American Bar Association
Section of Environment, Energy and Resources

CPR For Properties In Sheol

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43rd Section Spring Conference
Salt Lake City, Utah
March 20-22, 2014

ABSTRACT

The opportunities to acquire brownfield properties in North America abound. When one considers such an acquisition, however, pre-closing as well as post-closing issues also abound and deserve close attention to the entrepreneur and his legal counsel. Pre-closing challenges include: Where is the required investment capital? Is the local government entity supportive or antagonistic due to historic issues? Is there a voluntary cleanup program in the state or province? What environmental liability insurance coverages can be negotiated as to known or suspected conditions? Post-closing concerns include: Are there competent local professionals and contractors available? What infrastructure has to be reconfigured or modernized in order to support various kinds of reuse? Can there be multiple or mixed uses by prospective tenants or buyers? How is the site going to be marketed? Can the redevelopment proceed concurrently with the cleanup? This paper will review six properties in the United States and Canada that are in various stages of redevelopment.

Introduction

Throughout the United States and Canada there are communities of all sizes that had historically been industrial towns or cities. Prior to the 1980's, the majority of the population in these communities typically was upper middle class, blue collar, union families. Many times the owners and executives of the industries also lived locally. The tax bases were good resulting in adequate funding for quality schools and governmental infrastructure.

As economic development occurred in other locations of the world, competitive forces drove many of the formerly stable industries in these communities to move to cheaper locations or to close altogether. This malady permeates both countries, but is especially evident in the industrial Eastern states and provinces as well as the American Midwest. Properties that formerly employed thousands of laborers and white collar employees became either underutilized or abandoned. Much of the former industrial activity on these sites was prior to any significant environmental regulation or oversight. These properties and the communities in which they are located underwent a form of death.

Sheol is a Hebrew term designating a place in the depths of the earth where the dead go. There is, however, CPR for these brownfield properties, many of which seem to be doomed to Sheol. Hopefully, this "resuscitation" effort can bring them back to life in sustainable ways that will benefit the affected communities economically, environmentally and culturally. Perhaps, CPR could stand for Conservation, Production and Redevelopment.

Alton, Illinois – Laclede Steel Co. (now Alton Steel, Inc.)

Until the late 1970's, Alton was a prosperous river town situated on the Mississippi River about twenty miles north of St. Louis, which is situated in the practical "middle" of the United States. Transportation infrastructure in the St. Louis area is very broad, with almost every Class A railroad located there as well an active river port and adjacency to four Interstate highways. In the 1950's and 1960's, Alton had over 11,000 industrial jobs in facilities along an industrial corridor adjacent to the Mississippi River comprising over one thousand acres and multiple separate parcels. These plants manufactured steel, paper products, glass bottles, lead, aluminum, vinegar and other products. Unions were strong in these industries and the community had population increases for decades as people came from other areas for the employment opportunities.

The Owens-Illinois glass bottle-making facility was the first to close in 1978. Subsequently, the other industries (including Smurfit-Stone Container Co., Asarco, Federal Metallurgical) closed also, with the last one being Laclede Steel, which went into a liquidating Chapter 11 in May of 2001. A group of local investors formed Alton Steel, Inc. for the purpose of attempting to acquire the steel mill and restart a portion of the production. It had been determined that Laclede was actually making money with two product lines, but was losing money on other products. Additionally, Laclede had bloated overhead costs, high finance costs and an unfavorable union contract. A business plan was formulated by the group to acquire and restart the closed steel mill.

The first action taken by the group was to engage with the Steelworkers Union. Because of the national contraction within the steel industry in America, the workers laid off at the time of closure had no opportunity to stay within the industry. Many were underemployed or unemployed. A fair, five year contract was negotiated, which resulted in many of the former employees volunteering their time and skills to winterize the plant before the freezing winter could destroy the extensive water cooling systems of the mill. Permission was granted by the Debtor-In Possession to do this work so that the mill assets would retain value.

The next step was to determine what the US EPA and IL EPA would require of the buyer. The US EPA had a $125 million claim filed and the IL EPA had a separate claim with an unspecified amount. The mill was situated on 400 acres and had operated for 90 years when it closed. Most of its operations were prior to significant environmental regulation. There were known polychlorinated biphenyl (PCB) releases as well as other chemical contamination, water treatment issues and lead sediment and asbestos throughout the buildings. Although negotiation got off to a rocky start, the terms began to improve as the Alton Steel group decided that the purchase was not economically feasible if the EPA's requirements were imposed. Because of the support from many stakeholders that this acquisition should take place for the benefit of the community, a Consent Order was negotiated over an 18-month period providing for cleanup to be staged over a period of years and paid for from the cash flow of Alton Steel's steel mill operations.

Once it was determined that the cleanup requirements would be manageable, the Alton Steel team negotiated a purchase price of $1 million, which would go into a fund to be used for environmental investigation and cleanup. The bankrupt estate also contributed another $100,000 to this fund. The

Bankruptcy Court approved the sale as well as a Settlement Agreement that reflected the terms of the Consent Order.

The purchase was closed in May 2003, and production by Alton Steel of the two targeted steel products commenced in September 2003. Alton Steel has operated continuously since with employment consistently in the 300 to 350 range. The company has met its obligations provided in the Consent Order to clean up the contamination on the site. The effort of the local group prevented this site from being listed on the National Priorities List (NPL) and generated direct and indirect employment of over 1,500 jobs. This is far short of the 4,000 once employed at the steel mill, but a welcome rejuvenation of this industry in a community devastated by job loss, tax base deterioration and population declines of over 40%.

Alton, Illinois – Smurfit-Stone Container, Inc. (now Green Investment Group, Inc.)

Another of the brownfields in Alton's industrial corridor was a paper mill that Smurfit-Stone Container, Inc. had shut down in 1998. The reasons for the shut down were based upon the same issues as the other industries in Alton; labor costs were too high and competition was reducing profit margins. The shut down was done in spite of very recent significant capital expenditures to upgrade production equipment. This property consisted of 235 acres adjacent to the Alton Steel property. The notoriety associated with the completion of the challenging Alton Steel deal gave performance credibility to the purchaser of the paper mill site. This purchaser included one of the six members that comprised the Alton Steel investment group.

The acquisition was negotiated with consideration that included cash, an environmental liability policy (ELP) and a letter of credit to cover the seller for environmental liabilities. This structure was very much designed to satisfy the Treasury Department of the selling corporation, which was interested in a deal structure that would enable the deletion of footnote disclosures on financial statements pertaining to contingent environmental liabilities. As a publicly traded company, this was a significant negotiation topic as it related to the depth of coverage provided by the ELP. The seller was made an additional insured on the policy for historical unknown conditions as well as new conditions. This initial ELP was for a three year term with a $3 million limit and a $100,000 deductible. The cost was significant since the purchaser had no track record at that time with the ELP industry.

Environmental records were reviewed in depth by the buyer as well as the insurance underwriters. A phase one environmental report was also prepared prior to closing. Subsequent to closing, the property was registered with the Illinois EPA's voluntary Site Remediation Program. The EPA assigned a staff member to work with the new owner on the investigation to be completed and the remediation to be performed. Environmental professionals were engaged throughout the process to communicate with the EPA staff member and implement the investigation and remediation activities as agreed by the owner and the EPA. This resulted in a draft No Further Remediation letter (NFR) being issued by the Illinois EPA in 2010. The final will be issued at such time as some minor remediation is completed, consisting of engineered barriers in certain small locations. It is expected that these will be installed when parking lots are constructed for the reuse of the property.

At the time of this acquisition, which was on February 14, 2006, banks were still doing traditional business, and bank financing was obtained at normal rates based upon appraised value of the real estate. No equipment or salvage values were considered by the lender at that time. Within 8 months, another bank was competing to refinance the acquisition loan, proffering a better rate and larger loan balance. Prior to the time of the banking meltdown in 2010, this conventional lender advanced additional funds for working capital and to fund the acquisition of an additional brownfield in Ohio.

The somewhat favorable banking conditions for brownfield investments practically disappeared after the collapse of the financial world in 2010.

The primary driver for the acquisition of this property was the development of a corn-to-ethanol production facility. A development group that included the principals of the new owner had an option to purchase a portion of the Alton land for this purpose. The site was ideally located on property adjacent to the Mississippi River with access to two Class A railroads that could service the entire United States, was in the midst of ample corn supply and only 5 miles away from a large Conoco – Phillips refinery. Over $2 million was spent between 2006 and 2010 in engineering and design work for the plant as well as geotechnical work. The Illinois EPA issued its construction permit for the ICM 59-million-gallon-per-year production facility in 2010, just at the time that the financial world was collapsing. Prior financial commitments for the equity and debt structure of the $118 million project failed to materialize and the project did not move forward. Retrospectively, the owner may be better off to have lost the investment of $2 million as opposed to having completed construction of the plant in what has become a tumultuous political environment and market for ethanol.

All of the buildings and improvements located on the mill site were demolished.

Other projects pertaining to the production of methanol, coal gasification and waste-to-energy technologies have been reviewed. Most of these investments are experiencing capital challenges in today's markets. Because of the transportation centrality of the site in the United States, intermodal facilities are being favorably considered.

Circleville, Ohio - Smurfit-Stone Container, Inc. (now CircleGreen, LLC)

Primarily because the corporate operatives of Smurfit-Stone in 2006 were pleased with the structure and performance of the buyer of the Alton paper mill site, contact was made by their legal counsel to determine the interest of the principals in acquiring another Smurfit-Stone paper mill site. The mill in Circleville, Ohio was shut down on the same date as the mill in Alton, Illinois, so both of these mills had been "on the shelf" for approximately eight years. The corporate position of Smurfit-Stone was apparently to "warehouse" the properties rather than risk selling to a party for reuse while legally being required to assume liability for legacy environmental issues. Because of the positive deal structure and business relationship between Smurfit-Stone and the principals of the buyer of the Alton, Illinois property, this "warehousing" policy was modified so that additional properties could be sold to a responsible buyer who would protect the corporate interests of Smurfit-Stone. Negotiations resulted in the Circleville, Ohio site being acquired in December 2006. The deal structure was practically identical except for the amount of the cash payment.

This site was comprised of 303 acres, with the paper production facility being located on a 26 acre parcel that was bounded by streets on three sides and a four lane highway on the remaining side. The other parcel of 277 acres was on the other side of the four lane highway and contained the plant's waste water treatment system, which consisted of a lagoon system encompassing about 20 acres. The remainder of the land was agricultural and timber land along the Scioto River.

Because the site was adjacent to a Cargill grain elevator, the initial development plan was to construct a second grain-to-ethanol production facility using the same design as the Alton ethanol plant except that there would be a direct corn "feed" from the Cargill facility instead of the more typical truck unloading facility. Cargill had implemented this design feature at a couple of other locations in Ohio

where the ethanol plant was constructed adjacent to the respective grain elevator. Initial design work was completed by the engineers at ICM. These plans were submitted to the Governor's Office of Ohio, which authorized a grant of $250,000 for assistance in the environmental investigation required as part of any permitting process. Although the engineering plans had been prepared, the ethanol plant was never constructed for the same reasons the Alton, Illinois facility was stalled.

An environmental professional was engaged in Columbus, Ohio, whose office was only about twenty miles from the site. He had been formerly associated with the Ohio EPA and had gone into private practice. The site was registered into the Ohio Voluntary Action Plan and an investigation plan was developed in cooperation with the Ohio EPA. Through the effort of the owner and this professional organization, a grant was awarded in the sum of $750,000 to assist with the remediation of the environmental issues. Other than anticipated asbestos abatement and some normal soil and concrete contamination, the only significant remediation was in a parcel along the northerly border of the property which had been the location of the Ohio – Erie Canal over one hundred years before. Investigation established that the fill material used by those who were closing the canal was contaminated with soil that had been impacted by a coal gas production facility. The Ohio EPA required that this contaminated soil be removed, properly disposed in a hazardous materials landfill and replaced with clean soil.

Sales of reusable equipment and demolition of the buildings on the site was totally completed in 2012. After the environmental professional filed the No Further Remediation letter required under Ohio law, the Ohio EPA issued it Covenant Not To Sue during 2013. Shortly thereafter, the 26 acre former brownfield (now green) was sold to Cargill, who had previously been leasing a portion of the surface area for above ground corn storage. Cargill's grain elevator operations were also locked in by streets on three sides with the four lane highway on the fourth side. Although their business was expanding, Cargill had nowhere to grow, until they acquired this parcel in 2013.

The Ohio EPA approved a closure of the lagoon system on the other parcel that provided that the water could be drained and pumped into the Scioto River, after which the sides of these above ground lagoons could be collapsed over on top of the residual sludge. It had previously been determined that the sludge was not hazardous. This land was also sold in 2013 to a cattle rancher.

Although this property in Ohio was intended by the owner, the State of Ohio and local governmental authorities as a green energy reuse, the timing and economic conditions simply were not viable. Nevertheless, the sale to Cargill will result in economic expansion of a very successful grain elevator in the midst of an agricultural area.

New Richmond, Quebec - Smurfit-Stone Container, Inc. (now SSPM New Richmond LP)

In 2008, Smurfit-Stone shut down three locations in Canada on the same date. Executive management contacted the principals of the purchasers of Alton and Circleville mill sites to determine their interest in acquiring these sites, using the same structural format that had been previously utilized with the sites in the United States. Over an 18 month period, negotiations with Smurfit-Stone, service providers in environmental services, equipment sales, demolition services, and insurance products, were consummated. The closings of these three purchases took place in January 2010.

The purchaser had some concerns about these particular Canadian purchases because of the distance from the home office as well as the potential cultural issues associated with purchase of significant assets in communities where the French language was spoken by the majority of the local population. An additional concern was obtaining the capital for the acquisition and working capital for Canadian

sites in the midst of the collapse of the American banking system and capital markets. During this time period, however, commodity prices of copper, stainless steel and other metals were at high levels. This enabled the prospective owner to negotiate pre-closing sales of those commodity assets for sufficient cash to complete the acquisitions and have sufficient working capital for on-site operations.

Prior to the closing of the 165 acre purchase in New Richmond, however, the Mayor requested several meetings in New Richmond as well as Montreal to discuss opportunities that the City felt could be referred to the new owner for redevelopment. These meetings resulted in the execution of a twenty year lease of a former 100,000 square foot warehouse to Fabrication Delta Inc., a company manufacturing the large masts or posts for wind turbines. This lease was entered into four months after the acquisition. The province of Quebec as well as local investors committed over $20 million to upgrade the building as well as the fabrication and painting equipment to facilitate the process. The local government was also instrumental in referring two additional businesses that purchased acreage and constructed new buildings engaged in construction (PEC Construction) and in railroad equipment repair and renovation (Gaspe Diesel Inc.). All parties worked together to arrange easements required for new rail to be constructed for the needs of these new businesses at governmental expense.

Within 30 months, the employment lost to the community when Smurfit shut down the paper mill had been replaced through the joint efforts of the new owner, local business entities and the City. During 2013, Fabrication Delta determined that their expansion needs would be best served if they acquired the rest of the real estate at the site, completing redevelopment efforts. Demolition and remediation was primarily completed during the three years of ownership, utilizing Canadian companies. The bulk of materials resulting from the demolition were recycled into alternative uses.

Pontiac, Quebec - Smurfit-Stone Container Inc. (now SSPM Pontiac LP)

In January 2010, Smurfit-Stone sold its 2,200 acre pulp mill in Portage-du-Fort, Pontiac County, Quebec, which is located about an hour northwest of the Canadian capital in Ottawa, Ontario. The new owner experienced a similar level of energy and interest from the governmental entities in Pontiac as they had experienced in New Richmond. Minister of Foreign Affairs Lawrence Cannon represented the Pontiac district at the federal level and offered his influence on many occasions to support development of the site. Local county officials were equally supportive, arranging and participating in joint media events that generated significant positive media attention and local good will.

Referrals by local stakeholders of businesses were immediate. By summer of 2010, Trebio Inc. had signed a twenty year lease for a 100,000 square foot warehouse (almost identical to the warehouse in New Richmond leased to Fabrication Delta) for the purpose of installing a 130,000 ton per year, wood energy pellet manufacturing facility. The federal, provincial and local governments as well as private investors committed almost $20 million to this project. Production commenced in the spring of 2011, with direct employment of 160 persons.

Local representatives also referred Amor Construction, which acquired land for the purpose of forming the Pontiac Sorting Center. The primary focus of this business is to take various waste streams and recycle them so that almost nothing goes to the landfill. For example, construction and demolition debris is being recycled such that metals are sorted and processed for the ongoing commodity market, wood is sent to the pellet manufacturer on site, drywall has the paper stripped off and the gypsum is recycled into new drywall, and glass is converted into particles utilized as

aggregate and similar purposes. This company is now in the midst of acquiring the on-site landfill in order to process asbestos and other waste streams.

At present, 10 of the 85 lots that had been originally conceptualized for the site have been leased or sold, allowing ample property for continued development of the industrial campus.

Because of the proximity to the national capital, marketing emphasizes the ability to use the emerging technologies as a showcase for Canadian progress in green energy and recycling technologies.

Missoula Montana - Smurfit-Stone Container, Inc. (now M2Green Redevelopment, LLC)

In early 2011, one more opportunity arose to acquire a 3,200-acre paper mill site near Missoula, Montana. Missoula, one of the largest cities in Montana, is a university town with nearly 100,000 people in the immediate area. It is also considered to be one of the more politically liberal locations in the State. Environmental concerns are actively addressed by a variety of non-governmental organizations (NGOs). One of the local NGOs is the Clark Fork Coalition, whose primary concern is protecting the watershed associated with the Clark Fork River.

The relationship between Smurfit-Stone and some of the local environmental regulators and NGOs had been untrusting and stressed, particularly once the operations at the mill had been shut down in 2010. Some political forces were immediately pushing for a designation of the site as a candidate for listing on the National Priorities List (NPL). Much of this related to the very large size of the property, the fact that hundreds of acres contained water treatment ponds and the fact that the said ponds are adjacent to the four mile shoreline of the property along the Clark Fork River.

The site was acquired in May 2011, using the same basic deal structure with the seller and utilizing financing from a private funding source. A similar ELP had been negotiated for the benefit of the buyer and the seller, both of whom were named as additional insured parties on the policy. Removal and sales of marketable equipment commenced immediately, using local contractors and labor force. In 2012, asbestos abatement and demolition of buildings and assets that did not have reusable value also commenced.

The acquisition of the site included some very interesting water rights totaling 25 million gallons per day of capacity in various uses. This basket of water rights is the largest package of usable rights in the Clark Fork valley and one of the largest in Montana. These rights are also in a closed basin. Because of the large volume of rights, multiple industries and uses that require heavy water access could be accommodated.

Over 870 acres of the 3,200 total acreage has been agricultural in use historically, having never had industrial activities of any kind on these peripheral, but significant parcels. Approximately 205 acres was historically used for the primary industrial purposes of pulp and paper production. Over 400 acres was used for various stages of water treatment, and another 500 acres were water storage ponds. Approximately 1,230 acres is in the 100 year floodplain.

Very quickly after the acquisition in 2011, proposals were forthcoming from local sources for business opportunities involving the manufacture of wind turbines, wind turbine parts and posts, recycling of mining waste streams and similar technologies that could use the industrial infrastructure located on the site. Some of the proposals were from “start-ups”, which would need considerable financial and/or business consulting support from the owner to actually commence production.

Others were evaluating the viability of their business model as they considered the potentially more aggressive permitting environment in the Missoula area.

In late 2012, the prior governor, Brian Schweitzer, sent a letter to the Denver office of Region 8 of the EPA requesting that the site be listed on the NPL. Since that time, the owner has been engaging even more actively with the local community, including business and governmental entities at all levels, in particular the newly-elected Governor, Steve Bullock. Concurrently, additional investigation is being proposed by a voluntary association of the potentially responsible parties (PRPs), which includes the two prior successive owners of historical production companies at the site.

Because of the uncertainty generated by the potential NPL listing of all or a portion of the subject site, development activities have slowed considerably.

The site has many diverse potential uses. There is significant area along the Clark Fork River that could be reserved for walking trails, river access and other park and recreational uses. There are over 400 acres of existing wetlands that already are known for their aviary with regular visits by the Audubon Society. Industrial, commercial and residential opportunities exist simply due to the massive size of the site as well as the existing infrastructure. A large "core" industry could literally have a very green sustainable town built on the site, which would be largely self-contained and environmentally friendly. People who worked for the "core" industry or its supporting businesses also located in the industrial campus would have the opportunity to reside, enjoy recreation and shop without having to leave the present site.

What had been viewed as a contaminated paper mill site is planned to become a sustainable town in which those engaged in the environmentally-friendly movement can live, work and play.

Conclusion

The foregoing examples of real life properties in either completion or various stages of remediation and redevelopment reflect the opportunities as well as the challenges of converting brownfields. The challenges are economic, cultural and political. Each community has separate interests and goals. Most desire that employment be restored while balancing the environmental cleanup and future environmental concerns of the reuse. The entrepreneur is always advised to identify and consult with the local stakeholders to assure their understanding and cooperation. Successful redevelopment will follow with fewer problems if proper due diligence and advance planning is done to assure adequate capital for remediation and development beneficial to the community and profitable to the investors. Through this process, the existence of negative value properties today can result in viable, sustainable reuse for the present and long-term future.

Perhaps, there actually is CPR to resurrect these dead properties from Sheol to new life!