



Vantage Points - Winter Edition

Our new year has jumped from the starting line into March, but with great tragedies in our communities. The death of our fellow citizens in the coal mines of Sago and Aracoma and battles overseas have reminded us of the dangers and risks undertaken daily to provide for our families and our country. Our sympathies and condolences go out to the many family and friends of those lost.

Our inaugural Vantage Points was warmly received, and we welcome the opportunity to provide you with an update on several matters of interest, and also introduce you to several more of our outstanding attorneys. Our feature article on *Brownfield Redevelopment in West Virginia-Turning Liabilities into Assets* was prepared by Steve Golder in our Business Section. Steve has been with us for 13 years and concentrates on business and commercial law, mergers and acquisitions, real estate and bankruptcy law.

Bo Sweeney, one of our senior litigators, addresses planning for your home addition and renovation. Bo speaks from experience; he has represented many homeowners (and business owners) in construction and fire loss litigation. It's ounce of prevention, advice that bears repeating.

Our third Vantage Point is an update from Steve Wellman on Brick Street Insurance developments. We are extremely excited to be part of the Workers' Compensation revolution in West Virginia, and look forward to its unfolding.

On behalf of our Members, including our newest additions, Charlie Gould, Max Corley and Steve Wellman, we welcome you back. Please use, share and comment on our efforts to provide clarity in this new HTML format.



Warmly,

Barry Taylor
Chief Executive Officer



Privatization Accomplished

BrickStreet Mutual Insurance Company Open for Business

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As of the stroke of midnight, January 1, 2006, the state of West Virginia officially got out of the Workers' Compensation business. The successor to the West Virginia Workers' Compensation Commission is BrickStreet Mutual Insurance Company, which was created as a result of sweeping Workers' Compensation reforms passed in January 2005. It was no small task to build a multi-million dollar insurance company from the ground up in just one year, but BrickStreet accomplished it with great success.

The statutory reforms that created BrickStreet and privatized the West Virginia Workers' Compensation market included other major changes. One such change for employers who buy coverage from BrickStreet is that the legal fees associated with defending the claims decisions BrickStreet makes are now paid by BrickStreet, not the employer.

BrickStreet selected nine law firms, including Jenkins Fenstermaker, PLLC, to represent the interests of West Virginia employers when claimants file protests to BrickStreet decisions. When a claimant files a protest requiring legal defense, BrickStreet will assign that claim to one of the nine firms on its panel. If your business is already represented by one of the firms on the panel, BrickStreet will assign your claims to that firm. However, if your business has been represented by a firm that is not on the panel, or if your business has not previously been represented in Workers' Compensation claims, then BrickStreet will select one of the firms on its panel to represent your interests when needed. BrickStreet will pay all legal fees and costs incurred in defending claims assigned to panel counsel.

This change may certainly impact claims already in litigation as of January 1, 2006. By now, you should have received a letter from BrickStreet explaining your options as to the defense of claims already in litigation. If you have any questions about how the statutory reforms affect claims already in litigation when BrickStreet came into existence, please feel free to contact us.



Brownfield Redevelopment in West Virginia

Turning Liabilities into Assets

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For many years after the enactment by Congress of CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act) and RCRA (the Resource Recovery and Conservation Act), the "command and control" approach utilized by the federal government and state governments to address actual or perceived environmental contamination often created barriers to the redevelopment of used industrial sites and commercial properties. This approach was often not practical, efficient or cost effective. Potential investors and lenders were fearful of getting involved in sites that could likely get tangled in a regulatory nightmare. Also, this system made it almost impossible to determine the potential liability.

In 1995, the United States Environmental Protection Agency (USEPA) recognized the need for a fresh, innovative approach and commenced their Brownfields Initiative. From this initiative grew many states' statutes aimed at the redevelopment of "brownfields." West Virginia, to the amazement of many, followed suit. In 1997, the West Virginia Legislature enacted the Voluntary Remediation and Redevelopment Act (VRRRA). The Act was designed to encourage voluntary clean-up of contaminated sites and to promote the redevelopment of brownfields in West Virginia.

In West Virginia, many sites exist in areas with industrial infrastructure. These sites can be much less costly to develop than pristine sites. Moreover, the term brownfield just doesn't mean a former manufacturing or industrial facility. The term means any abandoned, idled or under-used industrial or commercial facility where expansion or redevelopment is complicated by real or perceived environmental contamination. As a result, brownfields could include sites such as a neighborhood vacant lot, an existing or former gas station, a former dry-cleaning business or even a residential site that had an underground fuel tank that leaked.

In a nutshell, the VRRRA limits enforcement actions by the West Virginia Department of Environmental Protection (WVDEP), provides financial incentives to entice investment in brownfield sites, and limits liability under environmental laws and rules for those who remediate sites under the standards provided in the VRRRA. Participation in the VRRRA can be initiated by the property owner, site operator, a developer, a prospective buyer or other interested party by filing an application with the WVDEP. The major components of the VRRRA Program are:

1. Licensed Remediation Specialist. Once a property has been selected for the Program, the next step is to hire a Licensed Remediation Specialist (LRS). Under the Program, all activities must be supervised by an LRS. An LRS is a person certified by the WVDEP as qualified to perform professional assessment and remediation services and to supervise the remediation of contaminated sites. The key to success in brownfield redevelopment is finding a qualified LRS who is experienced, a good listener, a good communicator, a good negotiator, and works in a cost efficient manner.
2. VRRRA Application. To participate in the VRRRA program, an application must be filed with the WVDEP. Each application must be accompanied by an application fee based on the size of the property, years of operation as a non-residential property and the SIC code for operations that occurred on the property. The application fee usually ranges from \$1,000 to \$5,000.
3. Voluntary Remediation Agreement. Each party who participates in the Program must execute a Voluntary Remediation Agreement with the director of WVDEP. This agreement must provide for the following: (i) services of an LRS; (ii) recovery of costs and a schedule of payment of costs incurred by WVDEP in excess of application fees; (iii) description of plans and documents to be submitted to WVDEP; (iv) listing of applicable environmental requirements on the site; (v) technical standards for work at the site; (vi) any engineering or institutional controls or land use covenants applicable to the site; and (vii) criteria for the reopening or modification of the agreement. Once the agreement is executed, WVDEP is barred from any enforcement actions against the applicant for the site and contamination under the agreement, unless there is an imminent threat to public health.
4. Site Conceptual Model. The Site Conceptual Model is a visual representation of the actual and expected chemicals of potential concern, the nature and extent of the contamination, the pathways for migration of the contamination, and the potential living organisms that might be exposed to the contamination. This model is the centerpiece of a voluntary clean-up project.
5. Phase I and Phase II Environmental Site Assessment (ESA). A thorough environmental site assessment is required for every site in the program. Sometimes sites can be closed under the program without conducting remediation based solely on the site assessments. The purpose of a Phase I ESA is to identify all potential sources of contamination on the site and develop an initial Site Conceptual Model. Based on the initial Site Conceptual Model, existing site data and a preliminary risk evaluation, a sampling and analysis plan will be developed. The actual testing of site soil and groundwater under this sampling and analysis plan constitutes the Phase II ESA.
6. Risk Assessment. Once the assessment process is complete, the Site Conceptual Model can be refined, and clean-up standards are developed. The clean-up standards are based on risk and therefore can vary from property to property and can vary based on the proposed use of the property. This risk based clean-up approach provides for much greater flexibility than the old "command and control" approach which essentially required creating "pristine" property. The risk assessment is used to decide whether a site needs to be cleaned-up to reduce the risk to human health, and if cleanup is needed, the extent of the clean-up. In fact, if the site assessment indicates that contaminants are present below DeMinimis Standards, only a minimal risk evaluation and limited remedial action may be necessary to obtain closure of the site.
7. Remedy Evaluation, Selection and Design. Once risk based clean-up standards are determined and risk evaluation of the site has been completed, a remediation plan is developed to meet those standards. This plan could involve treatment and/or removal of contaminants. The plan could also include engineering and institutional controls to limit migration of contamination and provide protection from human exposure and damage to the environment. In some cases, the remedy could simply involve capping the site with concrete and/or asphalt and placing legal restrictions on how the property could be used in the future. For example, restrictive covenants could be recorded in the land records that would prevent a subject site from ever being used for residential purposes.
8. Final Report and Certificate of Completion. Once the remediation plan is completed and/or the applicable controls are in place, the LRS prepares and submits a final report to WVDEP. Once the final report is approved, then a Certificate of

Completion is issued. This Certificate of Completion is the document that provides liability protection to the current and future owners of the property, including banks that provide financing on the property.

So what is the point to all of this? The simple answer is that there is now a workable program in West Virginia to clear contaminated sites or perceived contaminated sites of their environmental stigma and make them safe and acceptable for development. Despite the VRRRA being in existence for almost a decade, however, it is still underutilized and often simply overlooked.

The opportunities provided by the VRRRA are significant. There are properties and facilities in prime commercial and industrial locations that have been underutilized or abandoned because of environmental concerns. The extent and severity of the problems may be actual or only perceived. Because of the negative perception of past use and blighted appearance, the property value is likely low. Many times, however, the perceived problem is great, but the actual problem is small. Herein lies the opportunity for those who have the tools to remove the environmental stigma from the property. If you know of facilities or properties in prime locations that have been avoided due to this stigma, there lies a possibility for great success. Through the VRRRA, many properties can be processed and stamped by the state with a clean bill of health.



Building or Renovating a Serious Undertaking

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Building a new home or renovating an existing structure is a serious undertaking that can have many ramifications. Even simple renovations can cost tens of thousands of dollars, and large projects cross very quickly into six figures. Careful planning and good communication can take a lot of the risk out of a project, which will ensure a positive outcome in the end.

Once you have decided on a plan, the first step is to find a competent contractor, and then do the background work to make sure that the contractor can get the job done. Many people look at a contractor's prior work as a way of background research, but never determine whether the contractor has the financial wherewithal to complete the project. Ask the contractor for a list of his five biggest suppliers and an authorization to discuss the contractor's credit status and payment history with the suppliers. Many construction jobs go awry because the contractor needs to be paid for his last job before he can start the next. Worse, an undercapitalized contractor may fail to pay his suppliers, who file mechanic's liens on the property. This can cause delays or may ultimately derail a project. If the contractor refuses to provide the financial information, take that as a red flag and look elsewhere. Additionally, a search of courthouse records will help determine whether the contractor has been the subject of lawsuits or liens.

Second, determine how the contractor actually does the work, in a step-by-step approach. Does he own his own excavating equipment to dig the footers, or will he (and you) be at the mercy of a sub contractor? Does he have his own framing crew, block layers, electricians? Some contractors are general contractors who rely solely on subcontractors for every aspect of the construction project. Sole reliance on subcontractors can add delay to the job, and can also raise issues of quality control.

Third, sign a contract for the job. It is amazing how many six-figure construction projects go forward without a written contract. The contract need not be fancy or lengthy, but it should set forth the scope and nature of the work, the milestones for completion and payment, and a mechanism for dealing with changes. This last point cannot be emphasized enough – no construction project goes ahead as planned, and it is imperative that both parties understand and agree to the need for changes in job scope and the costs involved. Changes should be documented and approved as they occur. Finally, the contract should include a mechanism, such as a mandatory arbitration clause, for resolving any disputes that arise.

Money spent on the front end of a project in planning and investigation pales in comparison to the money spent litigating a bad outcome. Making the investment in a proper investigation and preparation of a suitable contract can yield great returns in the form of a successful building project.

For assistance with your building project, please feel free to contact us.



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