



COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

Who Should Pay Environmental Clean-Up Costs?

MARCH 3, 2015

Robert D. Cox, Jr. – The Worcester Telegram & Gazette (“T&G”) ran a front page article Sunday on the extraordinary and unanticipated environmental clean-up costs at property acquired just a year ago by the Worcester Regional Transit Authority (“WRTA”). “[Taxpayers left with bill to clean toxins, asbestos at future WRTA home](#),” published March 1, 2015, discusses how the 11 acre site purchased by WRTA for approximately \$2 million from NSTAR, now Eversource Energy, came with an estimated cleanup cost of approximately \$15 million. The Commonwealth agreed to fund remediation costs up to \$16 million. The article suggests that, because of uncertainty on clean-up costs, WRTA and the Commonwealth made a bad deal, NSTAR should have paid for some or all of the costs, and taxpayers are now unfairly left holding the bag.

That taxpayers pay environmental clean-up costs is hardly shocking news. Nor is it a bad thing. Indeed, for the T&G to suggest outrage that public monies are being used to clean up a waste site plays out a bit like [Capt. Renault in the film Casablanca](#) (“I’m shocked, shocked to find that gambling is going on in here,” as Capt. Renault is handed his winnings). After all, [governmental funding programs](#) allowed for the completion of remedial work to address contamination at the T&G’s former headquarters in downtown Worcester.

Given its prior uses and history, use of public funding to clean-up the WRTA site is entirely appropriate. Between 1870 and 1969, the property was a former manufactured gas plant (MGP). It burned coal to produce gas that was distributed to homes, businesses and industries throughout Worcester. MGP operations were messy. They left coal, tar, asphalt, coke and asbestos contamination at the property. But the MGP operations that left environmental contamination at the property occurred well before the adoption of our current environmental laws governing the use and disposal of these materials.

It was not until years later, in 1980, that Congress passed a law addressing our legacy of polluted industrial sites. In determining who should pay for clean-up actions, Congress chose to impose costs, not on all taxpayers, but rather on a limited set of parties, including the current owners of properties who are strictly liable – without regard to fault – for the contamination there. That liability scheme is at the core of the Comprehensive Environmental Response,

Compensation, and Liability Act – CERCLA or the Superfund (1980) – and the Massachusetts Oil and Hazardous Material Release Prevention Act – M.G.L. c. 21E (1983).

Both laws, however, while effective in cleaning up sites where hazardous wastes were brought for disposal, proved to be a major impediment to redevelopment of properties with a historic legacy of contamination, such as the WRTA site. Who would want to own or invest in property for which one is responsible for all clean-up costs, even where one did nothing to cause contamination or bring pollutants to the property? Beginning in the 1990's, however, contaminated, urban properties that no one wanted to own or develop were re-characterized as "brownfields." To encourage the re-use of brownfields over the development of undeveloped "greenfields," public policy shifted: the use of public resources and monies for grants, low-interest loans, technical assistance, tax incentives, and liability relief for brownfield sites became public policy, and the law. In 1998, Massachusetts adopted the Brownfields Act to advance the re-use of underutilized or abandoned contaminated properties. In 2002, the Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA by providing funds to assess and clean up brownfields.

Using public monies for cleaning up and reinvesting in the brownfield sites is a good thing. [According to the EPA](#), each dollar invested on brownfields' clean-up leverages over \$17 in other investments, along with jobs, better community planning, and increased value of surrounding properties once the clean-up is completed. These are good laws.

So, are taxpayers inappropriately left to pay for the cleanup at the WRTA site? I hardly think so. The property had been dormant for over 20 years. NSTAR performed response actions to achieve site closure under MassDEP's standards for the property's then current use. WRTA had a need and saw an appropriate use for the site serving the public interest – a public transportation maintenance and operations facility. WRTA sought and will use taxpayer money to clean up the Quinsigamond Avenue property. Shocking? No. Good business and use of public monies? Absolutely.