



Environmental Due Diligence Guide

REPORT

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Proposed Notification Law in Florida Will Have Chilling Effect on Brownfields

Proposed legislation making its way through the Florida Legislature substantially will expand the notification requirements imposed on contaminated property owners across the state, a Miami attorney told BNA April 1.

If enacted, the proposed law is likely to inhibit the scope and pace of cleanup throughout the state and diminish private investment capital, **Michael Goldstein**, a partner in the Miami office of the law firm Akerman Senterfitt, explained.

Specifically, Goldstein said, depending on which version of the legislation one looks at, a notification radius has been created for each point of contamination both on- and offsite. The Senate version (S.B. 114) calls for a 1,000 square foot radius for each point of contamination, while the House version (H.B. 1229) imposes the notification requirement to all specified entities located within 500 square feet for each point of contamination, he explained.

The legislation is driven by several high-profile incidents where the Florida Department of Environmental Protection arguably should have been more involved in providing notification to impacted communities about groundwater and soil contamination.

Notice to Numerous Parties

Under the proposed legislation, parties that would have to be notified include all lessees, operators, owners, residents, and tenants associated with property that falls within the specified radius. Notice also would have to be given to the chair of the county commission, city manager, mayor, state representative, state senator, all applicable U.S. representatives, and both U.S. senators.

Also, he continued, “the proposed bills would require all schools within a square mile of any point of contamination to be notified.” If contamination is discovered at a school site, additional parties that must be notified would include guardians, parents, and teachers. This also extends to day-care centers, he said.

Goldstein asserted the proposed legislation would have some immediate, unintended negative impacts throughout the state. “We anticipate seeing a chilling effect on brownfields redevelopment, less appetite for the additional cost of due diligence, and for taking on the risk of third-party claims,” he said.

Impact on Brownfields

“The requirements also would raise the decibel level on contami-

nated property transactions.” By requiring such a shotgun approach to notice, community concern will be needlessly inflamed, Goldstein explained.

“Unfortunately, it looks as though some form of this legislation will pass, instantly creating new notification requirements for contaminated property owners across the state.”

Goldstein further explained that although there is a brownfield exception in both versions of the bill, a property already must be undergoing cleanup under the brownfields program to trigger the exception.

“This leaves out thousands of potential brownfield sites across the state that likely will not get a chance to go through the brownfields program to be cleaned up and redeveloped because prospective purchasers will not want to expose themselves to liability, and lenders will be chilled by the enhanced threat of litigation and diminution of value of their collateral.”

While Goldstein strongly believes it is critical for a community to have fairly instantaneous knowledge of contamination, he and many brownfields stakeholders feel that goal can be accomplished more effectively in other ways “that don’t further cripple what has otherwise been a powerful program for incentivizing

private investment in cleanup and redevelopment.”

“This is just one more punch to the gut for the brownfields program in Florida that is already reeling from the near bankruptcy of the voluntary tax credit program and the complete dearth of other meaningful financial incentives at the state level,” Goldstein added.

As proposed, the legislation will scare away capital, entrepreneurship, and financing, Goldstein said, cautioning that the chilling effect third-party litigation will have on the brownfields program cannot be underestimated.

“If there is a way to ameliorate the negative and unintended impact the

proposed legislation will have on voluntary cleanup and reuse, it’s through the legislative enhancement of the liability protection for brownfield sites currently on the books by extending that protection to cover lawsuits for property damage.”

Goals Can Be Reconciled

Goldstein explained that the goals of providing community notice and allowing for redevelopment in communities can be reconciled. “You can promote public participation on the one hand while creating a situation on the other where the private sector is willing to invest in cleanup, reuse, revitalization, and public health protection.” However, the proposed leg-

islation sacrifices the latter in favor of the former, which is self-defeating, he added.

“It is not enough to provide notice. You need legislation that increases the investment of private capital in the inherently risky and expensive endeavor of cleaning up contaminated sites. Public resources have dwindled so dramatically that even maintaining the current level of remediation and public health protection is an unrealistic goal. Over the last 15 years, the brownfields model has proven itself to be a powerful engine for restoration and reuse throughout the country. Legislation that undercuts and subverts that model doesn’t benefit anyone.”