, tax credits, insurance and cash. Federal and Massachusetts initiatives begun in 1995 paved the way for the 1998 Massachusetts Brownfields Act and the federal 2001 Small Business Liability Relief and Brownfield Revitalization Act. Coincidentally, a cooling real estate market has lessened pressure to develop greenfields and recession bargains are attractive to smart developers.

## **Massachusetts Brownfields**

In 1995 Massachusetts initiated a pilot program to promote Brownfields revitalization. The Clean Sites Initiative provided covenants not to sue to prospective buyers of contaminated commercial or industrial property if they agreed to clean up the property to Massachusetts Contingency Plan (“MCP”) standards. Encouraged by the results in this program, on August 8, 1998 Governor Cellucci signed into law the Brownfields Act which provided liability relief and financial incentives to attract resources for redevelopment of contaminated properties.

The Act creates three vehicles to provide funding for cleaning up and redeveloping contaminated sites: the Redevelopment Access to Capital (“RAC”) Fund, the Brownfields Redevelopment Fund (“BRF”) Fund, and Brownfields Tax Credits. Under the RAC program, private sector loans for cleanups are backed by insurance that is used to pay for unanticipated costs. The insurance is backed by the RAC Fund. The BRF program provides targeted assistance for site assessments and cleanups in Economically Distressed Areas (“EDA”). Applicants must be “eligible persons” under G.L. c. 21E, §5C. There are dollar limits for types of projects. Lastly, tax credits up to fifty percent of clean up costs are available to “eligible persons” if the site is owned or leased for business purposes, is located in an EDA, and achieves a Response Action Outcome (“RAO”) (the endpoint for cleanups conducted under the MCP).

The Governor’s Office for Brownfields Revitalization provides technical assistance to developers and municipalities. It maintains a Brownfields Website ([www.massbrownfields.state.us](http://www.massbrownfields.state.us)) which covers everything from connecting buyers and sellers of Brownfields (BF Jump Start), to summaries of all federal, state and local programs.

The DEP Brownfields Program website

*continued on page 2*

Moehrke, Mackie & Shea, P.C.

137 Newbury Street

Boston, Massachusetts 02116

(617) 266-5700

e-mail [info@lawmms.com](mailto:info@lawmms.com)

**INSIDE**

Firm Activities

Environmental Law Update

Environmental Insurance

# Firm Activities

## Our New Partner



Michelle O'Brien

The firm recently recognized one of its attorneys who has consistently performed at the highest level. As of January 1, 2002, Michelle N. O'Brien became a partner of the firm.

Michelle is already well-known to many of our clients. She has successfully represented companies and individuals in permitting processes, government enforcement actions, and litigation since joining Moehrke, Mackie & Shea in January 2000. She recently obtained key victories in the Appeals Court in a case involving a special permit for a landfill, and in Superior Court defending a coal ash structural fill project. Along with Tony Moehrke, Michelle handled the longest solid waste site assignment hearing in the history of the Commonwealth.

Michelle will continue her practice in environmental and land use litigation, permitting, and compliance counseling. She is an active member of the Boston Bar Association's

Environmental Law Section, lectures frequently for continuing legal education programs, is President of the Lesley University Alumni Association, and is a member of the Saugus Planning Board. We look forward to Michelle's continued growth and success at the firm in her new role as partner.

## Sports Authority

Coach John Shea's Stoughton Sixth Grade Basketball Team posted an impressive 12-1 record in the Suburban West League. Point guard Carson Shea, Center Robert Davis and Forward Vinny Connors are enjoying stellar seasons. The Team is eager to avenge its early loss to Westwood during the Final Four Championship hosted by Walpole on March 9-10.

The Moehrke, Mackie & Shea Junior Boys Basketball team, looking for its third consecutive Town Championship, is off to a slow start with a 4-4 record.

## Team Work

On September 30, 2001, Moehrke, Mackie & Shea participated as a Team in the 13th Annual

Boston Marathon® Jimmy Fund Walk to Beat Cancer. Our 8 walkers joined 8,000 "heroes", adding \$1,865, for a total raised to date of just a little over \$4 million. Our Team Walkers were Tony Moehrke, Hench Ellis, Michelle O'Brien, Denise Miller, her son, Isaac Miller, Larry Green, our Team Captain Jeanne Collins, and her husband, John. Those who could not make the event made generous contributions and intend to clear their calendars next year to make sure they "walk the Walk!"



## Brownfields Redux *continued from page 1*

([www.state.ma.us/dep/bwsc/brownfld.htm](http://www.state.ma.us/dep/bwsc/brownfld.htm)) links to summaries of all Brownfields programs, essential publications, and DEP policies.

The Massachusetts Business Development Corporation ("MBDC") oversees the fund for assessments and remedial actions. MassDevelopment, the fund administrator, distributes grants and low-cost loans of up to \$50,000 for site assessment work, and \$500,000 for cleanups in an EDA.

MBDC also oversees a \$15 million guarantee program for private sector loans to finance cleanup costs, coupled with an insurance product at special rates to cover cleanup cost estimate overruns. MassBusiness administers the Brownfields Redevelopment Access to Capital program ("MassBRAC") and insurance is issued by American International Group ("AIG").

## Federal Programs

In 1996, the Clinton Administration launched the Brownfields National Partnership to protect public health and the environment, clean up contaminated properties, build economic viability and create jobs. EPA initiatives were aimed at changing the

scope or extent of liability in order to reduce economic risks to developers and lenders by issuing Comfort or Status Letters to buyers, and by entering into Prospective Purchaser Agreements to limit liability and de minimis settlements to prevent third party actions relating to non-source property over a contaminated aquifer.

The recently enacted Small Business Liability Relief and Brownfields Revitalization Act is expected to significantly enhance Brownfields reclamation. The Act:

- codifies the existing federal Brownfields programs;
- provides funding of \$150 million for FY 2002 – FY2006 to provide grants to "eligible entities" for site assessment and cleanups;
- clarifies Superfund liability by exempting owners of land contaminated by contiguous property and bona fide prospective purchasers as long as the purchaser does not impede performance of the remedy;
- explains what actions must be taken by landowners in order to claim the "innocent landowner" defense; and

- authorizes \$50 million in grants to states to develop State Response Programs.

President Bush is proposing to permanently extend the Brownfields Tax Incentive allowing businesses to deduct cleanup costs. The \$300 million annual investment and tax credit is expected to leverage \$3.4 billion in private investment in Brownfields.

## Opportunities in 2002

Will the Massachusetts Brownfields program and the recent boost from Congress produce redevelopment of contaminated industrial and commercial properties in these troubled economic times? Based on our experience with the recession of the 1990's when "bottom feeding" was coined, savvy investors will grab those bargains ranging from abandoned gas stations to old manufacturing plants. There are over 80 projects in the pipeline at Mass Development. Entrepreneurs and their teams of lawyers, LSPs and engineers now have the needed tools to do deals on dirty property: traditional risk shifting mechanisms, liability relief, tax credits, low

*continued on page 3*

interest loans, environmental insurance, and a privatized “predictable” process for cleanups under the MCP. When added to the aggressive lending goals at MassDevelopment and co-operative municipalities which are hungry for more jobs and a stronger tax base, we expect the Brownfields industry will grow and prosper.

Contaminated properties will continue to present excellent redevelopment opportunities to sophisticated developers. Although there are additional risks associated with Brownfields cleanup and redevelopment, the

potential costs and liabilities can be limited and the economic rewards great. Our firm has over 20 years of experience in Brownfields redevelopment. A few of our projects include:

- **service station conversions to retail and commercial uses;**
- **conversion of a harborside warehouse to a fish processing plant;**
- **use of a contaminated police station site for a bank headquarters;**
- **creation of recreational facilities on cleaned up properties;**

- **expansion of a regional bakery on multiple adjacent sites.**

For more information on Brownfield services, contact John Shea or Ed Gorman.



John Shea



Ed Gorman

## Environmental Insurance

Environmental concerns regarding existing or potential pollution conditions at a property can often prevent otherwise desirable real estate transactions. In Brownfields redevelopment, risks to buyers and lenders are exacerbated and traditional risk management measures alone may not facilitate the deal. An indemnification is only as good as the party's ability to pay. Escrows are contingent or limited in time. The insurance industry has recognized these concerns and developed a number of environmental insurance products to address them. A properly designed policy, or set of policies, can quantify the risk involved at such properties and transfer the liability for past, present and future contamination to the insurance company.

The cost of such coverage is affordable and is subject to competitive pricing. In exchange for a fixed, one-time premium, environmental risks can be covered for a term of one or more years.

For properties with known pollution conditions where remedial actions are underway, there are always concerns that the remediation costs will exceed expectations. Since the likelihood and extent of a cost overrun is difficult to quantify, such concerns can prevent the transfer of contaminated property. The Cleanup Cost Cap policy and the Remediation Stop Loss policy (collectively referred to as the “CCC policy”) essentially provide cost overrun protection for environmental remediation projects.

The typical CCC policy is written for an individual site and covers cost overruns for work performed under a government approved remedial action plan (“RAP”). The policies typically require a minimum self

insured retention of \$1 million. The environmental insurers have shown a reluctance to insure smaller cleanup projects because the risks at these sites are often more difficult to quantify and the smaller premiums are not as profitable.

If a pollution condition is discovered outside of those identified in the RAP, it would not be covered by the typical CCC policy. Accordingly, the insured should also have a policy to cover liabilities outside of the CCC policy. The Pollution Legal Liability (“PLL”) policy is an insurance product that provides coverage for unknown pollution conditions arising at covered locations. It covers cleanup costs as well as claims for bodily injury or property damage. A PLL policy can be issued for one or more properties owned or operated by the insured.

Many of the larger environmental insurers offer an integrated package of environmental insurance products and services for these sites. These companies can provide a blend of the products described above that are tailored to a specific site. In addition, these insurers can provide additional services, such as in-house environmental consultants and risk assessors that can assist insureds in evaluating and minimizing risk. This billion dollar specialty market is shared by AIG Environmental, Chubb Environmental Solutions, Kemper Environmental, Seneca Insurance and Zurich American Specialties, among others.

In addition to competitive pricing between insurers, there are governmental programs that provide additional cost savings. For instance, the Commonwealth's Brownfields Redevelopment Access to Capital (“BRAC”) program subsidizes environmental insurance

for developers and lenders. Developers can obtain protection against cleanup cost overruns associated with known conditions, and liability arising from newly discovered pre-existing contamination, for third party lawsuits. Lenders can secure protection from losses due to default for any reason on loans for acquisition, cleanup, rehabilitation or new construction secured by a property with contamination. The BRAC subsidies can reduce insurance premiums for developers by fifty percent.

Moehrke, Mackie & Shea has experience working with insurers in tailoring insurance products that suit our client's individualized needs. For example, environmental insurance (and a “top drawer” comprehensive site assessment and cleanup plan) was instrumental in the sale of the former City of New Bedford Police Station to our client, Compass Bank, for its new Headquarters. BRAC financed insurance (and a covenant not to sue and a state-of-the-art pump and treat system) helped to facilitate another client's sale of a manufacturing facility with significant groundwater contamination.

For more information on environmental coverage, contact Bill Squires or Tom Mackie.



Bill Squires



Tom Mackie

# ENVIRONMENTAL LAW UPDATE



## ***Court Victory***

In a significant decision for one of our clients, the Massachusetts Appeals Court recently ruled that the issuance of a special permit for operation of a sanitary landfill protected disposal operations from a subsequent zoning change, despite the fact that the special permit had not been recorded until after the zoning change took effect. The Court ruled that the landfill is protected as a prior non-conforming use.

## ***New Wetlands Guidelines***

In October 2001 the Massachusetts Department of Environmental Protection released its Draft Inland Wetland Replication Guidelines. A 1998 study conducted by the University of Massachusetts found that many wetland replication projects do not meet the minimum performance standards in the Wetlands Protection Regulations (310 CMR 10.55(4)). This guidance gives project proponents an outline of the steps necessary for appropriate and successful wetland replication. Particularly helpful are the Replication Check list (Appendix 2), the Monitoring Data Sheet (Appendix 3), and the list of Common Mistakes and Problems (Appendix 4).



# Insights & Updates

MOEHRKE, MACKIE & SHEA, P.C.

Moehrke, Mackie & Shea, P.C.

137 Newbury Street

Boston, Massachusetts 02116

(617) 266-5700

e-mail [info@lawmms.com](mailto:info@lawmms.com)