

May 26, 2009

The Honourable John Gerretsen
Minister of the Environment
12th Floor, 135 St. Clair Avenue West
Toronto, ON M4V 1P5

Dear Minister Gerretsen,

**RE: The Canadian Brownfields Network (CBN) and Discussions Associated with
Amendments to Ontario Brownfield Regulations (O.Reg. 153/04)**

The Canadian Brownfields Network (CBN) was pleased with the opportunity to meet with yourself, policy advisors and staff on April 27, 2009 to review the various discussion points as outlined in our Agenda dated April 27, 2009 (attached). As you indicated in this meeting the Ontario Ministry of Environment (MOE) is currently amending the brownfield regulations in Ontario with the intent of improving the brownfield redevelopment process in the province, unlocking the beneficial outcomes of brownfields to all stakeholders and supporting the Smart Growth Strategy. The intent of this letter is to summarize key discussion points and provide supplemental information as requested by the ministry during our meeting.

CBN Update and Technical Committee

CBN is currently being re-organized to become a stronger and independent association that encourages best practices in brownfield redevelopment across Canada within each provincial jurisdiction as well as internationally. The CBN technical committee was recently formed in order to facilitate improved dialogue with policy, regulatory and other stakeholder groups to achieve this objective. The CBN would like your ministry to consider formally identifying a brownfield champion beyond the implementation of the brownfield amendments to assist in improved stakeholder dialogue, including the CBN technical committee, on a continuing basis. The CBN would like to further assist in the use of innovative approaches to site remediation and supporting policy, particularly in the area of phasing out “dig and dump” practices and encouraging soil remediation technology.

Tier 2 Risk Assessment and Off-site Contamination

The CBN and its members support the efforts of the MOE to further the development and applied knowledge of the Tier 2 Risk Assessment process prior to the amendments coming into force. The CBN has encouraged its members to participate in the MOE pilot project for the application of Tier 2 risk assessment in the province. The CBN would like the ministry to consider expanding the use to Tier 2 risk assessment to include brownfield sites that have more complex off-site considerations. There also needs to be significant similar improvements to the Tier 3 Risk Assessment process since

Tier 2 is potentially limited in the scope of its application. There must be greater certainty of process given to stakeholders, especially in circumstances regarding off-site contamination since there is no consistency in policy within the MOE district offices.

Brownfield Financing and Tax Considerations

Despite the proposed amendments to the brownfield legislation, financing brownfields is even more difficult to complete today given the uncertainty in the current economic climate and a depressed real estate market. In addition, there remain a number of tax related matters influencing brownfield redevelopment that were discussed with ministry that also have financial implications. As requested we have included a brief overview of these matters with this letter for your consideration (Appendix I).

In summary, the CBN shares the goals of the MOE to improve health and environmental protection while encouraging the redevelopment of brownfields. We want to make the proposed brownfield amendments a success in achieving these goals and are eager to continue our work with the MOE. Thank you for your consideration and we look forward to further dialogue with your office.

Sincerely,



Bonnie Prior
Chair, CBN Executive Committee
Canadian Brownfields Network



Angus Ross, Spokesperson
Canadian Brownfields Network

Attachments

c.c.

Dave Harper, Executive Committee Member, Canadian Brownfields Network
Utilia Amaral, Director of Policy – Office of the Hon. John Gerretsen, MPP
Brenda Lucas, Senior Special Advisor – Minister’s Office, Ontario Ministry of the Environment
Terry Bulman, Manager – Scientific Issues and Information, Ontario Ministry of the Environment
Wendy Ren, Manager – Land Use Policy, Ontario Ministry of the Environment
Sabrina Grando, Chief of Staff – Ministers Office, Ontario Ministry of the Environment

CBN Agenda and Discussion Points

To: Minister's Office – Ontario Ministry of the Environment
From: Canadian Brownfields Network (CBN)
Date: April 27, 2009
Subject: Meeting with the Minister of the Environment – Honourable John Gerretsen

Introduction: Overview of the CBN today and how this organization could assist the MOE and its brownfield objectives

Agenda Items and Discussion Points:

1) The CBN technical committee and MOE working groups supporting amendments to the proposed brownfield legislation

- our appreciation for the MOE's acknowledgement of the CBN submission to the recent EBR posting and recognition of the meaningful results achieved by the Tier 2 working group

Consideration: *applying the revised Tier 2 risk assessment process on actual Brownfield sites that allow a better understanding on what assumptions in the MOE models are driving standards and there sensitivities (i.e. CBN support for the MOE proposal release on April 23, 2009)*

- CBN technical committee represents technical expertise across Canada and could be a valuable group in further working group initiatives (e.g. soil vapour and qualified persons)

Consideration: *opportunities to evaluate soil management and re-use, an important consideration to move away from the traditional "dig and dump" approach in Ontario*

Question: *Who is the MOE Champion for brownfields and a possible CBN contact, person or committee (Adam Leus)?*

2) Promoting innovation in site remediation and moving away from traditional "dig and dump"

- policies in the province that promote soil treatment and on-site re-use would assist in supporting this innovation (e.g. Quebec)

Note: *new standards will increase the quantities of soils and ground water that are considered impacted and require remediation*

- MOE and CBN representatives are collaborating with OCE to investigate how we encourage and support innovation
- through the CBN network identify remediation technologies and policies that have been successful in other provinces

3) Today's financial considerations and effects on brownfield redevelopment

- certainty of regulatory process
 - i. risk assessments and timelines – we encourage continued performance measurement by the MOE and revisions of Tier 2 and 3 processes

Note: more risk assessments will likely mean more MOE resources to support the process

- ii. RSC site closure documentation and process has been significantly enhanced by amended legislation
- iii. off-site regulatory policies continue to be a struggle especially with the revised regulatory standards

Note: encourage the off-site liability working group, planes of compliance project and efforts of Terri Bulman - de-coupling of on-site and off-site related polices within the MOE regulatory framework

- real estate market and demands
 - i. market has decreased significantly since 4th quarter of 2008 and it will take longer for a site to return to the market even after site clean-up (negative impact to financing)
 - ii. bank financing is challenging for any development site and those with environmental impacts are more difficult than ever before

4) Taxation and incentives for brownfield redevelopment

- TIFs may be underutilized because they are difficult to monetize by developers
- expensing of site remediation costs
- land transfer tax and site remediation costs
- MPAC assessment of Brownfield sites

Close: How can the CBN engage with MOE – more focus group interaction?

APPENDIX 1

The following is a summary of four issues regarding taxation and incentives with respect to brownfield properties, as identified in the meeting with the Minister of the Environment, the Honourable John Gerretsen (April 27, 2009):

1. Land Transfer Tax

In general, purchase and sale agreements for brownfield sites are typically on an “as is where is basis” that include any environmental deficiencies associated with the lands. Typically more sophisticated vendors request the purchaser to not only accept environmental deficiencies at their risk but also provide an environmental release and/or indemnity in favour of the vendor from the purchaser, preventing the purchaser or a third party from making an environmental claim against the vendor at some point in the future.

In a recent brownfield transaction within the province, where an environmental indemnity was provided by the purchaser to the vendor, the Ministry of Revenue Land Taxes Section insisted that the value of the indemnification must be included as part of the consideration the vendor received in addition to purchase price, and is therefore subject to Land Transfer Tax (LTT). Their interpretation of the indemnity meant the purchaser had to pay land transfer tax based on some assessment of site remediation costs over and above the purchase price for the lands which were sold on an “as is where is basis”.

In brownfield transactions the vendor receives a land transaction price commensurate with the environmental condition. With the environmental release and/or indemnity, the vendor would be protected from an environmental claim by the purchaser or a third party, and would not receive more, nor receive less, than the purchase price. In summary, the indemnification preserves the value of the contracted amount and should not be treated as additional consideration. If requested, the details of this example can be made available for further evaluation.

2. Realty Tax

The following considerations regarding realty taxes and the treatment of brownfields are discussed below. Representatives of the CBN are currently working with MPAC to explore policy solutions in these areas and would like your support.

a. Assessed Value

At this time, the Municipal Property Assessment Corporation (MPAC) does not have a specific procedure established to determine the impact of contamination on the assessed value of a property. Although contamination may negatively affect the ability of a landowner to occupy, lease or sell the property, there would likely be no reduction in the property assessment.

b. Tax Class

A brownfield property, in a vacant state, would likely have an Industrial Vacant tax class as it was most likely a previous industrial operation. The brownfield property would

remain in the Industrial Vacant tax class during the remediation process, only changing if a rezoning occurred which changed the permitted land uses. Upon rezoning, MPAC would immediately change the tax class (ie. to commercial or residential) whether or not those new uses would be able to locate on the property due to the on-site remediation work or lack of regulatory environmental site closure that prohibit the higher-order use from actually locating on the property.

c. *Greenfield versus Brownfield Development*

A Greenfield property remains in a low tax class (ie. farmland or Farmland Pending Development) with a low assessed property value, which results in low realty taxes charged until on-site construction works begin. In the brownfield redevelopment process, developers pay substantially higher realty taxes based on: the higher assessed land value and building; and the higher tax class. Developers of Greenfield properties may pay hundreds of thousands of dollars less in realty taxes than a brownfield developer undertaking the remediation/redevelopment process.

3. Assessment and Remediation Expenses

The Income Tax Act requires that, in many instances, remediation expenses are treated as improvements to real property and capitalised rather than treated as expenses that can be deducted from other income. This is particularly hard on smaller redevelopments and, as was originally pointed out in the NRTEE National Brownfield Remediation Strategy, remains as a significant barrier to redevelopment.

The CBN is considering an analysis of how other jurisdictions treat these expenses and will advise the Ontario Minister of the Environment of their findings and further recommendations.

4. Financial Incentives for Brownfield Remediation/Redevelopment

The structure of long term incentives, specifically Tax Assistance Programs such as Tax Increment Equivalent Grants (TIEGS), is difficult to monetize due to the timeframe in which they are provided. When the time value of money is considered, these grants provide significantly less value than the cumulative absolute amount of these grants.

TIEGs are based on the incremental difference between pre-redevelopment and post-redevelopment property taxes. As higher-order land uses pay higher property taxes, the TIEGS are really incentivizing a change in land use from Employment, particularly industrial, during the redevelopment process.

A letter dated May 2, 2008, was provided to Ministers Gerretsen and Watson outlining this difficulty in more detail. We would be pleased to provide you with a copy of this letter should you require it for your reference.