

***Brownfields Insurance
for Public Sector-Led
Development Projects:
Experience and Methods***

Northern Kentucky University

University of Louisville

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Executive Summary

Local governments and their economic development and environmental protection agencies have become ever more active in efforts to remediate and reuse the brownfield sites that are scattered across their communities. As they have come to play a more central role in such regeneration efforts, often acting as the real estate developer for brownfield projects, they have had to deal with other real estate actors and with the broader issues of risk management on their projects. They thus have had to confront a new purchasing decision – the acquisition of environmental insurance.

This report builds on the past work on brownfields insurance of Northern Kentucky University and its partner, the University of Louisville. Those earlier efforts examined the supply of insurance coverages, their utility as tools to smooth and facilitate brownfield transactions, state efforts to facilitate private sector access to coverages and impediments to public sector use of the tool.

The findings reported here are based primarily on tracking the role of insurance in three public sector-led development efforts over a period of more than two years. Those projects were monitored through personal interviews, attendance at key negotiations and decision-making meetings, and review of documents and agreements between parties to redevelopment deals. Additional data were collected about other local government projects that utilized insurance.

While those projects were being monitored, the authors continued to track the environmental insurance industry and collected additional data from brokers and insurance advisors on aspects of the insurance acquisition process. These data, largely involving purely private sector transactions, were analyzed for the guidance they offered to public sector organizations facing an insurance purchase decision.

All data collection was conducted with the promise of anonymity to the parties involved. Individuals who provided information are identified in the report only in terms of their roles in projects. Pseudonyms are used to identify cities and organizations.

After a review of the rationale for and methods employed in this study, the report describes in depth three case studies:

- ***Parkville*** – A municipal acquisition of an abandoned factory site for conversion to a park. The project involved demolition of the existing factory buildings as well as site mitigation. Due to city requirements for minimal oversight effort and cost predictability, the remediation and building demolition activity was funded through a pre-funded Fixed Cost Remediation Contract, with insurance protections for both the manufacturer and the city built in.

The manufacturer initiated the project and remained actively involved and supportive of the city's needs. The major problem encountered in the deal was that the remediation contractor

initially selected by the company and city through a Request for Qualifications (RFQ) process failed to deliver an acceptable insurance policy to back up its cleanup price quote. The contractor appeared to be unwilling to accept any of the cost uncertainties involved. After a delay of about a year, the city and the manufacturer found another remediation contractor with whom they consummated an insured arrangement in under four months.

- **Utopia Park** – Municipal Riverfront Authority utilization of a previously acquired manufactured gas plant site for a mixed use redevelopment. The project involves the re-use of prime river view land adjacent to a booming downtown revitalization. With a recalcitrant utility company and failed past redevelopment efforts on the publicly owned site, the Authority pursued exceptionally detailed site assessment to both get the utility to admit to its responsibilities and contribute to site mitigation and to manage the mitigation risks known to exist. The Authority got the utility's financial contribution and state approval for its mitigation plans for which they used a fixed-price remediation contractor, backed by insurance.

A RFQ process for a master developer for the 50-acre site resulted in selection of a developer that, after winning rights to negotiate a pre-development agreement with the Authority, never brought its principals to the table for additional meetings. After a delay of some six months, the Authority turned to its second choice for master developer, the pre-development contract was agreed to, and the final development plans are on the verge of approval, all in well under a year. Although the second developer has not yet raised issues about insurance coverages for the project, use of insurance to protect against unexpected cleanups and liability claims and to provide assurances to future users of the site remains a possibility.

- **Hapiton** – Offer by manufacturer with minimally remediated site to sell the site to a local municipal Redevelopment Authority (RDA). In this case, the RDA did not initiate the process, but was approached during a period of depressed industrial real estate activity in the area. The site was already remediated to industrial use standards and had earned state approval for a mitigation that consisted primarily of a cap over contaminated soil. The RDA wanted liability protection from the company. The manufacturer offered one year's indemnity and a short term, low limit insurance policy that the Authority found to be inadequate. Until it received guidance from environmental counsel, the RDA did not recognize that, if any new development pierced the approved cap, it might have to get another state approval for the site condition, and thus might need an insurance policy to cap the cost of remediation as well.

The manufacturer was not willing to deal with the RDA concerns over liability, wanting simply to dispose of the site. While negotiations dragged on, with the Authority not pressing matters because the project was not an organizational priority, the local industrial real estate market heated up. Private firms began negotiations with the site owner and the RDA stepped out of the picture. After over a year of private sector negotiations, the manufacturer is on the verge of finally selling the site to the fourth company to have attempted to strike a deal.

The most obvious lesson for public sector-led brownfield redevelopment from these three cases is that it is inappropriate to assume that project delays in such transactions are due to the public involvement. In all three instances studied, major delays occurred. *All those delays were caused by private sector parties involved in some aspect of the intended transaction.*

Three vignettes offer additional insights into environmental insurance decisions in public sector-led regeneration efforts. They include non-insurance risk management activities and decisions to buy certain coverages and not purchase other coverages, depending on the situation. The first example, building a school on a brownfield, includes acquisition of separate insurance policies for different parties involved. The second, using a brownfield for a new agency facility as part of a land swap, demonstrates how creative reuse can affect the economics of both a remediation and a regeneration with the risks managed by insurance. The third, building a community events facility and park on a derelict brownfield, illustrates the importance of selectivity in the purchase of insurance and the value of buying only the coverages really needed. All three involve a local government providing facilities for its own use, situations in which private sector end-users are not likely to dictate conditions or generate needs for coverage that might not otherwise make sense for public sector-led brownfield projects.

Lessons Learned about the insurance purchase process from these cases and vignettes include:

- The adversarial nature of any real estate transaction – buyers and sellers with different objectives – sets the context for any brownfield redevelopment. Insurance can play a role in reconciling conflicting objectives and arriving at mutually acceptable transaction terms.
- Information is central to any decision. Specialist consultants and advisors, extremely thorough site investigations and demands for full disclosure by sellers may all involve costs to a developer. But investing in better data for decision-making can save money over the course of the project. Overall, better information reduces uncertainty, and thus risk, and can reduce the need for the risk transfer capacity provided by insurance.
- Time is also both a cost and a resource. Investing the time needed to do in-depth site assessments and to consult with state regulators about alternative approaches to site mitigation will delay work on the ground at a redevelopment site. The political and other costs of such a delay, however, are likely to be offset by reductions in the uncertainty over environmental conditions and the regulatory requirements likely to be imposed and are essential to the purchase of insurance policies crafted to fit the risks of a particular brownfield.
- Time and information together, however, do not assure a good deal for a public sector-led redevelopment project. In any adversarial process, the party with the greatest expertise will generally “win.” Local governments and their agencies rarely have the expertise in-house that the sellers and/or redevelopers of remediated brownfields have available. While temporary advisors cost less than specialists on retainer, they will not be able to connect all the dots on

complex projects and thus will not be as competent to act on the behalf of the locality throughout the development deal-making process.

- Each project has its own dynamics, risks, and possible management processes. In some instances, insurance may be the key to completing a deal. In others, it may contribute the extra security that speeds a project along or generates needed political support even if it may not be central to the economics of the project. In yet others, it may make no sense, given the risks involved and the certainty generated by other means.
- A good insurance acquisition can, however, be distinguished from a poor one:
 - Are the risks of concern adequately covered, both in monetary and policy term limits?
 - Have extraneous coverages not needed to permit the transaction to proceed been excluded?
 - Are the appropriate parties protected as needed?
 - Is the price, including the premium, deductible or self-insured retention, and co-pay requirement, acceptable to the parties involved?If the answers to these questions are “yes,” then the purchase of insurance is a “good deal.” If not, then the transaction is questionable.

The report concludes with a chapter addressing the processes and issues that need to be addressed in purchasing environmental insurance.

- ***Determination of insurance needs*** begins with the identification of the other risk and uncertainty management and reduction tools available, or already in use, for a project. If it is determined that there are some issues that need the protection of insurance, it then becomes important to be very specific about what coverages are required. A checklist for developers (Table 3.1) is provided.
- ***The insurance acquisition process*** should not be initiated by a public sector developer until all the necessary expertise has been assembled to provide needed guidance. The process then proceeds through a series of clearly definable steps:
 - Project Conceptualization – including end use and possible risk allocations among parties,
 - Environmental Site Assessment – accumulation of all available data on the property,
 - Determination of Needed Protection – from allocation of liability risks and exposures,
 - Presentation of Underwriting Package to Insurers – an overview of the site and project provided in order to get their “indications” on coverage available and its costs,
 - Selection of an Insurer – on the basis of the indication and its fit to project needs,
 - Submission of Application – the details of the site condition, intended uses, and the coverage desired, including copies of all known environmental conditions data,
 - Negotiation over actual coverage terms, following receipt of a response to the application.

- ***Negotiating policies*** is a fine art in itself, and not an activity for the inexperienced. The more detailed issues arise in Pollution Liability policies; the negotiable elements include:
 - Definitions and Exclusions – language that determines what is covered,
 - Policy Triggers – the terms and conditions governing coverage activation,
 - Notice Provisions – the information flows required between the parties involved,
 - Cancellation – the limits on the rights of the insurer to terminate coverage,
 - Number and Status of People on the Policy – the parties protected by insurance.
 Mistakes made in the negotiations process can render an apparently valuable policy useless in practice, so attention needs to be paid to these details. Similar issues in assuring appropriate coverage arise for the Cost Caps policies, albeit the key issues are slightly different:
 - Scope of Work – the remedial activities and contaminants covered,
 - Policy Period – the length of time allowed for the covered remedial activities,
 - Accompanying Pollution Liability coverages – whether they are included and how they interface with the Cost Cap policy.

Three topics of particular concern to the purchase of environmental insurance for public sector-led projects are addressed at the end of the report:

- ***Finite Risk Programs***, a form of pre-paid insurance coverage that has been used extensively for brownfields with extended cleanup processes, may prove useful, but could be costly for public sector developers, notably in the capital requirements for pre-funding the project.
- ***Insured Remediation Contracts*** come in two forms, with very different features that make it difficult to choose between them for many projects. Fixed Price Remediation Contracts avoid the oversight and management burdens on the developer that are associated with the alternative – Time and Materials contracts covered by a negotiated Cost Cap policy. Other differences between the two types of contracts enable developers to pick the approach that best fits their needs and capacities. (Table 3.2 details the comparison.)
- ***Drafting a RFQ for Brokerage Services*** is particularly problematic for public sector bodies that may have least-cost, open-bid and other regulatory constraints on their purchasing processes. A mistake in the RFQ specifications can lead to a contract with a broker not really qualified to provide the guidance needed for environmental insurance negotiations. This section provides guidelines about the needed elements of such a RFQ.

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Chapter 1.0

Introduction and Methods

Across the nation, there are hundreds of local government redevelopment programs working to regenerate abandoned and underutilized brownfield sites. In order to stimulate more redevelopments, many localities are attempting to improve their risk management practices. In order to do so, they need specialized knowledge about utilization of insurance and guidance that may help them to acquire the most useful and cost-effective insurance products. This study was intended to serve that need. Three in-depth case studies were chronicled in which insurance was considered and/or used as a brownfield redevelopment risk management tool. Insights also were garnered from less intensive examinations of other local governments involved with insurance procurement.

1.1 Prior Findings Motivating This Study

Data from a 2001 study conducted by the authors, *Factors Affecting Municipal Pursuit of Environmental Insurance as a Brownfields Redevelopment Strategy*, provided information that shaped the data collection and analysis activities covered by this report:

- Environmental insurance has been used predominately in large-scale private redevelopment efforts in the past. Despite advances in the industry and its ability to serve diverse insurance needs, local governments were not regularly considering or using insurance in their brownfield regeneration programs.
- Insurance underwriters and brokers reported frustrations in marketing to the public sector. In particular, they commented on the slow pace of governmental decision-making processes, lack of public officials' knowledge of insurance products, and decentralized risk management decision-making. They noted in particular the high costs of educating personnel in multiple departments and agencies in order to sell their products.
- Local governments operate with requirements that purchases be put out to multiple bids, typically with bid content and price open to public scrutiny. Environmental insurance underwriters have a proprietary interest in the individualized insurance coverage programs they design for specialized client needs. They thus are reluctant to bid on standard Requests for Proposals for coverage for public sector projects.
- An additional problem arises since local government purchasing procedures are more oriented toward issuance of Requests for Proposals for specific insurance policies and coverages rather than Requests for Qualifications from brokers that demonstrate their capacity to represent public interests in negotiating policies.

1.2 Methods Employed

The project entailed acquiring information from local government representatives from localities in which insurance was being considered to foster a brownfield redevelopment. Their experiences were monitored through a procedure that included the following:

- Identifying EPA Pilot grant recipients and others working with them who were interested in utilizing insurance. The researchers solicited recommendations from EPA sources and used their own contacts, arriving at an initial set of over a dozen prospects for possible study.
- Selecting three cases for detailed examination with EPA approval, based on the localities' intention to pursue insurance during the study time frame, their willingness to provide information, and the diversity of the situations they faced.
- Conducting repeated interviews with local government personnel and their advisors for over a two-year period to collect data on their perceptions and understandings of their project insurance needs, and the methods employed to obtain insurance.
- Attending local government meetings at which insurance was discussed and following up with telephone and in-person interviews with different participants in order to monitor progress, log barriers encountered, and, if they were overcome, to examine the means by which the problems were resolved.

In addition to their liaison with the case study local government project participants, the researchers maintained communications with other governments working on brownfields insurance to supplement the case studies with shorter descriptions or vignettes of insurance acquisition.

Throughout the research effort, anonymity was promised to all interviewees and others providing data for the study. This commitment offered individuals the freedom to talk about situations and problems that may have been difficult to address, to admit to mistakes they would avoid the next time around, and otherwise to share the negative as well as positive aspects of their efforts. Most telephone and in-person interviews were taped and transcribed for detailed analysis, with the assurance to participants that the identities of speakers would not be reported. The descriptions of experiences and practices that follow here thus identify the sources only in terms of their roles in projects. Pseudonyms are used for the different localities studied.

Chapter 2.0

Overview of Experiences

In order to follow the case study descriptions below, the reader needs some understanding of the types of environmental insurance products utilized. The policies are discussed in greater detail in Chapter 3.0, which addresses the process of negotiating insurance coverages and the issues local governments and their agencies need to consider. Three key types of policies have been developed over time to serve the needs of the organizations accepting some liability for the risks associated with the mitigation and redevelopment of brownfields:¹

- **Pollution Liability (PL) Policies.** PL policies provide protection for costs resulting from preexisting pollution conditions and new releases of contamination. Coverages consist of protections for the costs of third party claims such as government demands for remediation and private lawsuits for property damage, bodily injury, and remediation. Legal defense costs to defend against third party claims are provided. The insured also may be protected against the costs of cleanup of newly discovered, preexisting contamination on the insured's property and related costs such as business interruptions.
- **Cost Cap (CC) Policies.** CC policies protect against cost overruns that arise in the performance of a planned remediation, such as those due to discovery of additional contamination. The insurer pays the excess costs above a "self-insured retention" paid by the insured that typically is calculated as a percentage of the estimated cleanup cost. Some CC policies include a co-pay element, with the insured paying a percentage of the excess costs.
- **Finite Risk (FR) Programs.** FR programs, which involve pre-funding the remediation, include CC coverages and are often written with a PL component. The insured deposits the "net present value" of the expected cleanup costs, plus some additional premium, with the insurer and the insurer pays for the remediation expenses as they are incurred by the remediation contractor. If the cleanup costs exceed the expected costs, the insurer pays for the overruns. If there is money left in the fund when the cleanup is complete, it is returned with interest to the insured or, if desired, to the contractor. The PL coverages may continue beyond the time it takes for the remediation work.

¹ Insurance companies have developed a variety of other products for businesses exposed to liabilities stemming from pollution conditions. Contractors' Pollution Liability policies protect contractors that handle remediation, demolition, transportation and disposal of hazardous materials against property damage, bodily injury, and remediation claims. Errors and Omissions policies provide protection against claims for mistakes and negligent acts for engineers, lawyers, laboratories, and other professionals providing services and advice. To assure that all contractors have coverages needed, insurers offer Owner-Controlled programs to protect all contractors and consultants working on a project

2.1 Case Study # 1: Parkville

Parkville, a medium sized city of about 100,000 people, is in the Upper Midwest. It enjoys a lake shoreline and is relatively homogenous with 83 percent of the population classified as Caucasian in 2000. Using 1999 Census Bureau area definitions, Parkville is the principal city of a small Primary Metropolitan Statistical Area of under 200,000 people. For the period of 1990-2000, both the city and its county enjoyed a population growth rate close to the national average of 13.1 percent, with county growth slightly outstripping that of the city. There are few differences between the population characteristics of the city and its county, and both have close to 75 percent of their populations in the 18-65 working age range.

The city is booming as a residential area. When adjusted for inflation, Parkville's housing values increased a staggering 40 percent between 1990 and 2000 in both the core city and the county. This is more than double the national average increase in value. This rapid growth, however, represents a form of catch-up: Parkville's housing values as of 2000 had basically just reached the national median values. Housing demand continued to be high with a vacancy rate of less than half of the national average. Parkville exhibits low poverty rates and a low unemployment rate relative to the nation, although its median household income is comparable to the national average.

2.11 Background: The Site

This is a case involving a roughly 30-acre site in Parkville that had previously housed a diverse manufacturing complex used for decades by a major Company, XYZ Products, Inc. The company approached the City, offering to partner with it for remediation and redevelopment of the plant. The site was close to existing residential areas of the City and, if remediated, had potential to contribute to economic development and property value increases. Residential reuse was possible, given housing demand, but development of the site for a public park also was possible and posed lower remediation costs. The decision was made to proceed with plans to remediate to the standard necessary to support the use of the site as a city park.

XYZ Company is a privately owned firm and does not have to disclose contingent liabilities on its books – such as those associated with possible claims on contaminated sites – in the manner required of companies with publicly traded stock. This left executives somewhat more willing to accept residual liabilities than would be the case with a firm required to explain its possible environmental liabilities to investors. Under the agreements finally consummated, in return for some direct funding, the City released the Company from all costs and liabilities associated with environmental remediation obligations with the exception of third party damage claims and a limited set of defined liabilities.

At the beginning of negotiations between the City and the Company, the site contained both buildings to be demolished and in-ground contamination. XYZ had spent over \$2.5 million prior to the involvement of the City to conduct site assessments and stabilize environmental conditions. Over 300

borings had been conducted to determine issues. The tests identified two chemical hot spots, some widespread volatile organic compounds on site, and a potentially problematic groundwater contamination plume. An additional problem uncovered was an off-site plume from an adjacent contaminated industrial site owned by another party that could potentially migrate onto the property in question.

Remediation plans required some soil removals, with other soil treated and retained on site, some capping and underground plume diversion, some natural attenuation elements, and probable pump and treat approaches to the onsite plume. Building demolition required addressing lead and asbestos risks and also posed the problem of disposal of minimally contaminated debris. Early involvement of the State Regulator, and that agency's cooperation in investigating alternative remediation strategies and approaches, helped the two parties to arrive at a cost-effective approach to the mitigation. The Regulator agreed that a risk-based approach was appropriate, and that, for the purposes of park uses, a cap of clean soil at least 18-24 inches deep above the permitted residual contaminated soils would permit utilization of the site as a park. The re-use could begin long before the natural attenuation and groundwater pump and treat processes that the remediation plan included would be completed.

The Company, wanting to dispose of the site, offered it to Parkville for \$1, with the intent of structuring a deal under which some public funds would be expended for site mitigation. Parkville obtained EPA grant funds to assist in the remediation and used an additional source of financing: a Tax Increment Financing (TIF) District, incorporating within it the land that would rise in value due to the area property development effects of the new park.

Box 1. Parkville: Players Involved

- The City, represented by its Mayor, City Manager, and City Attorney
- Environmental Counsel to Parkville
- Management of XYZ Products, Inc., previous owner of the site
- The State Regulator, the agency operating the Voluntary Cleanup Program
- Engineers, Inc., a national firm initially selected to remediate the site with which negotiations for the project failed
- Risk Acceptors, Inc., a risk assumption firm working with Engineers, Inc.
- Contract Remediators Ltd., the firm currently remediating the site

2.12 Negotiations with Remediation Contractor

Both parties wanted a fixed price for the cleanup for planning and budgeting purposes and neither party was in a position to offer an indemnification for prospective liabilities. A mutual determination was made to seek a Fixed Price Remediation Contract (FPRC) under a FR program that protected against overruns and included 30 years of PL coverages that extended beyond the anticipated completed cleanup with full attenuation within a 10-year period.

A guaranteed fixed price for the environmental response was important to the City. Although XYZ had conducted exceptionally extensive site assessments, the possibility of cost overruns was not acceptable. The issue revolved around financial management practices and obligations. Most state and local governments have to balance their budgets every year and cannot afford to run deficits. They also tend to fund major projects through borrowing or floating bonds to pay for capital expenditures. Bonds, however, can only be floated if there is solid evidence of the borrower's capacity to service the debt – to pay the interest and return the capital when the bond is due. That evidence requires certainty with respect to both revenues and expenditures relating to the capital project; a locality needs to be able to predict annual costs and project timing.

In principle, the Company, with the City, could have contracted with an engineering firm to conduct the demolition and mitigation on a time and materials basis and then directly acquired CC coverages. However, the City would lose the cost certainty it wanted for its TIF district if it had to file its own claims and attempt to collect from an insurer. The Company no longer had business in the area and did not want to have to monitor the engineering work. Similarly, the City did not want to spend its scarce specialist personnel resources on project monitoring. The strategy of reliance on a FR program that included management of the remediation, allowed the municipality to concern itself with other aspects of the redevelopment, notably consulting and planning with neighboring landowners and residents for street closures and openings associated with the conversion of the site to a park. Although pre-funding the entire cost of an environmental response in a single fiscal year would be difficult for a local government using current revenues, the City was going to borrow for its cost of site preparation and park construction. Thus, the capacity to pre-fund cleanup costs did not pose a problem. In addition, from the perspective of the City, the fact that the issue had to come up only once for municipal budgetary review was a positive argument for the FR approach.

Preparatory to the sale, Parkville helped the Company develop a Request for Proposals (RFP) for the services of an engineering firm with the following specifications:

- A Fixed Price Remediation Contract, backed by an insurance policy;
- No self-insured retention on the CC coverage;
- A 30-year PL policy;
- Total costs for remediation and demolition work to permit development of a park estimated at around \$5 million, with an additional \$200,000-\$400,000 acceptable as the insurance premium.

Competitive bids from remediation contractors were jointly reviewed and Engineers, Inc., a major national company with an extensive portfolio of brownfield mitigation, was selected. However, negotiations with the firm broke down over the insurance component of the proposed work plan and the remediation firm's unwillingness to accept the cost-overrun risks involved. This experience is worth noting since it offers lessons about the differential experience of regional offices of major engineering firms and about the variety of parties that may be involved in the risk transfer and management process for brownfield redevelopments. It also illustrates the extent to which municipal priorities and action plans may be delayed by the private sector, over which local governments may have little or no control.

Initially after selection, Engineers, Inc. indicated it had a preliminary commitment from an insurer for a \$250,000 premium as part of the FR structure of the FPRC. At the meeting to negotiate final contract terms and price, the City and Company found, to their surprise, that no insurance policy for the project had been negotiated by Engineers, Inc. Further, Engineers, Inc. brought in another party, Risk Acceptors, Inc., to accept the liabilities associated with the project.

Engineers, Inc. did have extensive experience with excavation, building construction, and brownfields remediation, but the nature of the contracts it had held was not clear. The firm's insistence on inclusion of Risk Acceptors, Inc. led the City to wonder if the geographic division of the company with which it was dealing had prior experience with FPRC work, or if they had simply performed brownfields remediations on a time and materials basis and had not been involved in risk management or price assurance.

Risk Acceptors, Inc. was a small firm, unknown to Parkville and XYZ personnel, that claimed to have an unspecified unique capacity to accept risks, and the experience and ability to negotiate less expensive insurance policies. It claimed that it would accept all legal liability, relieving Engineers, Inc. completely, a claim the City Attorney perceived to be of little value if not adequately supported by insurance. At the meeting, the City and Company indicated that Engineers, Inc. could involve Risk Acceptors, Inc. as it wanted but that Engineers, Inc. would need to be the signatory to the agreement.

The City and Company anticipated that it would take Engineers, Inc. two to three months after this first meeting to get a final proposal consonant with the RFP specifications. This proposal, however, never arrived. Eight months after negotiation began, all details were in place except for the requisite insurance coverage. That is, the City and Company had received a remediation response plan from the Engineers, Inc. that was fully acceptable to them and the State Regulator, but there was no provision in place for managing financial risks. While some insurance documents had been delivered, they were merely template policies that did not include specific insurance elements required in the RFP.

After waiting another month, the Company and City terminated negotiations with Engineers, Inc. for failure to perform. Subsequently, they selected an alternative provider, Contract Remediators, Ltd. A mere two months later, a full proposal for remediation accepted by the State Regulator and insurance to transfer risk was in hand. The following month it was presented to the Finance Committee and City Council and was approved.

While the City had to yield on its original request for a 30-year PL policy term, since that coverage is not available in the current market, the seller and buyer otherwise got the FPRC they originally had pursued. Insurance costs and coverages in the program ultimately initiated included:

- PL coverage for cleanup of preexisting, newly discovered conditions and for third party claims for bodily injury and property damage. This coverage carries a \$25,000 deductible and has a \$4 million aggregate. Both the City and the Company are named insureds.

- ▶ CC coverage for both known contaminants and unknown contaminants carrying a \$7 million aggregate, no self-insured retention and a 10% co-pay provision, with Contract Remediators, Ltd. as the named insured unless the City has to become responsible for the cleanup.
- ▶ A policy term of 10 years, with a 60 day extended reporting period for the PL coverages beyond the termination of the policy.
- ▶ Commutation provisions, permitting return of funds committed if the project is declared complete by the state after five years, with remaining funds provided to Contract Remediators, Ltd. as the named insured.²

The total FR program cost \$5.4 million, the maximum originally acceptable to the City and Company, with \$4.5 million for the demolition and remediation and \$900,000 for the PL and CC coverages.

Key elements of the full final agreement, described in detail in the Appendix to this Report, provide a useful illustration of how a local government can play a key role in regenerating a brownfield site. The property transfer involved the site in *as is* condition with an acknowledged and defined set of existing conditions for which the Company retains ultimate legal liability. The Company did not request indemnifications from the City. Its risk management concerns were addressed through the insurance coverage that assured that sufficient funds would be available to address cost overruns in the demolition and remediation process and that provided liability protection.

Work by Contract Remediators, Ltd. is currently underway. The demolition of the structures on site has been completed. Parkville is proceeding with neighborhood meetings to refine plans for the site redevelopment.

2.13 Lessons Learned

- Although a FR insurance program structure may not save money for a remediation project, such a program has advantages if a local government can raise funds for the cleanup and premium up front. In the Parkville case, a major benefit included minimizing the need for municipal involvement in assuring successful site preparation, thus freeing personnel for other important tasks such as community involvement in project decision making. Additional benefits of FR programs are discussed in Section 3.4.
- Not all remediation contractors, regardless of their experience in conducting site environmental responses, are prepared to accept all of the project risks and may not know how to offer FPRC.

² A negotiable feature of a FR program is the disposition of any funds remaining after a regulator approves a remediation. Receipt of all or a large share of that balance may provide a remediator with an incentive for speedy and cost-efficient performance.

The RFP for remediation services under such a contract thus should specifically ask about the responding office or division's experience in working under such arrangements.

- The insurance marketplace is constantly changing, so what past experience may suggest are reasonable insurance terms, such as the City expectation of a 30-year PL policy, may not be available.
- The greater the extent of cooperation of the Buyer and the Seller, the more they can determine the terms of any agreement to mitigate and reuse a site, and can influence the terms and conditions of insurance coverages.
- Cooperative State Regulators who can assist Buyers and Sellers in determining the extent of environmental response required before they advertise for remediation services can have a major impact on the cost, speed, and likelihood of a successful brownfield redevelopment.
- The fact that a public sector body is party to an agreement does not necessarily impede project planning and implementation, despite fears on the part of developers documented by Meyer and Lyons (2000).
- Neighborhood acceptance is important to any land redevelopment effort, and political and/or financial capital is always going to be needed to assure such support.

2.2 Case Study # 2: Utopia Park

Utopia Park is a mid-western city at the center of a Metropolitan Statistical Area (MSA) with a 1999 population of over 1.5 million people. This city and county have experienced a much smaller than national average population growth over the decade ending in 2000, with the county growing at twice the rate of the city. Neither the city nor the county enjoyed growth in median house values at even so much as three-quarters of the 18 percent national average for the 1990s. However, as a reflection perhaps of a shift in luxury demand for urban residential opportunities, median house value growth in the city exceeded that in the county by over 30 percent, despite the city's slower population growth. Median home value over the decade of the 90s, while growing, remained in the mid-\$80,000s across the central county of the MSA, with little change in population density.

Both the central city and county seem to be economically stagnant, unable to generate significant job growth as population and jobs shift to other counties in the MSA. They remain the regional job center statistically due only to their historic dominance of employment locations. The central county has the highest unemployment rate and one of the lowest economic growth rates in the metropolitan area, and its central city exhibits an individual poverty rate approaching 15 percent. 1999 median household incomes are in the \$35,000 - \$40,000 range, well below national averages.

2.21 Background: The Site

Like many older cities, Utopia Park was home to a manufactured gas plant (MGP) from the late 19th century until after World War I. Typical of such plants, the local facility simply dumped the tarry sludges that were a major byproduct of the early coal gasification process. While there were millions of gallons of contaminated liquid waste generated as well, those environmental problems had long since washed away. The MGP, as was common in the period, was located near a barge-navigable river to permit easy provision of the coal that was its feedstock. The site was neglected for most of the post-World War II period as Utopia Park, along with cities like it throughout the rust belt, turned its back on its industrial waterfront.

The MGP site, originally owned by the local utility company, MyGas, Inc. was taken over by the City in the 1950s, long before concerns about environmental problems affected public willingness to accept surplus private lands for possible redevelopment. The City, over time, had acquired title to virtually all its waterfront land since it was separated from the economically active downtown by a busy railroad line, and the waterway, while navigable, had become economically irrelevant as far as most of the local businesses were concerned. Those acquisitions included the site of an ammonia plant operated by Colamia that used waste products from the MGP facility.

Those parcels and adjacent properties were used for a period as a municipal landfill. Subsequent public sector activity included surface deposition of debris from structural demolition on public projects – mostly cement, rebar, and related materials – contaminated by friable asbestos. Such activity took place from the early 1960s into the 1980s.

Eventually, as the potential economic value of the waterfront property became apparent, the City formed a special arms-length economic development organization, the Utopia Park Riverfront Agency (RA), to take title to an array of properties and pursue regeneration. Formed in the 1970s, the RA is a City instrumentality with a municipally appointed Board and independent authority to condemn property, enter into contracts, and issue bonds. Its legal mission is the promotion of the local economy through its land development efforts.

Nurturing its assets and leasing rather than selling its more valuable locations, that agency gradually developed a portfolio of income-generating property. Funds from those resources were re-invested in further riverfront property development and provision of amenities near the old MGP site. The gradual improvement in the real estate market in the Central Business District, on the other side of the tracks, along with continued movement toward the river and the national tendency of cities to return to their riverfronts, led the City and its Agency to try to attract development to the area.

The RA initiated some efforts in the 1990s to attract developers to the 50-acre site that included the old MGP and municipal disposal sites. Those early efforts attracted only local firms as prospective developers, and the responses and proposals seemed to be more linked to the types of development experience the firms had than to any serious conception of what the market might bear at the location.

The RA attributed the failure to interest any non-local companies and lack of serious interest in a large tract of riverfront land to uncertainty on two fronts: (1) the costs for infrastructure needs (water/sewer services, road access), and (2) the problems posed by the site's environmental condition, about which very little was known at the time. These two concerns led to the fear that an economically viable private development on the 50 acres was not possible.

Relying on its own revenue-generating real estate interests and the City's willingness to take some responsibility for the wastes it had disposed on the site, the RA decided it could address some of the on-site environmental conditions. The residuals from the MGP, however, posed a relatively unique set of uncertain mitigation problems it could not address on its own. While the US Environmental Protection Agency had determined in the 1970s that deep seated coal tars and slurry remains did not pose any real environmental threats, deposits from the MGP operations much closer to the surface, especially the residues from liquid hazardous waste holding tanks, were of some concern. The RA thus approached MyGas, Inc. and Colamia with a request that they step forward and acknowledge their responsibility.

Box 2. Utopia Park: Players Involved

- The Utopia Park Riverfront Agency (RA) and its Manager
- Environmental Counsel to the RA, a local firm with a specialist environmental practice
- MyGas, Inc, the local public utility that operated the MGP through the 1920s
- Colamia, Inc., the operator of the ammonia plant next to the MGP facility
- The City of Utopia Park, its City Manager, Mayor and members of Council
- The State Regulator and Voluntary Cleanup Program (VCP)
- The Brown Coalition, the initially selected Master Developer for the project
- The Cityworks Company, the second choice for Master Developer, now doing the project
- The River Grove neighborhood association
- The Utopia Park Brownfields Coordinator, who has supported the project indirectly

2.22 Negotiations with Responsible Parties: The Role of Site Assessment

MyGas, Inc., the utility that ran the MGP, remains a major power company serving Utopia Park and is a major landowner in the area, holding title to property adjacent to redevelopment site. As has often been the case with similar efforts to induce parties to accept responsibility for contamination, the utility refused to admit it had anything to do with the pollution. MyGas argued that it was not responsible for any of the residues on-site, claiming that it had never deposited anything to begin with and that, given the number of years since it had turned the property over to the City and the use of the site for waste disposal, what was present resulted from subsequent uses. (MyGas representatives

substantiated their denial with claims that they had interviewed ex-employees of the MGP – a facility that had closed its doors in the 1920s.)

Given this resistance, the RA had to decide how to proceed with respect to potential reuse of the site. It could (1) abandon its efforts to turn around the property, (2) proceed to sue MyGas and Colamia as PRPs under CERCLA’s strict joint and several liability provisions, or (3) take a different approach to convincing the utility to help with the remediation. Given that the MGP site, only about five acres overall including ancillary operations, adversely affected surrounding property, rendering the entire 50 acres intended for development virtually unusable, the RA was not prepared to abandon its efforts. The second option, legal proceedings, could have tied up the site for a decade or more, and the RA did not want to expend its financial resources on litigation. Yet something needed to be done about the MGP site.

The RA thus decided late in 1999 to begin extremely intensive site investigation efforts and to pursue regulatory decisions regarding the MGP waste sludges and the risks they posed if left in place. The Agency recognized that its efforts could facilitate the redevelopment they wanted:

- Having the evidence to offer the PRPs might enable the RA to come to financial terms with the MyGas and Colamia without having to resort to litigation;
- The detailed data would make the whole site more attractive to prospective developers, at a minimum attracting more attention by reducing the due diligence costs associated with considering the site as an investment prospect.

With ten percent funding from the state environmental agency, raising the rest from its own revenue stream, the RA initiated the intensive site investigation for all 50 acres, focusing the majority of its efforts on the MGP site, and spending roughly \$1 million in the process. After taking over 400 test borings, hiring a specialist on MGP wastes and fully characterizing the problems on its property, the RA had the evidence it needed to return to MyGas and reopen discussions. The data suggested that a full mitigation, removing all the waste coal tars in order to permit single family residential use, would cost over \$50 million, but that a risk-based approach leaving the tars and sludges 15 feet underground would cost a maximum of \$10-\$12 million, including funds needed to bring in “fill,” raise the ground level another 15 to 20 feet, and grade the site to maximize the real estate value of the river views, thus increasing the soil barrier between users and the remaining pollutants to 30 or more feet.

In order to reinforce its findings on remediation requirements and their adequacy and cost, the RA entered the entire 50 acre site into the state Voluntary Cleanup Program (VCP) and won approval from the State Regulator for a risk-based remediation, with the VCP noting the reasonableness of the cost estimates. The state VCP was prepared to offer a “No Further Action” (NFA) letter for a

successful site mitigation that addressed all surface deposits from the municipal landfill and building demolition debris, but did not address or remove the subsurface tars.³

The RA thus used the VCP itself as an additional authority to validate the analysis and remediation approach it presented to MyGas and Colamia in order to get participation. The RA did not pursue the full \$10 million plus that was its maximum cost estimate for site preparation, since it wanted to give the companies an incentive for settling and contributing to the remediation without resorting to litigation. The strategy pursued involved arriving at an agreed mitigation approach with the state VCP, obtaining a firm bid from a fixed price remediation contractor, and showing the remediation plans and costs to MyGas and Colamia, asking them to contribute as PRPs. The acceptable bid for mitigation of the strands of waste coal tars within 15 feet of the surface came in at \$1 million. Additional cost coverage was requested for:

- provision of water and waste-water services to the new development, which might have to be located within contaminated subsurface areas;
- reimbursement for the higher due diligence costs incurred by the RA due to the historic contamination; and,
- insurance to cover additional risks and uncertainties the development might have to address.

All told, the bill presented was for under \$5 million, less than half the plausible worst-case scenario. The PRPs settled for that sum since the figure avoided litigation costs, including possibly paying for the litigants' costs in suing them.

The remediation contractor selected was the same firm that had conducted the in-depth site assessment originally funded by the RA. It thus was very well acquainted with the site, the mitigation problems and the risks. It offered a Fixed Price Remediation Contract (FPRC), which the RA was pleased to accept.

The RA did not have experience buying environmental insurance, nor did the Brownfields or City Risk Management offices. It also had no capacity to oversee the work of the contractor to assure that the efforts were timely and cost-effective. In the interest of time efficiency as much as anything else, it chose the FPRC, backed by the insurance the remediator carried. Work began in 2002 and the mitigation and contamination removal activities required for state VCP approval were completed in 2004. The VCP approval was granted, contingent on the site not being used for single family detached homes but imposing no other form of land use limitation.

³ The coal tars are not water soluble and pose no threat to the river and are not likely to migrate off site. While globules of tars have been spread vertically in subsoil surfaces by the river, rising with the water table and remaining when dry, the highest recorded subsurface water table levels have reached only to 15 feet below grade level at the lowest points on the 50-acre plot.

2.23 Acquiring a Master Developer

While work was progressing on funding and completing the mitigation of the problems left by the MGP, the RA re-initiated efforts to attract a master developer for the site. A Request for Qualifications (RFQ) was developed after consultations with the River Grove Neighborhood Association that helped shape conceptions about development alternatives and contributed to the broad specifications for a proposed mixed use project.

The RFQ solicitation initiated in 2003 differed from those pursued earlier on two major levels: First, the RA was offering a fully assessed, characterized, and remediated site. Second, the RA itself contracted with a national real estate marketing specialist for an analysis of the possible market demands and appeal of the site and provided results of that analysis on a CD accompanying the RFQ. Both these activities served to reduce risks for prospective RFQ respondents. The remediation and attainment of NFA status in the VCP reduced the anticipated due diligence and compliance costs for respondents. The market analysis enabled prospective respondents to decide whether the site fit into their business plans and provided data to the selected party that would reduce its actual pre-development costs.

The decision to issue a RFQ, rather than a RFP, reflected the RA's interest in *partnering* in the redevelopment project, rather than just turning the site over to another party. As a partner, the Agency could retain more influence over the nature of the redevelopment project and the mix of land uses on the site without dictating the parameters of a preferred project to developers. Such rigid requirements are characteristic of many municipal development RFPs. Brownfield developers report that such restrictions make it difficult for them to use many publicly owned sites (Meyer and Lyons 2000).

From a risk management perspective, the RFQ process that was followed avoided placing the issuer in the position of offering indemnifications or other forms of assurance that might have required insurance underwriting. Provisions associated with the approval and certification of agreements of all parties to the VCP, which would be extended to the selected developer, offered protections from damage claims from others, further reducing the need for insurance coverage. (These protections even extended to eliminating the possibility of natural resource damage claims from the state itself.)

RA representatives anticipated, however, that insurance might play a role in the project because of the extent to which the redevelopment relied on a Risk-Based Correction Action (RBCA) mitigation that left contamination in place. The state VCP includes a provision that permits a state-approved mitigation plan to be augmented by a negotiation process for problem resolution to address any contamination issues that may arise in the course of the redevelopment activities. If a new problem such as a stray strand of coal tars close to the surface were discovered, the basic requirements for the NFA letter would remain in place for the site as a whole. Only the new condition could be the subject of a negotiation on a supplemental mitigation process. This provision, available in a number of different states' VCPs, significantly reduces the perceived risks of cost increases for regulatory

compliance associated with undiscovered contamination: the scope of work originally approved cannot be reopened due to discovery of a limited new environmental problem on the site.

Despite this provision, there remains the risk that the development will experience cost overruns due to unanticipated environmental problems. These possibilities, combined with the toxic tort liability risks associated with the reliance on a RBCA approach, constitute uncertainties that insurance might address. Moreover, the master developer could utilize insurance protections to increase the marketability of parcels of the site. It did not make sense to pursue insurance coverages at the time the RFQ was issued, however, given the need to determine specific site usages. Thus the RFQ solicitation itself did not reference insurance. It is notable that, while the Agency received questions from over a dozen different firms with an interest in its site and proposed redevelopment, no questions about plans to manage risks with insurance were raised by any party.

The market analysis was completed in time for the RA to publicize the RFQ at a major developers' conference before issuing it late in 2003. In addition to magazine advertisements and a conference display, the RA sent the RFQ specifications, with the market analysis data CD to some 80 national firms known to have undertaken projects of comparable scale. The Agency also held a prospective bidders' meeting and provided interested parties with the opportunity to ask for additional information.

When the RFQ process closed, the RA had received three responses, slightly below the number they had gotten on other RFQs not involving previously contaminated sites. All responses were from nationally prominent groups with large-scale redevelopment experience. The responding firms also understood the characteristics of the Utopia Park real estate market: they all were actively engaged in one or more local redevelopment or infill project when they responded.

The Brown Coalition was selected in March 2004. It was given 180 days' exclusive right to negotiate a pre-development agreement with the RA that covered both the project conception and design work to be done and the financing arrangement for pre-development planning. These pre-development agreement elements were necessary before a contract for any redevelopment designs to be implemented could be signed. The Agency had committed the resources at its disposal to making the site attractive to developers and was not prepared to commit more funds to project design and planning. As noted above, the RA had avoided specifying any details about the type of development it expected in order to encourage innovative and negotiable ideas. However, it was not prepared to give any developer a completely free hand.

The broad, mixed use planned for the site fit the demand patterns for the riverfront. The design question involved how best to build on complementary investments evident in the area, and the RA expected to collaborate with its master developer on the issue. The Agency Board initiated trips to waterfront projects in other cities in order to learn more about possibilities now that their preparations appeared to be bearing fruit.

The Brown Coalition, however, seemed unwilling to meet with the RA and work collaboratively toward an approach tailored to the local market conditions. Instead they repeatedly offered fixed designs based on past projects and never brought in the design and marketing expertise they had offered in the RFQ response and on which the Agency had expected to rely. The Brown principals also failed to come to the table with proposals for how to bring in the financial and planning resources needed to complete the pre-development activities. No progress was made toward a pre-development agreement, and the Brown Coalition was informed in mid-summer 2004 that the Agency was terminating the exclusive negotiation agreement due to their failure to deliver any of the specialist resources that they had promised in their RFQ response.

The Cityworks Company, the RA's original second choice, was then awarded negotiation rights. Although the firm had responded to the RFQ, it had been only minimally interested in the Utopia Park project and had to be encouraged to step into the lead role after the Brown Coalition failed to perform. Once convinced of the opportunity, however, Cityworks moved quickly to a pre-development agreement with the Agency, committing to provide its own internal expertise to support planning and design efforts. The pre-development agreement was consummated late in 2004.

Designs for a pedestrian-friendly, mixed-use urban village have been drawn up that satisfy all parties. City Council support, generated in part by Council member participation in the Agency's planning efforts, helped to put into place zoning changes and other facilitative arrangements. Financing plans explicitly include pursuit of possible co-venture components, involving a continuation of the collaboration the Agency has pursued all along. This objective is consistent with the RA's past efforts to build their operations on revenue-generating real estate holdings, using their access to publicly owned land not as a simple subsidy to developers, but as a means of gaining access to ownership shares and direct financial returns on the dollar value of their public sector contributions.

Recent pressure for rapid decisions and project progress has been mounting as new opportunities have emerged. The adjacent real estate market has heated up at a rate not anticipated earlier in 2005. A spate of projects elsewhere in the downtown have made massive amounts of excavation fill and clean demolition debris available at little cost for the required additional grading and shaping of the land contours on the site. Moreover, Cityworks and the RA want to have plans in place to be able to site underground utilities before additional fill gets placed above them, and to direct the flow of the fill material so it does not need to be moved again in the future.

As a result of explosive development nearby in the area originally not expected to boom, the River Grove neighborhood, Cityworks and the Agency have been collaborating on accelerating the removals of city demolition debris that were originally deemed to be a low priority issue. State economic development funding for strategic brownfield cleanups will cover 100 percent of the estimated \$4.5 million cost. They also are joining in efforts to pursue improved access to the site from the nearby hot real estate zone, a linkage not considered important in the specifications and data offered as part of the 2003 RFQ invitation. After planners hired by Cityworks developed outline site plans and consulted with River Grove residents on their plans, a proposal for a road extension was

developed and submitted to the City for approval and appropriation of needed funds. Approval is expected without formal resolutions from the City Council. The involvement of the City Manager, Mayor, and senior Council members in the selection of the master developer and their participation in site visits to Cityworks' projects in other cities that were undertaken to help form a local vision has given them a personal stake in the development.

Until the final development agreement is completed, the precise role, if any, that insurance will play in this project remains to be determined. The co-venturing component of the arrangement with Cityworks Company explicitly references the need to address the "financial risks of joint ownership." As of May, 2005, neither party to the pre-development agreement has fully addressed the management of the financial risks associated with unexpected costs in final site preparation. Both also know that toxic tort risks have yet to be addressed. Roles for liability coverage may emerge as the plans for ownership and management of the site are further articulated.

2.24 Lessons Learned

- Detailed site assessments and in-depth investigations of remedial options, while expensive, may be cost-effective, since they both reduce uncertainties and may be useful in inducing PRPs to settle and contribute to revitalization efforts.
- State VCPs can help reduce uncertainty in brownfield site preparation costs and efforts if the enforcement agency is willing and legally able to provide assistance to prospective mitigators in examining alternative standards and strategies for cleanups.
- The national experiences and past successes of development firms working with brownfields do not always translate to local effort and capacity – developers need to have some commitment to the specific project in order for a revitalization effort to move forward efficiently. Otherwise, a developer's limited interest could contribute substantially to project delays, despite public sector efforts.
- Many local redevelopment agencies have very limited in-house planning and design capacity. Such organizations need to invest heavily in building collaborative partnerships on brownfield projects with private development firms, both to assure needed certainty and commitments and to derive economically viable plans that can then be subjected to public discussion and modification without generating adversarial relationships.
- The necessity of obtaining environmental liability protection cannot be determined prior to derivation of project development options. Site development plans, since they must take financing and sale or lease options for the facilities developed into consideration, not just the mix and spatial arrangement of land uses, may shape the extent and duration of liability risks and thus define the insurance coverages needed.

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2.3 Case Study # 3: Hapiton

Hapiton is a city of some 250,000 in the Southern United States. This population closely resembles that of the nation overall, with over three quarters of residents between the ages of 18 and 65 and a median age of 36. Hapiton is the principal city of a medium-to-large sized MSA – one with a population of approximately one million. Both the city and county experienced below average population growth for the decade ending in 2000. Moreover, the city is becoming less dense while the county gains in population density. Sprawl is thus a serious concern in Hapiton.

Economically, Hapiton is poor and underperforming. While median housing costs rose at more than double the national rate between 1990 and 2000, the area still has below average housing costs, with the city showing a median value of only 70 percent of the national average, and the county, despite the out-migration and new construction, still only at 86 percent. Incomes have not kept pace with housing costs, so affordability has dropped: both the city and county experienced below average job and economic activity growth rates in the 1990s. In 2000, Hapiton's individual poverty rate exceeded 20 percent, far above the roughly 12 percent rate exhibited by its county and the nation as a whole. Median household income, similarly, was well below the national average for the city, but closer to the national figure for the county. Overall, Hapiton may be described as economically distressed, suffering competitively in a county (and metropolitan area) that outperforms its city.

2.31 Background: The Site

This case involves the Baker Corporation, a major diversified manufacturer, with a roughly 100-acre factory site in Hapiton that it no longer wanted and on which it had mitigated environmental risks. The company approached the local redevelopment agency in late 2002 with an offer to sell. Two characteristics of the case underscore its value as an example:

- Local government was not pursuing the site for a specific brownfield revitalization effort. It was concerned with the economic revitalization of a depressed area, and the site, mitigated with an approval from the state VCP, was seen as a possible catalyst for redevelopment.
- Baker had conducted a RBCA mitigation that relied on an impervious cap over extensive remaining contaminants to reach an industrial reuse standard. The company wanted to constrain any on-site redevelopment activities to assure that it would not bear any costs for modification of its already-approved environmental response efforts.

The Baker Corporation had maintained manufacturing operations in the area through most of the post-war period. It closed the facility in the 1980s and completed stabilization of known contaminants – metals and some petroleum distillates and solvents – in 1992. Since that time, the site has remained idle, except for one remaining building occupied by another manufacturer that is renting the premises. That renter expressed an interest in purchasing the site it occupies, but Baker would not further subdivide, insisting on selling the entire site intact. It appears that the basis for this insistence is that

the environmental response that won state approval was for the site as a whole, and the company feared any reconsideration in the event of a real estate transaction involving subdivision.

The property is only a portion of the original factory site, having been separated from an adjacent site that once held a long-since dismantled foundry to segregate the greater environmental problems posed by the foundry. It lies in an industrial zone that had become obsolete over time and that had a number of abandoned or underutilized sites, few of which were being offered for sale during a period of depressed local demand for industrial facilities. The rail yard serving the area is also largely abandoned, with few reutilization prospects although an active trunk line runs through the area and the site is serviced by a rail spur.

In terms of contamination, metals problems lie primarily under the portion of the site now occupied by the tenant manufacturer, as do the majority of the “hot spots” that were not to be disturbed under the original approved mitigation. The remainder of the site, all unoccupied, is capped to avoid water penetration that could create runoff and groundwater problems with remaining solvents and petroleum distillates found in the soils at levels below those requiring mitigation actions. Groundwater monitoring wells, checked regularly by Baker, have not shown signs of emerging problems.

Box 3. Hapiton: Players Involved

- The Executive Director of the Hapiton Redevelopment Authority (RDA)
- The Hapiton Brownfields Coordinator
- The Hapiton Chief Officer for Economic Development (to whom both of the above report)
- Real Estate Counsel to the RDA
- Environmental Counsel to the RDA
- Risk Manager for the Baker Corporation
- Environmental Counsel for the Baker Corporation

2.32 Negotiations with the Seller/Responsible Party

The Baker Corporation’s initial sale offer was \$3.5 million and was for the entire site, *as is*, with no contingencies, indemnifications, or other protections to the buyer. The company had successfully sold the foundry site to a self-financing real estate operator that accepted the full legal liability for any remaining environmental problems as a condition of sale. Baker hoped for a similar outcome for the less contaminated, but larger site it offered to Hapiton.

The RDA responded, stating it would pay \$2 million for the site. Baker, however, did not look at the purchase offer contingencies until the dollar amount rose past the first bump of \$2.5 million, to the \$3 million offer that launched the negotiations. The negotiations that ensued proved to be very

difficult, colored by factors that suggested that Baker was more interested in divesting itself of liabilities than of the property:

- Baker insisted on complete confidentiality in the transaction, requiring the RDA to pledge not to share any data on environmental conditions with any parties, including prospective purchasers that might be identified in the course of planning for redevelopment of the site. This condition rendered the site unattractive to the redevelopment authority, so Baker agreed to disclosure to private third parties interested in the site – but only under very rigid confidentiality agreements.
- Baker demanded that the cap never be breached. This left the RDA responsible for costs associated with piercing the cap. This was likely, since the cap would have to be pierced to build a structure with anything other than a slab foundation. The RDA agreed that, as of the date the cap was breached, it would accept responsibility for conforming to required standards for further mitigation of *known* contaminants, but wanted protection for *unknown* contaminants, arguing that Baker remained liable for the actual pollution remaining on the site as of the property transfer date.

RDA management never took Baker Corporation’s demands for non-disclosure of information on known site conditions as a serious stumbling block. Although the Executive Director noted that the property had zero value to an economic development unit if it could not be re-sold for private use and that any such sale would require full disclosure of site conditions, he assumed the requirement would eventually be waived if the parties could settle on other terms. The RDA was more concerned with the apparent insistence by Baker that it be able to dispose of all its liabilities and responsibility for prior site conditions in the course of the sale by limiting the buyer’s recourse rights. The City and RDA would not move forward without protections provided by Baker as part of the deal and expressed concerns about two issues to be addressed:

- Costs for remediating pre-existing, newly discovered types and quantities of contamination not mentioned in the environmental reports; and
- Liability protections for damage due to known contamination.

Subsequently, Baker offered to indemnify the RDA for a period of one year after the sale – for a total of \$1 million, after a \$100,000 “deductible.” RDA noted that the indemnification was too low and the term proposed was shorter than the time it might take them to find a prospective buyer for the capped portion of the site, and thus had virtually no value. In response, in addition to the indemnification, Baker offered to procure and pay the full costs of an insurance policy with a policy period of not more than 5 years and a dollar limit of not more than \$5 million, with the RDA assuming all liability after that, for any known or unknown contaminants.

The “insurance policy” that Baker sent was, in fact, an insurer’s “specimen policy,” available on the Web. It outlined the major elements of the most common coverages, with no detail beyond the aggregate and term provided. Along with that specimen, Baker attached three endorsements or coverage modifications that severely reduced the policy’s potential value to the RDA:

- Coverage was provided only for “third party claims,” which meant the RDA was not covered for additional cleanup it felt it needed to make the site safe.

- Coverage excluded any claims for releases associated with work conducted on site prior to the initiation date of the policy. This limitation meant that the RDA could not initiate any work during the one year period it was covered by the indemnification from Baker and before the insurance coverage began, thus delaying any work to make the site more attractive to new users. The limit also excluded any unknown contaminants or pollutants not declared when the policy was negotiated, but discovered before it went into effect, thus making it economically unreasonable for the RDA to even conduct site investigations in its first year of site ownership.
- The policy excluded coverage for off-site groundwater contamination, leaving the RDA responsible for any possible migration of substances below the cap that might migrate off site.

The documents thus generated more questions than answers and the Executive Director and Real Estate Counsel concluded that they needed the expertise of Environmental Counsel to negotiate with Baker. In consultation with their new Counsel, who consulted with a national specialist environmental broker, the RDA developed a more sophisticated understanding of the uses and timing of insurance coverages. For example, CC coverages likely would be needed. The initial review of the project by the RDA Director and Real Estate Counsel did not consider risks such as the possibility that piercing the cap in one location could cause damage to the rest of the cap elsewhere on the site and could affect the tests at the well sites installed by Baker, to which the company insisted on having access in perpetuity. In fact, re-stabilization of the site after the existing cap was breached constituted a new remediation response, with the risks inherent in such actions. RDA's Director also came to understand the risks posed by the time elapsed since the original approval by the state VCP. Due both to the possibility of changed standards, and, perhaps even more importantly, improvement in detection technologies, a new site mitigation might have to comply with requirements for additional assessments and remediation and have to address previously unknown contamination.

A further concern raised by the Counsel was the minimal disclosure of site characterization by Baker. The firm was only willing to provide the environmental data on the site that had already been submitted to the state to obtain approval for its site mitigation plan. The Counsel noted that this most likely represented only a small subset of the data that Baker actually had. His argument was that any competent consultants and attorneys would have helped the company to submit to the state absolutely no more than what the state required. However, it was reasonable to assume that the company had obtained other site characterization data in order to select one approach to mitigation and not another. Those additional data would help a successor owner/operator do a better job of managing the pollutants remaining on site. In addition, and importantly, if other reports did exist and were not provided to the insurer prior to underwriting, that failure to disclose could invalidate claims made under the coverages.

Despite the efforts of the RDA and its Counsel, direct communication after the transmittal of the specimen policy was limited to a single conference call with company representatives. Information was requested during that phone call about several facets of the proposed coverages, none of which were evident in the specimen policy offered:

- The relationship between the indemnification and the subsequent insurance policy, for two reasons: (1) the inadequacy of the indemnification limit, and (2) the likelihood that any problem that arose in the first year would not be resolved before the indemnification was over and the insurance was to take effect.
- The identity and status of the insured party, to make sure that it (or any designated successor owner) was entitled to file claims for insurance coverage.
- The levels of the deductibles and who would be responsible for paying for them, since extremely high deductibles could be imposed in order to lower the insurance premium to be paid by Baker.
- The policy triggers or conditions/events initiating eligibility to file a claim for reimbursement, since the ways in which they are defined can severely limit the value of a policy.
- The sub-limits imposed per occurrence that trigger coverage which could mean that, for low sub-limits, a very large number of small claims would have to be filed for the insured to come close to collecting the full policy aggregate.
- The extended policy period under which the RDA could file a claim.
- The transferability of the policy, since the site's appeal to any subsequent owner or occupant would be higher if the policy also covered them.

The Risk Manager for the Baker Corporation, to whom RDA's Counsel submitted further e-mail requests, proved to be uncooperative: responses to the requests were never provided. Negotiations stalled in late 2003 as a result of this lack of cooperation and because the RDA needed to turn its attention to obligations to other redevelopment projects.

In addition, new market conditions resulted in a decline in the need for public sector action to get the property back into productive use. The local climate for industrial activity when Baker approached the City with an offer to sell was poor, with plants closing creating a growing supply of vacant sites. By late 2003, however, the market had shifted and demand for industrial land expanded unexpectedly. Two firms entered into independent private negotiations with Baker for the property in early 2004. In response, the City and the RDA stepped back, not wanting to expend public resources to promote economic regeneration that the new market conditions appeared to drive without further support.

Neither of the two prospective buyers were able to arrive at acceptable terms with Baker. By mid-2004, a third interested private party entered into negotiations and retained the same environmental Counsel that the RDA had brought into Baker purchasing efforts. That buyer pulled out in October, 2004, also unable to come to acceptable terms on prospective liability relief with the seller.

As that buyer ended negotiations, a fourth party stepped forward. As of Spring 2005, this party had signed an option to purchase the site with Baker. The firm is currently conducting due diligence and pursuing re-zoning to non-industrial. Notably, their reuse plans involve slab construction that will not pierce the cap at the site.

2.33 Lessons Learned

- Some sellers are unwilling to take full responsibility for their pollution and will only agree to exploitative deals. Not all offers, even at low costs, are good deals for public agencies.
- The inability of the RDA to consummate a private-public deal with Baker does not reflect on the Authority's real estate market operations efficiency, but rather on the seller's unwillingness to accept responsibility for pollution it created and to disturb a previous mitigation using RBCA standards.
- A real estate purchase is essentially an adversarial process, and that condition is even more central when there are contamination issues. Independent specialists, including environmental counsel and brokers, need to be retained by public sector entities that do not have the needed expertise on staff to place them on an equal footing with large private firms. The need for such support, and the recognition that the costs of such services may have to be incurred even if a deal is not consummated, should be recognized prior to entering negotiations on brownfield site acquisitions.
- Full seller disclosure of environmental conditions is essential for costing out projects, determining remedial response needed, and selling the site to a new owner.
- The documents provided to a regulatory body rarely constitute the full body of information about a site that is known to the applicant. Full disclosure by the seller is essential to negotiating for and managing insurance coverages.
- Knowing the aggregate limits and terms of insurance policies does not suffice for determining the adequacy of coverages. A number of other key elements – discussed in Chapter 3 – need to be understood as well.

2.4 Vignettes

The three projects described below offer some additional insights into environmental insurance decisions in public sector-led regeneration efforts. They include non-insurance risk management activities and decisions to buy and not to purchase coverages, depending on the situation. The first example includes acquisition of separate policies for different parties involved. The second demonstrates how creative reuse can affect the economics of a remediation and a regeneration with the risks managed by insurance. The third illustrates the importance of selectivity in the purchase of insurance and the value of buying only the coverages really needed. All three involve a local government providing facilities for its own use, a situation in which private sector end-users do not dictate conditions or generate needs for coverage.

2.41 School

This project involves a sixteen-acre site in the center of a mid-western city with a population of roughly 100,000.⁴ The site was selected by a school district board to build a new school; given high demand for property in the city in the last decade, no other acceptable locations were available. The site had been used primarily by an automobile manufacturer and, since the early 1990s, had been capped with asphalt and used to store semi trailers. Phase II assessments conducted by the school district in the fall of 2000 found petroleum products, lead, and other heavy metals in the soil and discovered that a corner of the property was contaminated with TCE.

To assist with the project, the school district brought in an environmental attorney and consulted with the state environmental agency. Environmental response planning was conducted in the spring of 2001. An agreement was reached with the owner to divide the property into a twelve-acre parcel, which the school district would purchase to build the school, and a four-acre parcel that contained the TCE contamination, which would not be purchased.

The biggest hurdle the school district faced in the property transaction was reaching a legal agreement with respect to the potential of future third party liability suits from students and staff at the school. The manufacturer wanted indemnification from the school district for these liabilities, but the district was not willing to accept that contingent liability. Negotiations began in June 2001 and continued for the next year. At a stalemate, both parties agreed to utilize environmental insurance to resolve the situation. The negotiations continued for another seven months before the agreement with the manufacturer was finalized and the policies were issued.

Ultimately, the manufacturer agreed to pay for most of the \$250,000 cleanup on the school site. In turn, the school district contributed \$50,000 for a portion of the premium for a ten-year PL policy for the manufacturer. The school district also purchased a separate PL policy for itself designed to protect the district from third party claims and from expenses related to unexpected pollutants that might be discovered during construction. The policy has a ten year term, a dollar limit of \$10 million, and \$25,000 deductible. The cost of the premium was \$150,000.

The cleanup in the spring of 2003 involved soil removal and took just a month to complete. Because foundry sand had been found during the site assessment, the state environmental agency classified the site as an landfill. Consequently, the school district was required to construct a vapor barrier under the school to protect against possible intrusion of methane and other vapors and to monitor the venting system for a ten-year period. Currently, no hazardous vapors are present and the school board expects to receive a Certificate of Completion from the state agency in the early summer of 2005.

Employees of the school district who participated in the negotiations credit the success of the project to (a) the assistance of the state environmental agency, which was involved early in the process, and (b) the use of the insurance to settle the issue of liability relief with the manufacturer.

⁴ From 1990 to 2000, the city's population grew by 13% and housing values rose by over 35%.

2.42 Agency Facility

This project involves a site encompassing a block in the downtown area of a southern city of about 500,000.⁵ The city, which had a heavy industrial history, experienced severe economic decline in the 1970s. The downtown area was largely abandoned until revitalization efforts were initiated in the mid-1980s.

Previous uses of the property included a railroad yard starting in the 1800s; a dry cleaner from the 1930s through the 1950s; and a garage, office building, and parking lot into the 1960s. The buildings were demolished in the late 1960s and the city acquired the site through a tax foreclosure. The site remained vacant until 2003 despite the surrounding regeneration activity. Although there were petroleum products on site, the primary contaminants of concern were dry cleaning solvents.

The redevelopment entails a property exchange between the city and a one of its arms-length non-profit agencies. The land swap provided the means both to keep the agency in the downtown area and to facilitate municipal waterfront revitalization efforts. The agency will use the dry cleaner site for a new office building containing first floor retail space and a parking garage. The city will acquire the agency's old site and seek a contractor to develop new downtown condominiums, which are currently in demand.

Other key components of the redevelopment include the state dry cleaner program, funded by business registration fees and surcharges on dry cleaning solvents, and a CC insurance policy. The state dry cleaner program was set up to pay for the cleanups of such sites. However, the maximum per-site expenditure permitted under the program is \$1 million. This amount roughly equaled the estimated cleanup costs and the city was concerned that the remediation would exceed it.

This concern was exacerbated by the overall environmental response and redevelopment plan. Two years were scheduled for the remediation firm to conduct soil cleanup and construct a pump-and-treat system for contaminated groundwater. This would be followed by a two year period in which the agency would construct its building and erect the parking lot structure over the wells. Well monitoring would continue after the construction for another five years, with the wells accessible from the ground floor of the garage. However, if the remediation did not proceed as planned, the costs to rectify the problem could be exceptionally high due to the need to conduct further response work beneath the parking structure.

To address these concerns, the city chose to purchase a CC insurance policy with a relatively long term that extends through the monitoring period. The policy dollar limit is \$1.8 million. The premium cost \$145,000 with a \$500,000 self-insured retention.

⁵ The city experienced only a minimal (2%) increase in population from 1990 to 2000 but a housing value increase almost equal to that of the US as a whole. However, the 2000 median housing values remained well below the national average.

A local broker worked with a consulting firm specializing in brownfields risk management to procure the policy for the city. The process took about six months from the time the broker submitted information for policy indications to the point at which the city had the policy in hand. Because the remediation effort was at the minimum cleanup cost level that an insurer will consider for a CC policy (\$1 million), there was little room for negotiating the conditions of the insurance contract.

2.43 Park and Community Center

This project is in a small northeastern city with a population of about 30,000.⁶ For a number of years, the town had been seeking acquisition of riverfront property for a park as well as a site on which to construct a community and events facility. Both of these objectives were served in the late 1990s when the town decided to foreclose on a tax-delinquent, 23 acre property on the river. However, the site had been used as a bulk petroleum storage facility: it contained fifteen large above-ground storage tanks and the soil and groundwater were polluted with petroleum products and PCBs.

Shortly after the site was acquired, the town received \$250,000 in state funds to assess alternate designs for site use, a process that helped them to develop their cleanup strategy. In 2000, the town received an \$85,000 targeted brownfield site assessment grant from EPA. In 2001, their consultants developed a remedial action plan and the town removed the petroleum tanks at a cost of \$320,000.

The remaining cleanup, which took place between September 2003 and March 2004, involved removal and disposal of some of the contaminated soil, on-site relocation and management of other contaminated soil using a four-foot cover of clean earth, and the installation of an interceptor trench dug between the site and the river to prevent oil from leaching into the water. The \$1.32 million cost of this work to the city was partially offset by an additional \$500,000 state cleanup grant.

At present, the property has been remediated to state standards. The community/events center is nearing completion and will open in the summer of 2005. Construction of the facility was a \$6.5 million effort supported in part by a \$750,000 state grant and some \$100,000 in donations from private sources. The center will provide new premises for community gatherings and is expected to generate tax and fee revenues that will help offset its costs as well as increase other commercial activity in the town.

Master planning for the riverfront park is underway; the city has some \$800,000 in state and federal grants pending and \$400,000 in donations pledged to help with its development. Even before completion of the entire project, the redevelopment has delivered several important community benefits including removal of an ecological threat to the river, elimination of an eyesore, and creation

⁶ From 1990 to 2000, the town's population grew at a rate slightly higher than the US as a whole. While housing values in 2000 (over \$200,000) were higher than national average, they actually had declined by over 25% from 1990.

of new open space. Offsite property value impacts should contribute even more to tax revenues when the park is completed.

For this project, PL insurance was purchased with the town as the insured. The primary concerns that led to insurance use included the possibility of costs for unexpected remediation of newly discovered contamination onsite, third party claims from individuals who would be involved in the park construction, and claims stemming from offsite migration of remaining contamination.

In addition to PL, the town initially had considered and received indications for a CC policy. City officials decided against purchasing CC, however, because (a) they were confident in their site assessments, and (b) the policy did not seem to make economic sense for them in light of their thorough assessment. The estimated remediation cost was approximately \$1 million and coverage was only available with a self-insured retention of \$350,000. The premium would have cost over \$100,000. Thus they would have had to spend over \$450,000 above the estimated cost before the policy began to pay. As it turned out, the determination not to buy CC paid off as the ultimate cleanup costs were \$1.3 million, so the city saved the cost of the premium for a policy on which they could not have filed a claim.

To arrange for the PL coverage, the town used its insurance broker of record who worked closely with an environmental attorney. The town manager also was closely involved in the negotiations. After receiving indications from insurers, they debated different dollar limits (\$5 or \$10 million) and term limits (three, five, or ten years) in light of the differential costs of the premium. Ultimately, they decided on a ten year policy with a \$5 million limit. The premium price was \$120,000 with a \$50,000 per-claim deductible. The purchase negotiations took approximately four months and a policy was put in place in late 2003. The insurance for this case was not considered to be indispensable. Rather, it was part of a “belt and suspenders” approach that brought comfort and certainty to the town.

2.44 Lessons Learned

These vignettes offer a starker perspective on the environmental insurance purchase decision compared to the detailed cases simply because the decision stands out with little information about the complexity of the context in which it is undertaken. The lessons learned reinforce those from the cases:

- Environmental counsel and insurance specialists are essential to insurance decisions.
- State regulators can make major contributions to project risk management, especially for local public sector entities that may be able to get more guidance and collaborative assistance from state personnel than might be available to a private sector developer.
- Sometimes the economics of the deal – the cost of coverage or limits on protection – renders insurance a poor choice, even when the developer wants to avoid uncertainty and limit risks.

- The insurance acquisition decision is always subjective – based on risk perception and risk tolerance. The decision not to purchase CC for the for the Park/Community Center project may have been conditioned in part on the volume of grants received, meaning that the city already saw its total cash outlay risk cushioned by external support. The decision to buy CC for the Agency Facility project, by contrast, reflected a concern over the magnitude of a possible cost overrun, given that a structure would be built on the site.

2.5 Risk Management for Public Sector-Led Brownfield Projects

The adversarial nature of any real estate transaction – buyers and sellers with different objectives – sets the context for any brownfield redevelopment. In any adversarial process, the party with the greatest expertise will generally “win.” Since local governments and their agencies rarely have the expertise in-house that the sellers of brownfield sites have available, public sector bodies need to assure that they have specialists in contaminated land transactions as part of their project teams from beginning to end of the transactions.

Information is central to any decision. It costs money to hire specialist consultants, as it does to conduct extremely thorough site investigations. Consulting with state regulators about alternative approaches to site mitigation and with the community about plans for the site will delay the onset of visible initiation of work. But information has economic value, and the funds invested in better data for decision making can, and usually will, save money over the course of the project. Most significantly, better information reduces uncertainty, and thus risk, and can reduce the need for the risk transfer capacity provided by insurance.

The purchase of insurance, or the decision not to, does not reflect the “success” or “failure” of other risk management efforts. Each project has its own dynamics, risks, and possible management processes. In some instances, insurance may be the key to completing a deal. In others, it may contribute the extra security that speeds a project along or generates needed political support even if it may not be central to the economics of the project. In yet others, it may make no sense, given the risks involved and the certainty generated by other means.

A good insurance acquisition can, however, be distinguished from a poor one:

- Are the risks of concern adequately covered, both in monetary and policy term limits?
- Have extraneous coverages not needed to permit the transaction to proceed been excluded?
- Are the appropriate parties protected as needed?
- Does the policy respond properly to unexpected changes in the deal, in ownership or project objectives?
- Is the price, including the premium, deductible or self-insured retention, and co-pay requirements, acceptable to the parties involved?

If the answers to these questions are “yes,” then the purchase of insurance is a “good deal.” If not, then the transaction is questionable.

Chapter 3.0

The Insurance Procurement Process

This chapter is written from the perspective of a brownfield site developer in general, since most of the risk management issues that lead to consideration of insurance are the same for public and private entities. We make specific reference, where appropriate, to the unique issues that can arise for a public or quasi-public agency playing the role of redeveloper. The chapter opens with an examination of insurance needs, including a checklist of risks that might be addressed by insurance. This first section leaves open the possibility that no insurance will need to be acquired. The rest of the chapter, however, assumes that the developer will be procuring coverages. The second section addresses the purchasing process itself and the parties likely to be involved, while the third addresses negotiating for coverages needed and notes some of the pitfalls that can arise in the course of designing manuscripted policies. The fourth and fifth sections discuss the specifics of two different choices that a party seeking insurance might have to make about how to acquire coverage. The chapter concludes with a section offering guidance for public sector agencies on crafting a RFQ for brokerage services to support insurance purchase decision making.

3.1 Determining Insurance Needs

Insurance is not the only way for a developer to manage risk. This simple fact is clearly evident in the cases discussed in Chapter 2.0. It is true, however, that even if other risk management mechanisms can be brought to bear, some risks may remain. Whether or not it is appropriate and efficient for them to be addressed by insurance depends on a number of site, project and developer characteristics. A cost-effective insurance purchase requires that the buyer understands which risks do – and do not – need to be addressed.

3.11 Insurance in Conjunction with Other Risk Management Mechanisms

There are two major sources of uncertainty in a brownfield project -- the environmental response required and the environmental liability that may arise from damage done by pollution. Overall, risks and uncertainties at different brownfield sites tend to vary with:

- the toxicity of the contaminants;
- the media in which they are found to be present (soil, groundwater, surface water);
- the likelihood of migration off site (which depends in part on the contaminants and media);
- proximity of the site to sensitive human uses such as homes and schools and to vulnerable natural resources such as lakes, rivers, and wetlands;
- proximity to other sites from which contaminants may migrate (industrial facilities, dry cleaners, service stations, landfills); and,
- the intended future use(s) of the site (e.g., industrial versus residential).

There are many ways to address uncertainties, so any assessment of insurance coverage needs must be undertaken with reference to the other risk management approaches that may complement – or substitute for – insurance.

Thorough environmental site assessments are central to determining the cost of site mitigation and the likelihood of third party suits. The Utopia Park and Parkville cases both underscore this point. In the first instance, the assessments helped define the coverage needed and helped hold down remediation and liability coverage costs. In the second, the assessment not only helped bring a PRP to the table to address financial issues, but also provided enough certainty to attract a master developer to undertake a project on a site.

State-issued assurances such as No Further Action (NFA) letters and Certificates of Completion (COCs) that designate approval of a remedial response clearly provide protection against further state claims for action. They also contribute to uncertainty reduction by showing other parties that the state has ruled that a site is safe for reuse. Thus the award of an assurance may deter third party suits if potential litigants know they have to prove the state, not just a PRP, is in the wrong. It is unlikely that Utopia Park could have attracted a master developer to a site that had not passed state standards without offering some liability coverage in the form of insurance, given the extensive contamination remaining on the project site.

The need of a public sector body for insurance for third party liability coverage may depend on another aspect of state policy and law. In those states in which municipalities and other local government enjoy “sovereign immunity,” or protections from private lawsuits, cities would have little reason to purchase such coverage for themselves. (This may even be true in those states in which there is a low cap on the amount for which private parties can sue, even when they retain the right to do so.) Though it may make sense to have such protection for owners who buy the property from a public developer, the insurance cost might be avoided if the locality simply holds title to the land, thus retaining the immunity privilege, and leases the land to a new occupant, perhaps for a 99-year term, in order to encourage development.

Such a lease arrangement is one way a seller, developer/remediator, and a longer term user of a site may arrange to control liability uncertainty. Other forms of contractual agreements between or among buyers, sellers, previous owners responsible for pollution, and eventual site occupants are commonly employed to allocate risks. The seller and original PRP, for example, may have sufficient financial capacity to permit them to self-insure for any liabilities associated with the pre-existing, on-site pollution determined to be present on a property, provided they are protected from the risks associated with any future uses. If they accept that risk, then the new owners or occupants would need coverage only for what they, themselves, would do on the remediated site. In such a situation, the new occupants might see no need for special environmental liability insurance, especially if they are engaged in a non-polluting use of the land. (The Appendix enumerates the representations, warranties, and covenants allocating risks and responsibilities associated with the Parkville remediation and redevelopment project.)

One common tool for allocation of responsibility is indemnification of one party for the costs of another. This approach was proposed in Hapiton by the seller: the Baker Corporation (the indemnitor) offered to commit to assume the cleanup and related costs and third party claims associated with unknown contamination incurred by the Redevelopment Authority (the indemnitee). The proposal was rejected in that case, since the indemnification was for too short a period of time (one year) and carried too many conditions.

Indemnifications may have disadvantages for both parties. For example, it will negatively impact the indemnitor's financial statements since it needs to be carried as a contingent liability. In a worst case scenario, it may expose the indemnitor's organization to a catastrophic loss. The indemnitee, on the other hand, would have to incur the costs of investigating the indemnitor's financial capacities prior to accepting such an offer. The indemnitee also risks finding out, after filing a claim, that the indemnitor no longer has the resources to fulfill the commitments made. Even if the indemnitor is financially able to cover the claim, the indemnitee may have to undergo costly litigation to obtain the promised financial support (and a court may find in favor of the indemnitor if an agreement is not carefully crafted). Moreover, neither party is fully protected from liability risk by an allocation agreement: third parties are not bound by buyer-seller agreements, so an injured party may decide to sue both a property seller and buyer regardless of their agreement on division of liability. At a minimum, such a suit would expose both buyer and seller to legal defense costs.

Relative to indemnification, the purchase of an insurance policy has several advantages:

- Because insurance carriers are more likely to provide payment on claims than are many indemnitors, the guarantee is worth more to the indemnitee.
- Insurance coverage includes legal defense fees, while indemnifications often do not.
- Insurance brokers and underwriters generally have more knowledge about relevant risk exposures than lawyers who draft indemnifications, so more protection may be available.
- Purchase of insurance eliminates contingent liability so that an indemnitor's financial statements and credit ratings are not jeopardized.

There are, however, limits to insurance relative to its alternatives. For example, a risk may be judged by a carrier to be too great to insure or the price of the premium may be too great for the purchase of coverage to be economically viable. Sometimes, therefore, insurance is unobtainable. In other instances, some combination of protections may be desirable (e.g., indemnification backed by an insurance policy). A carefully developed risk management strategy takes into account the options of risk retention, governmental protections, contractual agreements, and insurance.

3.12 Selecting Needed Coverages

Ideally, insurance policies and indemnifications should be worked out in conjunction with one another, so that risks not covered by the insurance can be negotiated into the indemnification. Table 3.1 below offers a checklist of risks that can be insured by Pollution Liability (PL) and Cost Cap (CC) policies.

Table 3.1 – Brownfields Insurable Risks Checklist

Pollution Liability Policy

Probability that pollution on (and originating from) your site will cause you to pay for:

- Cleanup required by a regulator of previously unknown, pre-existing pollution
- Property damage caused by cleanup of previously unknown, pre-existing pollution
- Business interruptions caused by cleanup of previously unknown, pre-existing pollution
- Cleanup required by a regulator of known pollution conditions previously granted regulatory assurance, i.e., re-opener coverage
- Bodily injury to tenants/new owners/occupants

Probability that pollution from your site will move offsite causing you to pay for:

- Bodily injury to neighbors
- Property damage to neighboring site(s), including diminution of value
- Losses due to interruption of neighboring business(es)
- Damages to natural resources on lands controlled by government entities

Probability that pollution from neighboring site(s) will move to your site causing you to pay for:

- Cleanup required by a regulator
- Property damage caused by cleanup
- Business interruption caused by cleanup
- Bodily injury to tenants/new owners/occupants

Probability that releases during transportation of your contaminants will cause you to pay for:

- Cleanup
- Bodily injury
- Property damage

Probability that disposal of your contaminants at a disposal site will cause you to pay for:

- Cleanup
- Bodily injury
- Property damage

Probability that you will need to pay for:

- Legal costs to defend against third party bodily injury and property damage claims

Cost Cap Policies

Probability that, during the execution of a planned remediation, you will need to pay for:

- Costs due to discovery of a greater volume or higher concentrations of contaminants than were noted in the remediation plan
- Costs due to discovery of contaminants that were not noted in the plan
- Costs due to regulatory changes during the performance of the remediation plan
- Remedy failure during the execution of the remediation plan
- ‘Soft’ costs, such as loan interest, due to unanticipated delays caused pollution

3.2 Overview of the Insurance Acquisition Process

The first step – examination of the potential of insurance to facilitate redevelopment – is the largest in many ways. Public sector agencies may not recognize the centrality of this decision point and thus fail to involve all the parties that should be involved in risk management early enough in the assessment of project feasibility and importance. The result may be inappropriate risk-taking or, on the other hand, excessive spending on insurance.

Key project team members and their potential contributions to insurance – and possibly project feasibility – decisions include the following:

- *Local brownfield or economic redevelopment officials* – often the parties that first conceive of the project and bring it to public attention.
- *Private or nonprofit developers or investors* – who may have brought a site to public officials' attention or who may be the intended purchasers and redevelopers of a remediated site.
- *Real estate and environmental counsel to the developers* – those who have a grasp of the risks and risk management tools that are available to a brownfield redeveloper.
- *Environmental consultants* – the engineers with the capacity to assess site conditions (or who have already done so for a target site), and who may direct or conduct a site mitigation.
- *State environmental regulators* – the people who will determine the cleanup standard to be met and who provide Voluntary Cleanup Program and other assurances of completed mitigations.
- *Lending institution risk managers* – those who would finance any private sector construction following site preparation and who have concerns about post-remediation site condition risks.
- *Public sector risk managers* – those who acquire other insurance services or manage self-insurance programs for the local government, and who, whether or not they are qualified to advise on environmental insurance issues, may legally have to be involved in the process.
- *Insurance brokers* – either multiple brokers responding to a RFQ for brokerage services, or the local government's general purpose broker, who may be able to assist in the design of the needed RFQ for such services.
- *An insurance carrier's underwriter and legal counsel* – the individuals who will decide on what coverage options will be offered for a project, and at what costs.

Obviously, not all these types of individuals will be present at all steps along the path to a decision on the use of insurance. However, as the cases in Chapter 2.0 illustrated – even those in which a decision was made not to acquire coverage – they can play important roles in project decision making.

3.21 Project Conceptualization – Should Insurance Enter the Picture?

The possible ways that insurance might facilitate a brownfields regeneration project should be considered from the inception of the project. Anything that helps to reduce uncertainty, determine costs or enable developers simply to calculate risk may promote the redevelopment of sites that are

currently overlooked. Insurance is only one of the many tools available to accomplish those ends. Some projects, such as the Parkville and School redevelopments, may not be feasible without the risk transfers insurance provides. Others, such as the Utopia Park project, may not require the tool since alternative risk management options are available.

While the costs of insurance cannot be determined in advance, knowledge of the types of coverages available can make or break a project through their potential contribution toward:

- encouraging sellers to bring vacant, underutilized, and/or contaminated properties to market;
- helping sellers, other responsible parties, and buyers to arrive at an acceptable allocation of responsibilities for cleanup and liabilities;
- supporting indemnities offered by sellers and PRPs to buyers; and,
- making the lenders on which private developers depend comfortable with site risks.⁷

If it appears that a brownfield development prospect may proceed or not go forward depending on the availability of some risk transfer to third parties, an environmental insurance broker should be brought on board to suggest how insurance may help the project. Selecting a broker who has the needed experience in brownfield transactions may make the difference between obtaining and not obtaining coverage and always will be key to acquiring the most cost-effective insurance policies. Basic advice on preparing a RFQ to find such a broker is provided in Section 3.6 of this chapter.

3.22 Environmental Site Assessments

As we have emphasized, there is no substitute for a thorough site assessment. While a seller may fear discovery of more contamination as the result of an assessment, it is possible that a thorough investigation might reveal that there is *less* of a problem than expected. Buyers or future redevelopers of a remediated site may be difficult to attract without information about the real extent of the environmental problems and the ways in which they may be addressed. The detailed site assessment was central to the negotiated agreements in the Parkville case, enabling the seller and the city to agree on how to split environmental response and site preparation costs. An estimate of expected costs is a prerequisite to any financial feasibility analysis.

The cases discussed in Chapter 2.0 involved projects that were made possible by virtue of early consultation with state environmental regulatory agencies. That early discussion has to be grounded in the site assessment. It may inform cost options for alternative remedial responses and thus shape the rest of the project feasibility analysis. The consultation, moreover, may be essential if there are tight project completion deadlines that need to be met if a project is to attain the developer's objective, as was evident in the School vignette case.

⁷ A lender can be protected by (a) an endorsement to the borrower's PL policy that assigns the policy to the lender on foreclosure, or (b) a separate Secured Lender policy that, on foreclosure, provides reimbursement for the lesser of the cleanup costs or the principal loan balance. Both approaches give the lender protection for the costs of third party liability claims and legal defense.

Without an assessment that they trust as thorough and complete, an insurance company may exclude certain coverages or set a higher deductible or premium price to provide either CC or PL protection for a project. But the assessment also may reduce the need for coverage in the first place – as both the Utopia Park and Park/Community Center projects illustrated.

Both these considerations underscore the need for care in the selection of the environmental consultants employed as site assessors. Insurers may not be willing to offer coverage without co-pays or may ask for higher deductibles if they lack confidence in the engineering work.

3.23 Determine Needed Protections/Begin Allocation of Liability Risks

Any of the parties to a real estate and redevelopment transaction on a brownfield may share some portion of the liability for past site environmental conditions. The principle of “joint and several liability” that the courts have determined applies under CERCLA means that all parties in the title chain and those occupying and using a site even though they are not owners, could be held liable for the costs to remediate and damage done by past pollutants. This means that the future owners and occupants of a site that received a VCP approval potentially could be held liable for on-site conditions that existed prior to their involvement with the property. Section 128 of the 2002 Small Business Liability Relief and Brownfields Revitalization Act bars EPA from enforcement if a site retains state approval. However, the state remains capable of reopening a previously approved mitigation. The need to allocate the responsibility for any future consequences of past contamination is obvious.

For a publicly led development, staff from the locality or its development arm first need to discuss the risks with legal counsel and the environmental consultants that did the site assessment. Then the insurance advisor or broker should be consulted about available coverages. The developer, as the party that will propose an agreement to permit the project to move forward, needs to rely on these experts and their recommendations in enumerating the relevant risks, their allocation across the parties involved in the deal, and what protection should be provided to which party. For large sites with complex problems, the consultations with experts may involve an extended period of time for review of technical reports and relevant government regulations.

As Section 3.3 on negotiating policies highlights, utilizing legal counsel for the insured(s) to review and negotiate the policies is especially critical for complex remediation transactions. The counsel employed for these discussions should have an environmental law background and, ideally, should have represented insureds on previous brownfield insurance policy negotiations.

Lending institution risk managers, when available, can be an asset to the team, both in defining risks and in specifying desirable protections. The risk managers, unlike local bank loan officers, understand how insurance can mitigate risk and uncertainty. Loan officers, even commercial lending specialists, often are apprehensive about loans on environmentally risky properties. The risk managers are the officials charged with helping their institutions to manage the uncertainties involved in order to make

it possible for them to make those risky, but profitable loans. In doing their jobs for the lenders, they thus may fill in as additional insurance experts and advisors to prospective loan clients.

Another important possible team member that may be overlooked is the public sector risk manager, where the locality has an official charged with such duties. Where such officers exist, they may have to be involved in and approve insurance purchases. They may not understand the special insurance needs of a brownfield project if they are not involved early in the process.

3.24 Present Underwriting Package to Insurers

Once the developer has identified the risks of concern, has dealt with other parties involved in the development to arrange shares of liability and responsibility, and determined the coverages needed to get all the parties to agree on allocation of liability, it is time to present a coverage package to prospective underwriters. The broker approaches several insurers and provides information about the site, the transaction, and the intent of the policy. Each interested insurer will respond with a preliminary “indication,” quoting the insurance available for the project. The indication document will generally cover six elements: (1) the coverages the insurer can offer, (2) the policy terms offered, (3) the deductibles, (4) the exclusions from coverage, (5) a list of the additional information about the site and transaction needed for underwriting, and (6) an anticipated pricing range.

As Taylor (2002) notes, at the point of soliciting indications, an experienced broker will not simply send each insurer contacted a box full of technical reports and agreements. Because the insurer is providing only preliminary, non-binding estimates at this point, the carrier is not likely to conduct a thorough review of the information. The detail could confuse the issues and result in insurers returning indications that are full of qualifications and caveats based on a quick review of site conditions. Such indications do not provide a realistic idea of how the insurance policies can move the projects forward, since they would tend to be based on uniform worst case scenario assumptions.

Rather than provide all the detailed information available, the submissions to insurers at this stage should include *descriptions* of:

- previous operations at the site;
- hazardous materials that were used at the site;
- all investigations of the site, previous remediations, and the current remediation plan;
- the regulatory status of the site, including issues that have not been resolved with regulators;
- future development plans for the site;
- the proposed transaction and identification of the parties involved including the buyer, seller, other responsible parties, lender, developer, and environmental remediator.

3.25 Select Insurer

On the basis of the indications returned from underwriters, consultations should be held with advisors to determine which insurer’s proposal best fits the project needs. The selection process is not simply

a matter of comparing prices, since the indications will differ with respect to coverages and terms each insurer offers. Different carriers will be concerned about different risks based on their experience.

In addition to the insurance provisions offered and their cost, the characteristics of the insurer should be considered at this stage. Factors to examine include the firm's stability/years in the market and financial strength. There are several major rating agencies that track carrier financial strength data, including Standard & Poors, A.M. Best, Fitch, Moody's, and Weiss. Assessing an insurer by using these sources can be complicated. Different agencies use different procedures to rate carriers and use different terminology and symbols to present their results. The extent to which data on a parent insurance company are relevant to its specialist environmental subsidiary also may vary from company to company, and from one rating agency to another. An environmental broker will be able to collect the relevant information from more than one agency and present it to the insureds.

3.26 Submit Application

Once a prospective underwriter is chosen, a complete package of information about the property and transaction should be submitted; omitting any available documents or information will simply delay the process. The request for coverage should be reviewed with a broker and counsel prior to submission, since the data provided as part of the application becomes part of the policy. Errors, omissions, or misleading information on the application could void coverages or the policy itself. Because of this, it is advisable to change the certification at the end of most application forms indicating that the signer attests to the fact that the statements in the application are "true" to a certification that the statements have been made according to the applicant's best "knowledge, information, and beliefs." It also is advisable to include a list of all documents disclosed with the application to establish the record of what information was provided. The XYZ Company list submitted in the Parkville project ran to four single-spaced pages and distinguished which of the materials had and had not been submitted to the state regulators for their review.

Materials required by the insurer before underwriting policies at a site at which a cleanup will be conducted can be substantial. The following list of documents, adapted from Avena (2001), notes materials that may be requested, depending on the particular site, the remediation plans, and the insureds on the policy:

- remediation plan and schedule including estimated cost with backup data for cost calculations;
- any and all environmental site investigation reports;
- description of past uses of the site including products produced and methods of manufacture, environmental compliance, hazardous materials storage documentation, underground storage tank records, etc.;
- statements of qualifications and certificates of insurance from consultants and contractors being used on the proposed remediation;
- description of contemplated changes in the future use of the site and names, or, at least the expected characteristics, of prospective purchasers;

- any correspondence from state, federal or other regulatory agencies such as approval of the remedial action plan, prospective purchaser agreements, voluntary cleanup agreements, etc.;
- public records of complaints and/or suits against environmental conditions of the property;
- legal description of property and map noting onsite businesses and surrounding properties and land uses;
- applicable title information including land use restrictions and easements;
- applicable contracts and/or indemnifications between property owner, previous owners, consultants and tenants, including those negotiated pending acquisition of the insurance policy;
- existing insurance policies on the property;
- annual financial reports from the insured and from prospective purchasers if they will be included on the policy.

3.27 Negotiate Insurance

For some very large, complex projects, insurance policies are completely manuscripted or written largely “from scratch.” Most situations, however, share enough in common that a base policy form can be used. The coverage then is tailored to the project by a series of endorsements or changes added at the request of either the insured or the insurer.

At this point, an individual underwriter for the insurance company becomes involved. Although the insured does not have influence over selection of this person, the broker may be able to affect the underwriter selected by the insurance company by requesting someone with whom he or she has worked before. Obviously, it is preferable to have an experienced underwriter who knows the risks the insurance company is willing to take, has experience with the carrier’s legal counsel, and has experience submitting endorsements that will be accepted. If requested endorsements have not been approved by the insurer before and/or if there are related contracts to review, such as a prospective purchaser agreement or an indemnification, it is helpful to have the legal counsel for the insurer involved in the early stages of negotiations.

It is also be useful to have the environmental consultant for the insured available to confer with the underwriter to discuss the cleanup strategy. The insurer also may want to discuss the project with state environmental agency staff to discuss their opinions of the work plan.

The length of time involved in negotiating a policy depends on the complexity of the project – and that involves the complications of the contamination issues, the intricacies of the coverages themselves, and the extent to which they may be contingent on the future actions of external parties such as regulators, and the number of parties involved in the transaction. They also are compounded by the extent to which those parties’ interests are consistent with each other or exhibit conflict. Negotiation on the School project had been underway for a year before the parties involved agreed to insurance procurement and then lasted another seven months before the insurance policy was worked out. The Hapiton case reflected a direct conflict between Baker’s demand that nothing about

the site condition be revealed and the RDA's need to reveal in order to resell the site. Insurance in that case, had the sale gone forward, would have had to deal with the disclosure issue.

Time to negotiate can span anything from weeks to well over a year, since the parties involved cannot drop all their other work for full commitment to insurance negotiations. Some consultations may involve people from several different organizations, making scheduling a major problem. A week or two may be ample time for a relatively simple project with good site investigation information to get from submission to an insurer to completed underwriting. For more complex deals, similar speeds may be attainable, but only at the sacrifice of the consultations that serve to (a) define the coverages needed and, most significantly from a cost perspective, those not required; and (b) provide all the information the insurer needs to determine the limits on the uncertainty it faces and thus to offer a lower premium.

However the insurance acquisition process is managed, negotiating a policy can be a challenging process. The next section discusses examples of some of the challenges that need to be considered.

3.3 The Need for Expertise in Negotiating Policies

Obtaining policy terms and conditions that are advantageous to an insured party depends on the insurer's desire to close the deal (which often depends on the size of the premium and other business with the prospective insured); the risk appetites and internal policies of the specific insurer; and the risks associated with the brownfield site to be insured.⁸

Most importantly, however, crafting a good policy depends on the skill of individuals negotiating on behalf of the insured. There are many complex elements of any brownfields policy. If a negotiator is unaware of them, the policy may not provide the coverages the insured thinks it does and may not be written so that claims will be paid.

The material in Section 3.3 is based on interview transcripts and notes from presentations by environmental brokers and attorneys on negotiating brownfield insurance policies. In addition, data were taken from articles on the topic (Avena 2001, Fersko and Waeger 2002, Taylor 2002, Waeger 2002) and collected during individual interviews.⁹

⁸ Some provisions desired by an insured will be impossible to obtain; a carrier will not be willing to insure risks if they are too exceptional. Others may be so expensive the insured will not want to purchase them.

⁹ We especially acknowledge the expert contributions to this section of the report provided by (in alphabetical order) Suzanne M. Avena (Garfunkel, Wild & Travis), Kathleen A. Moriarty (JCH Insurance Brokers), and Ann M. Waeger (Farer Fersko).

Based on these sources, we offer *examples* of issues that insureds and their advisors should discuss. The issues are not intended to be comprehensive, nor should the suggestions offered be relied upon to manuscript a policy. More than anything, the points made should alert prospective insureds to the need to consult with knowledgeable environmental brokers and attorneys. We begin by introducing the discuss by describing the typical elements of a PL policy.

3.31 Pollution Liability Policies

A PL policy begins with a declarations page signed by the insurance company that sets forth the parties involved in the contract; the property or properties insured; the policy term limits, limits of liability (policy dollar limits), deductible, and premium; and a list of policy endorsements. This is followed by several other sections in varying order depending on the carrier:

- The ‘Insuring Agreement’ describes the overall coverages to be provided (e.g., indicating the insurer will pay for loss arising from pollution conditions, for remediation expense).
- The ‘Definitions’ section provides precise meanings of most - but not necessarily all - of the policy’s key terminology (e.g., the definitions of a pollution condition, remediation expense). (Terms that are defined in this section are noted by bolded and/or capitalized text in the rest of the contract.)
- The ‘Exclusions’ section limits coverages, noting what will not be covered (e.g., certain pollutants, criminal fines and penalties).
- The ‘Conditions’ section specifies various contractual stipulations (e.g., cancellation procedures, responsibilities of the named insured, subrogation rights, policy assignment).
- The ‘Extended Reporting Period’ section describes the automatic extension to the policy term limit and optional extension that can be purchased.
- The ‘Endorsements’ attachment provides the modifications made by the insured and the insurance company to the policy.

Other provisions of the insurance contract may be provided as separate sections that describe, among other matters:

- notification of claims requirements;
- the rights of the company and duties of the insured;
- limits of insurance and deductibles;
- transfer of legal defense duties.

A policy needs to be reviewed in its entirety as each section is intricately tied to others. For example, to understand any particular coverage, it is necessary to refer to the insuring agreement, definitions, exclusions, and conditions sections. The following sections point to selected policy elements to which prospective insureds and their advisors should be alert.

3.311 Selected Definitions and Exclusions. Definitions in brownfield insurance contracts are policy specific. Different insurers use different terms for the same coverage and the same insurer may use different definitions of the same term depending on the policy form. The following examples relate to coverages for particular damages.

Property damage. This term includes physical injury to or destruction of tangible property and/or loss of use of tangible property that has not been physically injured. Depending on the location of the brownfield site, it should include *natural resource damage* or physical injury to/loss of value of land, water, air and wildlife that is owned or controlled by a government entity. Coverage for *diminution of property value* of the insured's site and/or neighboring properties may be negotiated. However, it will be extremely difficult or impossible to purchase coverage for loss in value simply due to environmental stigma when there has been no actual damage to a property (e.g., loss in value of a neighbor's site solely because of its proximity to the insured's brownfield site.)

Bodily injury. Bodily injury refers to physical injury, sickness, disease, or death. Ideally, it also should include anxiety about possible injury caused by pollutants and medical monitoring if physical symptoms are experienced by a third party.

Pollution conditions/incidents. Pollution conditions are defined with respect to the discharge or release of an array of solid, liquid, gaseous or thermal contaminants. The definition needs to be broad enough to encompass all types of contaminants that may be associated with a specific brownfield (e.g., soil vapors, odors, medical and low-level radioactive waste). It also should include pollutants deposited illegally by a midnight dumper or tenant if these sources of pollution are a possibility at a site.

Pollutant exclusions. Typically, asbestos, asbestos-containing materials, lead-based paint in a structure, mold and other microbial matter, and natural radioactive material (e.g., radon) are excluded from coverage as are known underground storage tanks. An insured will need to buy an endorsement for these contaminants if needed at a site. The endorsement may include a separate deductible for a particular substance or a sub-limit on the most the carrier will pay on a loss arising from the substance.

Known conditions exclusion. Policies often contain an exclusion specifying that coverage will not be provided if a defined set of people knew or reasonably could have expected that a pollution condition existed prior to the inception of the policy, but did not disclose the condition to the insurer. This exclusion is key since the policy is voidable if a responsible insured conceals material circumstances related to the insurance; failure to disclose known conditions is one of the most common reasons for claim denial or policy cancellation on the part of the insurer.

Clear delineation of the parties that knew or could have expected a pollution condition is paramount. Some policies define them as 'responsible insured,' a term that includes any manager, officer, director, or partner of the named insured or a manager of the named insured responsible for environmental affairs. The policy language should limit the parties to those who not only have the opportunity to learn of a pollution condition, but also have a responsibility to report the condition. In addition, the language should make clear that conditions described in any of the environmental reports given to the insurer constitute disclosure.

Note that, while it is not possible on a PL policy to negotiate coverage for cleanup of known pollution conditions that have not yet been remediated, it is possible to purchase ‘re-opener’ coverage for cleanup of previously remediated conditions for which a regulatory agency issued a comfort document, such as a No Further Action letter, if the additional cleanup is ordered by the regulator. It also is possible to obtain coverage for bodily injury and property damage arising from a known condition.

Cleanup costs. These costs include expenses incurred to remove, dispose, and remediate contamination in the soil, groundwater, and surface-water to the extent required by *environmental law* and legal expenses in connection with these activities. (See notes below on environmental law.) The costs should include investigation and monitoring of contamination and, depending on the site, *restoration costs* or costs to repair or replace property to its condition before it was damaged by cleanup work.

3.312 Policy Triggers. The term ‘policy trigger’ may not be in a policy itself, but is an important concept. It refers to conditions or events that activate coverages.

Claim. A claim - the first type of trigger - generally refers to a written demand or assertion received by the insured that alleges the insured’s responsibility for loss and seeks remedy from the insured. A claim can come from (a) a private party demanding remediation and/or compensation for damages stemming from a pollution condition (e.g., a lawsuit); or (b) a demand from a government authority to take action with respect to a pollution condition. The latter often refers to actions required by *environmental laws*. Ideally, this concept should be broadly defined to include all possible sources of governmental mandates from environmental agencies and other government authorities (e.g., federal, state, and local laws; regulations; ordinances; guidance documents; administrative directives). Some remediation standards are not yet codified, but exist only in EPA and other agency guidance memoranda.

Discovery trigger. The second type of trigger for remediation coverage provides for expenses incurred for remediation of previously unknown pollution conditions at actionable levels that are discovered by the insured. While this trigger may not be included in a policy, it is important to negotiate; if a policy does not have such a trigger, an insured would need to ask a government authority to demand action before the policy would respond which would result in project delays.

3.313 Notice Provisions. All environmental insurance policies are *claims made and reported* policies. This means that a claim must be submitted to the insurer during the policy period; no coverage will be provided if a problem arises during the period, but the claim is not filed with the insurer until after the policy has expired. All policies contain an *automatic extended reporting period* (e.g., 30 to 60 days). Insurers also offer an *optional extended reporting period* beyond this that can be purchased although it may be expensive.

Three points are noted here with regard to notification. First, the insured should be required to notify the insurer of a claim “as soon as practicable” rather than “immediately.” Second, the policy should allow for oral notice to the insurer, with a provision that the insured agrees to furnish a written notice as soon as practicable. Third, ideally, a policy should contain a *notice of possible claim* provision that allows the insured to notify the insurer during the policy period of a pollution condition that the insured reasonably expects may result in a claim. With this provision, a claim made against the insured for a specified period of time after the end of the policy period will be deemed to have been first made and reported during the policy period if the notice was filed.

3.314 Cancellation. Insurance companies vary in terms of specifying and limiting conditions under which a PL policy can be cancelled by the insurer within a stated time period (e.g., sixty days). Some list circumstances such as material misrepresentation by the insured and the insured’s failure to comply with the terms and conditions of the policy, including failure to pay premiums or deductibles when due. Some companies specify that the insured may attempt to cure or rectify the circumstances that gave rise to the notice of cancellation within the stated period. Other insurers simply indicate that the company can cancel the policy by giving the insured notice within a stated time period. With respect to these latter policies, the specific circumstances for cancellation and the opportunity to cure the problem should be added to the policy by endorsement.

3.315 Number and Status of People on the Policy. A single insurance policy can and often does insure a variety of parties (e.g., owners, former owners and operators, buyers, lenders, tenants, investors, developers). Important decisions in structuring the contract pertain to how many should be insured on a policy and the status they should have. Several issues should be kept in mind.

Shared limits. One difficulty with multiple insureds is the possibility that one or a few may exhaust the total or aggregate policy dollar limit, leaving others unprotected. As more parties are included on a policy, less of the total amount is available to each one. One way to address this is to assign dedicated or reserved sub-limits so that each insured has only a designated proportion of the aggregate limit available. This option, however, may be significantly more expensive, and, when it is used, insureds must be aware that they cannot access the entire amount of the policy.

Types of insureds. Different parties insured on a policy will have different duties and rights. Specifically, there can be the ‘first named insured,’ ‘additional named insureds,’ and ‘additional insureds.’ Variation exists among policies with respect to the rights that each of these has; the policy language should be examined to assure that all parties have the protections they believe they have.

The first named insured is listed first on the declarations page and is responsible for interactions with the insurer (e.g., submitting premiums and deductibles, accepting claims payments). *Named* insureds (including the first named insured) differ from *additional* insureds in most policies in that the latter are covered only when their liability arises from the named insureds’ operations or ownership of a site. That is, an additional insured may be able to submit a claim only if liability rests with the named insured and, in some policies, only when a suit filed against them also is filed against the named

insured. Moreover, some policies are structured so that claim limits are available to additional insureds only after claims against the named insureds have been paid. Thus, it is important to be certain that the policy language regarding additional insureds doesn't restrict their rights to the insurance in such a way as to violate a contractual or other agreement to provide insurance for them. One option is to craft the policy so that an additional insured becomes a named insured when or if they assume ownership (e.g., in the case of a lender that desires protection in the event of foreclosure).

Designating multiple named insureds is possible. However, depending on the likelihood that the named insureds will be sued, this can be more expensive than endorsing additional insureds onto a policy because the named insureds have direct access to the policy. Further, third-party claims that jeopardize the aggregate limit are more likely since the policy will respond to each party independently of the other.

Separation of insureds. One condition that should be included and carefully worded is separation of insureds, also called severability. This specifies, first, that the insurance applies to each named insured separately, i.e., each named insured will be treated as if they were the only named insured with respect to filing claims. Second and importantly, a severability provision should specify that misrepresentation or concealment under the contract by one named insured will not negatively affect the coverage for other named insureds. Without this latter provision, a policy would be subject to cancellation if, for example, one insured failed to disclose known pollution conditions. With it, coverage would be denied for the insured at fault, but not for other insureds.

Insured versus insured exclusion. Policies often exclude from coverage claims made between named insureds. (The exclusion does not apply to additional insureds.) This exclusion can be problematic if it precludes critical coverage (e.g., if a buyer and seller are both named insureds, the policy would not provide coverage if one party sues the other). Flexibility in the exclusion can be negotiated so that, for example, the insurance company will cover claims between named insureds if they result from claims initiated by a third party or if a claim arises from an indemnification agreement or other contractual obligation between the parties.

3.32 Cost Cap Policies

3.321 Scope of Work. The primary consideration in a CC policy is attentive delineation of the scope of work (or remediation plan) attached by endorsement to the policy. The insuring agreement generally specifies that the insurer will pay remediation expenses in excess of the insured's self-insured retention and any co-insurance participation for activities necessary to complete the plan (up to the policy dollar limit). This includes expenses incurred as the result of the discovery of greater quantities of known pollutants than were noted in the remediation plan and discovery of pollutants not identified in the plan. For these coverages to apply, various conditions must be met (e.g., pollutants must be discovered in the course of executing the scope of work, discovered and reported to the insurer during the policy period, and remediated during the policy period).

If the insurance contract is not carefully crafted and understood, unanticipated problems in coverage may arise. Examples include the following:

- If the scope of work involves soil removal only and a pollutant requiring cleanup is found in the groundwater, expenses to remediate the groundwater would be covered in some policies, but only if the pollutant is a *newly discovered* pollutant. If it is a *known* pollutant that was included in the scope of work, costs to remediate the groundwater may not be covered, depending on the policy language. (In some cases, the insurer may add an endorsement excluding cleanup of certain contaminants in certain media such as groundwater.)
- If a remedy included in the scope of work fails to effectively remediate contaminants, costs to utilize a different technology may not be covered unless the policy refers to remedy failure (e.g., indicating that the policy will cover *any* costs incurred due to regulatory requirements to reach the agreed upon closure standard).
- On some policies, the remediation plan is described in terms of very specific activities (e.g., excavation of soil, installation of soil vapor extraction). On such policies, the insured runs the risk that an activity not listed may not be covered.

Also in this regard, an *infrastructure expense* exclusion should be heeded when a risk-based cleanup involving engineering controls is used. That is, infrastructure components that are part of a remediation should be noted as remedial costs and not development costs (e.g., foundation thickness, ventilation systems).

3.322 Policy Period. While the policy term limit is always important on a CC policy, it's significance varies by specific policy provisions. Some insurers will continue to pay a claim made during the policy period even after the policy term has ended. Others, however, stop paying a claim made during the period when the policy period expires. For those policies, it is especially important to allow sufficient leeway to assure that the term will continue until closure of the remediation.

3.323 Accompanying Pollution Liability Coverages. Because of the requirement that expenses incurred under a CC policy be tied to the remediation plan, it is advisable that a CC policy be purchased in conjunction with a PL policy. (It is possible to buy a policy that combines the two types of coverages.) The PL coverages could provide protections for onsite cleanup expenses that would not be insured with a CC policy alone. These include, for example, legal expenses associated with a cleanup, coverage for remediation of newly discovered contamination that was *not* discovered during the execution of the plan, and re-opener coverage for the costs for additional remediation required by regulators after the CC policy has terminated.

3.4 The Pros and Cons of Finite Risk Programs

Finite Risk (FR) programs, also referred to as Blended Finite Risk or Pre-funded programs, entail pre-funding of expenses at a brownfield site where a cleanup is planned.¹⁰ They include a CC and, in some

¹⁰ For additional information on FR programs, see Elliot (2000).

policies, PL coverages; each FR program is tailored to the individual project and involves options that can be complex.

At the outset of the program, the insured deposits all or a substantial portion of the net present value of the expected cleanup costs plus the costs of the policy premium. This “commutation” account is invested by the insurer. The insurer pays for cleanup expenses as they are incurred by the remediation contractor. If there is a balance remaining in the fund at the end of the cleanup, the insured receives a profit commission or interest based on a contractually defined market benchmark such as a US Treasury Bill rate. The insurer, however, invests in instruments intended to yield a higher interest rate and keeps the difference. Because the program concept is based on investment income over time, the approach is appropriate for brownfields where cleanup costs are expected to be high and remediation is expected to take at least five years.

If the cleanup costs are higher than expected or claims are made on the PL component of the policy, the insurer pays the costs above the deductible, up to the policy dollar limit. This is the “underwriting risk” associated with the program. The insurer also is accepting an “investment” risk - the chance that it will not be able to realize the rate of return on investment it was expecting - and a “timing” risk - the possibility that expenses will be paid out faster than estimated, leaving less time than anticipated to earn investment income.

From a local government perspective, the disadvantages of a FR program include the facts that:

- substantial funds must be paid up-front, requiring floating of a bond or raising the needed monies in other ways;
- it may take a longer time to arrange FR programs due to their complexity;
- the program may require an aggregate limit that applies over multiple years so that large losses early in the term may exhaust the policy dollar limit.

On the other hand, a FR approach has several advantages that should be considered. These include the following:

- If a local government is working with a private developer, use of a FR program assures that the cleanup will be completed because funding is guaranteed by the financial strength of the insurer.
- Longer policy terms for PL components can be built into a FR program than can be acquired outside of a program.
- The interest rate paid on the commutation account may pay more than a local government otherwise would be able to earn.
- The commutation account balance may be used in a variety of ways (e.g., it may be paid to the contractor to reward rapid execution of remediation activities or used for post-remediation operations and maintenance or engineering controls monitoring).

3.5 Fixed-Price Contracts Versus Time and Materials Cleanups Using Cost Cap Insurance

Any brownfield site mitigation faces uncertainties about what may be discovered underground, regardless of the extent of the prior site assessment. It is thus appropriate to take steps to limit the possible costs associated with remediation. In some instances, such as for responses costing under \$2 million, cost cap insurance may not be available. Even in states with special programs to facilitate access to CC coverage for small sites, the total cost may be excessive. For the larger scale tasks for which insurance is more cost effective, there remains a tradeoff between the purchase of coverage and the alternative, which is contracting for a guaranteed or fixed remediation cost.

The elements of the tradeoffs apply to either public or private sector-led remediations. The values placed on those elements, and thus the decision about which approach is most efficient, will vary with the site and project. Public sector remediator/developers need to be aware that their valuations of the elements may be very different from those of private firms.

The two approaches may be broadly characterized as follows:

- Traditional Time and Materials Contracts, also known as Cost-Plus Contracts, are the most recognized engineering contract forms. The mitigation firm receives payment based upon the actual time and materials costs of performing the cleanup, plus an agreed upon fee (which may be written into the hourly billing rates and materials costs). The developer maintains control and direction of the clean-up process, overseeing the work and remaining responsible for issuing “change orders” for new effort that may be needed to respond to site conditions uncovered during the work. It is up to the developer to decide whether or not to purchase CC insurance to limit the possible cost of the project, and the developer will have to be prepared to file claims and deal with the insurer in order to collect in the event of cost overruns.
- Fixed Price Remediation Contracts (FPRC, also known as Guaranteed Fixed Price Remediation Contracts) mean exactly that: the contractor receives a fixed price to complete an agreed upon level of cleanup. That level is generally defined as attaining the site condition required to obtain a pre-defined state approval of a completed mitigation. Under the FPRC, it is the contractor that would negotiate and hold environmental insurance to protect itself against unforeseen circumstances.

There is no clear-cut advantage for one of these approaches over the other. The tradeoffs for a developer are real in terms of money, effort levels, and control over risk exposures. They are summarized below in Table 3.2, which shows the differences in the incentives to and behavior of the remediation contractor and the cash and other costs to the developer ordering the work under the two different approaches.

Table 3.2 – Tradeoffs Between Insured Time and Materials and Fixed Price Remediation Contracts

Table 3.2 – Tradeoffs Between Insured Time and Materials and Fixed Price Remediation Contracts						
	<u>Time & Materials, with CC Coverage</u>			<u>Fixed Price Remediation Contract</u>		
	Performance	Insurance	Risks	Performance	Insurance	Risks
Mitigation Contractor Incentives and Expected Behavior						
	- No rewards for efficient work - elapsed time and \$\$ billings may be greater without careful developer oversight	<i>None, other than retention of the firm’s normal Errors and Omissions Policy; burden retained by the developer</i>	-No assumption of any performance risks, except for time and cost target rewards & penalties in the remediation plan contracts	- Fixed fees are retained, so faster, smarter, and more efficient work will maximize profit - May cut corners where regulatory process permits	- Need to negotiate CC Insurance - Past performance affects coverage availability & cost - Bid to mitigate at high level to avoid making any claims	- SIR could absorb all expected profit - Objections to work scope from adjacent sites could add costs - Uncertainty of Regulatory OKs
Brownfield Developer Costs, Risks, and Off-Setting Benefits						
Monetary	- Negotiation costs for mitigation “scope of work” - Direct project oversight expenses - Hiring costs for staff or contract work oversight	- Premium costs - Liquidity needed to cover SIR funds - Costs for filing, enforcing claims - possible fees for insurance counsel	- Not negotiating needed coverages for the site, project - Premiums paid for unnecessary coverages - inability to collect on claims	- Higher base costs for price guarantee - costs for off-site impacts - <u>Benefit</u> : Assured that cleanup will meet standards at a known, fixed cost	- Project costs will include more than just the premium, adding in: * engineer’s negotiation charge * some portion of expected SIR	- Delay costs due to perverse timing incentives if a claim is not paid promptly and contractor needs to find more funds to complete the work
Process and Transaction	- Delays due to conflict over work required or done - <u>Benefit</u> : Insurer review of cleanup plans	- Time finding and negotiating policy - Organizational issues in buying new insurance coverages	- Project elapsed time lost during claims processing - Delayed cleanup extending beyond coverage term	- Time spent drafting contract - Neighborhood objections due to little concern for off-site impacts	<i>None, since all coverage matters and claims would be between the contractor and the insurer</i>	- Uncertainty over adequacy of the engineer’s policy - Developer might have to take over mitigation efforts

Table 3.2 addresses three key features of each type of contract:

- First, the incentives to which the engineering contract will respond varies when operating under a Time and Materials (T&M) contract and with the obligation to remediate at a fixed price. This behavioral difference is fundamental to the entire transaction.
- Second, the quoted price for a FPRC will generally be substantially higher than for a T&M contract, and often involves a major pre-payment element, thus requiring the developer to commit more cash at the outset.
- Third, there are substantially different transaction and process costs to the developer, especially the need to oversee a T&M remediation, that tend to counteract the lower cash cost of such contract relative to an arrangement for a FPRC. The Table notes one clear compensating benefit to the developer deriving from the process involved in each option.

To fully understand how these tradeoffs operate, and what role insurance plays in offsetting some costs and causing others, it is necessary to consider how costs actually manifest themselves. The Table thus distinguishes three elements of incentives and costs arising under any contract:

- *Performance* involves how the mitigation will proceed and the costs and savings that are associated with the contractor's incentives, expected behaviors and relationships to the developer.
- *Insurance* describes the coverages needed and costs involved – and underscores the shift in responsibility for cost overrun management from the developer under T&M to the contractor under a FPRC.
- *Risks* describes the types of risks that carry real project costs but that may not be covered under the insurance policies unless they are recognized and addressed.

Taken together, the entries in the Table should demonstrate that there is no single “correct” remediation contract form for a development. Depending on the developer's appetite for different risks or experience in managing remediators and/or relations with insurers, T&M might be more cost effective than FPRC.

Local governments and their arms-length development agencies are less likely than many private development firms to have the in-house expertise needed to minimize insurance transaction costs and to cost-effectively manage and oversee an engineering firm operating under a time and materials contract. Thus, there may be good grounds in terms of total project costs for such entities to enter into FPRC arrangements, despite their higher up-front dollar costs.

Many local governments operate under legal requirements for least-cost purchasing. Since FPRC proposals will carry higher price tags than T&M bids for the same remediation work, a RFQ for remediation services should specify the type of service contract required if a strict least-cost selection obligation limits the buyer's discretion. The Parkville case involves precisely such a specification – that was why the initial contractor for the project had to be replaced when it could not deliver a FPRC with appropriate financial assurances.

3.6 Drafting a Request For Qualifications for Brokerage Services

Whatever the legal and regulatory requirements governing the purchasing operations of a municipality, acquiring the appropriate insurance coverage for a redevelopment with environmental concerns is likely to be difficult. One mistake that can be made involves issuing a RFP for coverage on a specific project. The problem with this is that

the first broker to contact an underwriter is the only broker with whom the carrier can work and the broker who blocked other brokers may have little or no experience with brownfields.

Preferred or pre-approved vendor lists, even if they include insurance service firms with environmental units, will not always require the involvement of the specialized divisions of national brokerages. Open records requirements, and sometimes open bidding, can make it very difficult to attract bidders offering specific insurance products or coverages.

These problems really are based in the complexity of the environmental insurance coverage decision, more than in issues of price. Different coverages are needed as a project progresses over time, and the specific clauses needed in each general coverage policy depend on an array of project characteristics. Price and budget constraints can, of course, add to the problem, since tradeoffs between desired coverages might need to be considered. As the Hapiton RDA discovered in its efforts to deal with the Baker Company, the decisions to be made generally will require the help of a specialist in the management of environmental risks, no matter the developer's experience in other aspects of real estate and economic development.

Therefore, a major problem facing those who want to pursue environmental insurance coverage for projects is finding competent brokers and advisors. Despite some maturation of the field, the number of experienced brokers remains small. (One experienced environmental insurance specialist claims there may be fewer than one hundred highly qualified brokers negotiating coverages for clients.)¹¹ Given the need to individually craft policies, innovative underwriters and brokers can make a huge difference in the coverages available and costs involved, so assuring the availability of well qualified personnel through the RFQ process is an essential consideration.

Brokers usually are paid commissions only on policies sold. If an agency just posts a RFQ for commission-based insurance services and requires environmental insurance experience in broad terms, the unspecialized local branches of brokerage firms that have environmental records will apply, citing the experience of their parent organizations, in order to win a contract. Unless the solicitation for offers is written carefully, the local brokers then might have no legal obligation to bring in the personnel who have the brownfields and environmental insurance expertise – and they would have an economic incentive not to call on them, to avoid sharing their commissions.

Any formal request for environmental insurance services thus has to be extremely specific and state that it requires the services of personnel named in the proposal or quotation who actually have negotiated and implemented a designated number of policies that included some or all of the types of coverages in which the requester has an interest. The broker needs to be an “excess line broker” (also called an “excess and surplus line broker”) who is licensed in the state to broker “non-admitted” insurers or insurers that provide specialized insurance - such as brownfield policies - and are not licensed in the state. Other possible elements to include in the RFQ posting thus include:

¹¹ One way to address the scarcity of specialized brokers is to procure the services of an environmental consulting firm. The client, however, will have to pay a fee for these services even when no insurance is purchased.

- Requests for the qualifications of key *named individuals*, not just of the offering firm or its branch office or division, including requests for documentation of their experience writing policies that were actually sold and implemented (so one can judge if the people available fit one's needs).
- Indication that heavy weight in ranking proposals will be given to the specific environmental insurance experience in years and number of policies written of the *named individuals* offered in the response (to make sure that one can demand that the needed specialists be available).
- Specification of the types of policies that will count in demonstration of experience, including factors such as size and number of policies implemented, number of sites in a single policy, types of contaminants covered, types of coverages provided, and extent of work with public sector bodies (so one can emphasize experience with the issues that are of concern to one's project).
- A clear statement that national, not just local, experience is expected from the named individuals and the firm (to make sure that the brokers have a broad enough perspective to help one to arrive at creative, possibly more cost-effective or less expensive solutions, if they are available).
- Some specification on the timeliness of service expected (since, otherwise, a broker would be free to stall, while devoting time to a larger prospective sale offering a bigger commission).
- Specific contract preferences: the expertise wanted, services desired, and remuneration offered. Questions that the individual charged with crafting the RFQ might ask decision-makers include:
 - ▶ Do you want lawyers providing contract and legal advice on insurance issues with a primary concern for your future rights as a claimant, or do you want lawyers and/or others with brokerage experience more attuned to negotiating the right coverage so you have protection paid for by, say, the parties from whom you are acquiring sites?
 - ▶ Do you simply want advice on options available and their costs and feasibility, or do you actually want someone who can sell you a policy? (Remember, the broker is a salesman, and thus wants to sell, while the advisor may be more objective and disinterested in whether or not insurance is purchased, but the advisor needs to be paid whether or not you buy any coverage.)
 - ▶ Are you prepared to pay a fee for advice, or do you want to state that the RFQ is strictly for selecting the party that will have the opportunity to earn a commission. (You will have to pay a fee for a pure advisor, but this will get you someone who is less interested than a broker in consummating a sale.... and you may be paying by the hour for education in the insurance field. A minimum fee contingency is also possible: a fee for brokers to be paid only if commissions are not earned through the sale of insurance that cover the amount.)

Whatever conditions are specified, care must be taken not to raise the bar too high. A requirement for 20 years experience negotiating environmental insurance policies, or even 20 or more policies written, may result in no qualified bidders being available.

The larger the possible insurance coverage purchase, or the more extensive the advice and guidance needed, the more it may make sense to post the request nationally, not just locally. In many instances, in fact – basically outside major metropolitan areas – it is unlikely that even the local office of a national brokerage firm with environmental specialists will have the capacity to serve environmental insurance needs. Decisions about how to disseminate a RFQ may be very important to its success. Standard vendor lists from local economic development organizations

or state leagues or associations of municipalities or counties will not be sufficient. Notice of issuance of RFQs thus should include distribution to:

- Local commercial insurance brokers, even if the locality has never dealt with them and they have not advertised environmental coverage as a specialty (since they can team with specialists and might help identify non-local firms that way).
- Any local, regional or state services broadcasting RFQs from public agencies and nonprofits (where such systems exist, they can be a big help, since they are scanned by many possible providers).
- Environmental law firms in the area, or the environmental specialists in large local or regional corporate law firms (since they are as likely as any others to have worked with environmental insurance specialists).
- Firms identified from worldwide web searches on more than one “yellow pages” or directory site (since no one web site is likely to have links to all potential providers).
- All of the insurers and underwriting firms known to the issuer (since the underwriters can forward the announcement of a RFQ to brokers with whom they work).

The point is that dissemination of a summary of the RFQ and instructions of where the full documents are available or to whom requests for copies can be directed is relatively inexpensive – especially if dissemination is by e-mail or faxed one-page announcement. With a small universe of specialist firms out there, it is essential to get the word out, and it is too easy to miss excellent providers through an overly narrow distribution list.

Finally, allow sufficient time. With an ever-changing mix of underwriters, brokers and advisors out there, the objective is to locate specialists who can serve a project’s special needs. Making all potential information sources aware of a RFQ can take time. Make sure the process is initiated as soon as possible and reserve time to locate providers – and then give them the time they need to respond.

Appendix

A Sample Property Transfer and Remediation Agreement

This sample comes from the Parkville Case Study. The key parties to the agreement that moved the project forward were the original PRP, the Company, the City as redeveloper, and the Contractor that provided a fixed price remediation to the negotiated mitigation standard. The capsule description below was compiled from the four documents, including the insurance policy, that constituted the agreement between the three parties. The accuracy of the description of the agreement terms was reviewed by the Parkville City Attorney. Statements about the incentive consequences of some of those terms and conditions are the conclusions of the authors.

The Property Transfer involved the site in *as is* condition with an acknowledged and defined set of “Existing Conditions” describing the pollution on site for which the Company retains ultimate legal liability. While the site was valued by the Company at almost \$1.5 million in its current condition, it was transferred to the City for the symbolic \$1, along with title insurance covering the multiple distinct parcels that made up the company facility.

Liability Releases and Assumptions involved the Company, XYZ Products, the City, Parkville, and Contractor, Contract Remediators, Ltd., with the latter undertaking to remediate the site from its current Existing Conditions to the Required Remediation condition required by the state in order for the City to begin construction of its park. Key liability releases, assumptions and transfer rights in the agreements included the following:

- All parties may transfer their rights and obligations to successor owners/entities.
- The remediation is required to meet requirements “that may now be in effect or which may be enacted or adopted at a future date” during the term of the agreement by any party *other than* the City. (Thus Parkville cannot decide on its own to impose a higher mitigation standard on the Contractor, whatever reasons may arise that recommend such an action.)
- The Remediation Liability is defined so as to be independent of any current or future state-provided liability relief to local governments such as the City (including the “sovereign immunity” from third party suits provided to local governments in some states).
- Despite the extensive site assessment by the Company, the Contractor is still explicitly liable for remediation of *unknown* as well as known Existing Conditions.
- XYZ Products retains responsibility for any *off-site migration* attributable to Existing Conditions that may affect groundwater and for future liability for damages due to the Existing Conditions prior to the property transfer, despite the sale of the site to the City.
- The Contractor’s financial liability is limited to the total funds available under the Finite Risk insurance policy, after which any additional needed expense has to be covered by the original PRP, the Company.
- Parkville accepts responsibility for any New Pollution Conditions that may arise as a result of its efforts to build a park, except for pollution conditions that may result from the work of Contract Remediators, Ltd. in its demolition and remediation activities.

The Required Remediation agreement included provisions for possible on-site disposal of sufficiently clean demolition debris as a means of holding down costs. The Contractor agreed not to use any wood or metal debris on site, but could dispose of masonry and asphalt on-site or provide it as crushed material to the City for its use.

These provision discretionary powers required a process of consultation and agreement between the City and Contractor, along with a mediation process to resolve disputes.

Representations, Warranties, Indemnifications are included in the sales agreement, remediation contract, and insurance policies included in the contractual arrangements between the three parties, and contain some important provisions:

- The Company assures all parties that it has provided all data it has on site conditions, without claiming it is complete information.
- The City asserts it accepts site ownership knowing the property has not met state requirements, and that the Contractor has only to mitigate to a level appropriate for site use as a park, with any additional remediation an expense the City would have to incur.
- Both City and Company agree not to challenge the agreement in court, but both acknowledge that third party suits may affect the terms, so a severability clause is included to protect the agreement as a whole in case any portion of it is successfully challenged in court.
- The Contractor relieves the Company of all Remediation Liability (up to the specified dollar level), but offers that relief to the City only for Existing Conditions, since the City bears responsibility for New Pollution Conditions.

Remedial Response Obligations accepted by the Contractor include:

- A schedule of time limits for achieving key milestones in site demolition and remediation.
- The status of Potentially Responsible Party for the remediation and of Generator of any hazardous wastes transported from the site and disposed of at another location.
- Granting the City the right to review all remediation/disposal plans since Contract Remediators. Ltd. can dispose of demolition debris on site, under 18-24 inches of soil, but Parkville needs to be party to location decisions in order to not disturb such deposits and create new problems when constructing its park.

But there are also key remedial response obligations for the City and Company, who are jointly the “Client” of the Contractor:

- The Client agrees not to have any independent contacts with regulators overseeing the mitigation, to provide all data and to offer any municipal regulatory relief that may help ease the site preparation, and accepts that the remedial response is completely under the control of the Contractor, in negotiation with the State Regulator.
- Client acceptance of a series of Institutional Controls on the site, including limiting a portion of the site exclusively to Non-residential use with no use of on-site water for drinking, limits on placement of underground utilities so as to not disturb any subsurface contaminants, and the registration of the site with the state as having institutional controls and land use limitations.
- City, specifically, accepts that any intervention or new demands for specific actions by the Contractor may constitute “Change Orders” in the originally contracted scope of work, and that Parkville would be separately billed to it.

All parties also agree to specified mediation and arbitration processes designed to speed conflict resolution and avoid the costs and delays associated with litigation over provisions of the agreement.

Insurance Costs and Coverages were central to the agreement. A Finite Risk policy is inherently complex and has to be tailored to conform to the other provisions of the agreement between multiple parties in order to protect them all. The manuscripted policy thus depended on all of the obligations, procedures, and liability allocations described above.

- **COVERAGES, LIMITS, DEDUCTIBLES, CO-INSURANCE** did not provide all that the Company and City originally hoped to obtain:
 - ▶ Pollution Liability coverage for On-Site and Off-Site Cleanup of Existing Conditions and for Third Party Claims for On-Site and Off-Site Bodily Injury and Property Damage. This coverage carries a \$25,000 deductible (including legal expenses and defense) and a \$4 Million aggregate with both the City and the Company as Named Insureds.
 - ▶ Cost Cap coverage for both Known Contaminants and Unknown Contaminants carries a \$7 Million aggregate, no Self Insured Retention, and a 10% Co-Pay provision. This co-pay is to be guaranteed by an irreversible letter of credit that had to be obtained by the Contractor. The Contractor has the status of Named Insured unless the firm defaults on its project obligations or bankrupts, at which point the City accepts being responsible for the cleanup and becomes Named Insured.
 - ▶ Only the City can add Named Insureds under its coverages, which it would do if it transferred all or part of the site to another party for a different form of redevelopment.

- **POLICY PREMIUM, LIMITS AND TERMS**, similarly, are not what the Company and City originally pursued, but were acceptable in light of changes in the insurance market:
 - ▶ Total Finite Risk Policy Cost around \$5.4 million, the maximum originally accepted by the City and Company when they began the process but allocated differently.
 - ▶ The Commutation Account, the funds provided for the demolition and remediation amount to about \$4.5 million, with “Demolition Costs,” defined as including “removal of the buildings and structures,” capped at slightly under \$2 million.
 - ▶ The Insurance Premium paid for the PL and CC coverages was about \$900,000.
 - ▶ The Policy Term was limited to 10 years, with a 60 day extended reporting period for the PL coverage on the termination of the policy, if new coverage was not purchased.

- **DUTIES OF THE INSURED** are specified separately for the PL and CC policies.
 - ▶ For the Pollution Liability coverage, both the City and the Company have the duty to clean up Existing Conditions that began prior to initiation of coverage as required by law, using professionals acceptable to the Insurer (presumably the Contractor).
 - ▶ For the Cost Cap coverage, the Contractor is expected to take steps to minimize remediation costs, except that the City does not need to accept more restrictions on use or sale of site than are already present in its Agreement with the Contractor, so the latter cannot take short cuts by renegotiating its RBCA arrangements with the State Regulator.

- **EXCLUSIONS** for all coverages include any natural resource damage, with policy-specific additions:

- ▶ The standard asbestos and lead exclusion under the PL coverage does not apply to either material that is discovered to be in the soil or groundwater due to factors other than the Contractor’s demolition work, such as Existing Conditions.
- ▶ The CC coverage pays for delay, suspension, or defects that cause problems only to the extent that the problems cause an increase in the Remediation Costs or Loss.

Issues Raised in the Definitions section of the Insurance Policy are worthy of some note, since they affect both costs and risks for the different parties. These matters did not, apparently, cause any problems in arrival at the agreement, but represent decisions that others may want to make differently, given the incentives and impacts these definitions generated.

- “Demolition Costs,” defined as including “removal of the buildings and structures,” are capped at \$1,752,095. This means that the Contractor would not have any claim to any of the CC protection under the policy should its removal costs exceed this amount, and it implies potentially very heavy pressure on the Contractor to dispose of all masonry and asphalt debris on site. To the extent that such disposal might pose cost or other problems for the City’s plans for use of the site as a park, this incentive could generate conflicts.
- “Named Insured” for CC coverage is defined as the Contractor OR the successor taking over the cleanup obligations, which can only be the City. Only the Named Insured benefits from funds remaining in the Finite Risk account after completed remediation. Since Parkville does not in any way benefit from expedited remediation efforts except through speedier access to the premises, if other factors reduce its interest in the project or the speed at which it progresses, the City may not be as willing to expedite site preparation as the Contractor might prefer. That risk and the potential conflicts involved might have been reduced had the City stood to benefit financially from a more rapid or lower cost mitigation. (The issue is not whether the City really wanted this reward, but, rather, that it might actually have been in the interest of the Contractor to offer to share the potential gain, in order to increase the likelihood of funds remaining when the remediation was completed.)
- “Termination Date” for CC coverage is defined as the earliest of (1) termination of the 10 year time limit, (2) exhausting of the funds in the Commutation Account, or (3) attainment of Project Completion, with no extension due to a government entity’s actions to reconsider site conditions after having previously approved the remediation as complete. This explicitly states that no party has any access to CC coverage for re-openers as the result of State Regulator action. Any additional remedial effort would have to be covered by the PL policy that carries a lower monetary aggregate claims limit.
- Commutation conditions permit commutation after the fifth policy year and on the policy anniversary every year thereafter. This language could leave funds in the commutation account, earning for the Insurer, for as many as 364 days if the work was completed a day after an anniversary date and suggests that none of the insured parties had any serious interest in the potential proceeds of returned funds from that account. Moreover, commutation prior to the completion of the Required Remediation included termination of the PL coverage as well as the CC policy. There would therefore be virtually no reason for any of the parties involved, all of whom would have to agree, to accept commutation prior to completed remediation.

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