Redeveloping Former Gas Stations

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Former gas station sites are often prime targets for redevelopment. Retail tenants often find former gas station sites suitable for their businesses due to their physical features, since former gas stations are generally situated in high traffic areas, often on corner lots that provide excellent accessibility. Additionally, gas station sites often possess larger curb cuts than a typical street-front property. Existing curb cuts may be grandfathered and eligible for use by the new developer, which is particularly desirable in communities that carefully regulate curb cuts and traffic flow. Upgrading the use of former gas station sites is generally regarded favorably, even in communities with a restrictive attitude toward development. However, numerous legal and environmental issues must be considered in the redevelopment of a former gas station.

Releases of petroleum from underground storage tanks (USTs) present the most significant environmental liability at former gasoline stations. According to the United States Environmental Protection Agency (EPA), 2009 UST Program Facts, approximately 617,000 federally regulated, active USTs are located at an estimated 233,000 sites throughout the country. Additionally, the EPA’s Fiscal Year 2009 Mid-Year Activity Report indicates that more than 1,700,000 USTs in the United States have been closed. Over the past 25 years, more than 482,000 leaking USTs have been reported, and the EPA’s Petroleum Brownfield’s Action Plan estimates that there are approximately 200,000 known petroleum brownfields in the country. In its publication, “Underground Storage Tank Program, 25 Years of Protecting Our Land and Water,” the EPA has estimated that the average cost to fully clean up a release from a leaking UST is approximately $125,000.

As the above numbers demonstrate, the risks and liabilities associated with leaking USTs at former gasoline stations can be extremely high. Older stations utilized bare steel USTs, which would often corrode over time and release petroleum into surrounding soil. Even if the USTs
themselves did not leak, overfills during product deliveries and leaks from piping connecting the USTs to dispenser pumps may have caused significant subsurface soil and groundwater contamination. In fact, dispenser pump islands are often more significant sources of contamination than the USTs—particularly at newer stations with modern, corrosion-resistant USTs. Automobile service bays may provide additional sources of contamination, including leaking used oil tanks and releases from in-ground hydraulic lifts.

Previously unknown “rogue” USTs often are exposed during the redevelopment of properties with a long gasoline station history. In many instances, prior owners and operators simply abandoned unused USTs in place, sometimes filling them with water, sand or concrete. In addition, it is not unusual to encounter abandoned USTs that still contain fuel. These rogue USTs may evade discovery during pre-transaction due diligence studies because of incomplete historic records. Rogue USTs are particularly common in New York City, where earlier City Fire Codes prohibited the storage of motor vehicle fuel in USTs with capacities exceeding 550 gallons. In contrast, the current New York City Fire Code limits motor vehicle USTs to a maximum capacity of 4,000 gallons. Instead of a few large tanks, gasoline was stored in a series of several smaller USTs, with upwards of 20 USTs buried at larger stations. Complicating matters, certain earlier City Fire Codes required the gasoline USTs to be encased in 12 inches of concrete, making removal difficult.

When construction commences at a former gas station, it is not uncommon for the tenant to encounter additional environmental contamination beyond that previously disclosed. Excavation over an entire site may reveal areas of contamination that were not discovered during less invasive, more localized site investigations involving the advancement of soil borings. In addition, even if a site has been extensively investigated and received the applicable federal, state and local regulatory approvals to proceed with redevelopment, the excavation and compaction necessary for the installation of new utility services and the construction of new improvements may lead to the discovery of additional USTs. Many current gas station sites have been used as service stations dating back to World War II or before. Earlier configurations of the service stations may have been very different from what is observable today. It is not uncommon to find USTs under the streets abutting the property, which have been widened over the years. Portions of the sites that appear to be untouched may contain additional USTs and old construction debris, which may present not only an environmental remediation issue but also may render the site geo-technically unsuitable for construction without further preparation. Developers should be prepared for the impact of previously unknown contamination on a project’s costs and schedule. If evidence of previously unknown petroleum releases is encountered during redevelopment activities, the release must be reported to the proper agencies as soon as possible. Some states, such as New York, require the reporting of a release within 2 hours of its discovery, while other states provide 24 hours or more to report the spill. Failure to report the release within the appropriate time frames may result in civil or, in extreme cases, criminal penalties.

Contamination at former gasoline stations typically includes volatile organic
compounds (VOCs) and semi-volatile organic compounds (SVOCs). Additionally, lead is a common contaminant at sites used as a gasoline station between the 1920s and 1970s. While soil contaminated with petroleum is generally a nonhazardous waste, elevated concentrations of lead may make the contaminated soil a hazardous waste. At sites where cleanups were performed in the 1980s that did not follow modern procedures, the concentrations of VOCs in the soil may have significantly decreased due to volatilization (evaporization), but elevated concentrations of lead may remain.

The extent of contamination at a property is dependent upon numerous factors, including the complexities of the geological conditions beneath the site. The porosity of the soil is often a critical factor. The sandy soils of Long Island, NY, for example, allow leaked gasoline to spread faster than stiff clay soils. Man-made subsurface structures, such as utility pipes and electrical conduits, also provide a pathway for contamination to spread.

The types of soil present will also greatly impact the cleanup methods employed at a property. Extensive remedial investigations may be required to determine an effective cleanup, often at a very high cost. Whether the contamination will simply be excavated and transported to a landfill for disposal (dig and haul)—or whether an alternative cleanup technology can be implemented—depends on the geological conditions present at a given property, the applicable zoning code in place and the cleanup standards that the regulatory agency chooses to apply to the site.

While a dig-and-haul remediation is fast and relatively simple, it can be an extremely expensive solution. Dig-and-haul remediation will involve the classification of soils (which is often the subject of state and local regulations, practices and interpretations), the supervision by local inspectors, the identification of a landfill to receive the particular category of excavated soils and the appropriate manifesting to document the removal. Often carting costs can be reduced if the same trucks hauling away the contaminated soil are used to bring in clean backfill; however, this requires careful planning and a sufficient staging area to stockpile soils and keep the earth-moving equipment on-site as the backfill is delivered for the layered compaction of the site.

In contrast, alternative remediation systems may be more cost-effective, especially for deeper contamination; but, they can require several years to clean up a site. Additionally, certain remediation systems may require permits for their operation, including permits for air emissions and/or discharges of treated groundwater. Moreover, the geology is not always uniform across a single property. Even though gasoline stations tend to be relatively small parcels of approximately one-half acre, human development activities and natural variations in soil conditions affect geologic conditions. As a result, multiple remedial methods may be required over a given site to complete a cleanup.

Released petroleum often percolates through the soil column into the underlying groundwater table. The flow of groundwater can then carry the contamination off-site to surrounding properties. The well-publicized gasoline additive known as methyl tert-butyl ether (MTBE) is especially susceptible to off-site migration. Compared to other gasoline constituents, MTBE does not strongly adhere to soil and readily dissolves in water, allowing
MTBE to travel relatively long distances in a short time. In addition to cost considerations, chasing off-site contamination plumes adds layers of liability and other legal issues to the redevelopment of a site, including possible claims for property damages by adjoining property owners. Easements and access agreements with neighboring property owners also may be necessary to install monitoring wells and remediation systems.

Vapor intrusion has recently received significant attention at former gasoline stations. Chemicals present in soil and groundwater may volatilize and move up through the soil column into overlying buildings, contaminating indoor air. For gasoline-contaminated sites, benzene is the major contaminant of concern for vapor intrusion. Soil vapor and indoor air sampling may be required at surrounding properties above a gasoline-contaminated groundwater plume. Additionally, if residual gasoline remains in the soil and groundwater, vapor barriers or mitigation systems may be required to address potential vapor intrusion issues.

Even after a cleanup has been deemed “complete” or “closed” by the appropriate agency, residual contamination sometimes remains in the soil and/or groundwater at a former gasoline station. Agencies employ a “risk-based corrective action” strategy for site cleanup, which identifies cleanup standards that are designed to protect public health and the environment without necessarily requiring that every molecule of contamination be removed. Long-term monitoring may be required to ensure that either concentrations of contamination in groundwater are decreasing naturally over time or that groundwater is not being impacted by overlying contaminated soil. Oversight agencies often require the filing of a restrictive covenant limiting future use of the site in order to assure the protectiveness of the risk-based cleanup.

There is some good news. The federal government and state governments have developed incentive programs to encourage the redevelopment of petroleum-contaminated sites, also known as brownfields. These incentive programs encourage public/private partnerships, which can promote the coordination of regulatory programs, the streamlining of administrative procedures, and a multiparty examination of cleanup solutions and risk-sharing. The EPA and state brownfield programs may offer significant grants, tax credits and/or liability protection to parties that assess, remediate and re-use former gasoline stations that are impacted by petroleum releases. The 2002 federal Brownfields Law requires that 25 percent of the funds appropriated to the EPA for the assessment and cleanup of brownfields be used for petroleum-contaminated sites. Potential opportunities through federal and state programs should be thoroughly investigated prior to redeveloping a former gasoline station.

Liability protection for unknown pre-existing contamination may be provided through a well-drafted environmental indemnity clause in a purchase agreement or a lease. The developer or tenant may seek indemnification from the previous gas station owner or operator for liabilities associated with existing contamination, including a duty to defend against potential claims brought by government or private parties. Additionally, a tenant may seek rent abatements in its lease if remediation is required after taking possession of the property—particularly if the tenant’s development schedule is delayed. Leases should contain the following: precise
language regarding the conditions prior to delivery of possession; the right, but not the obligation, of the tenant to perform independent testing; a mechanism for the return of possession to the landlord if hazardous materials are discovered; and a tolling of the free rent/construction periods during testing, awaiting laboratory results and remediation.

Developers and landlords often have no connection to the environmental condition of the site, having purchased the property from a former gas station operator or a national petroleum company. In such cases, unless the property was bought in a distressed “as-is” sale, the former operator may have granted an indemnity agreement to the new owner. While these indemnification agreements are often highly negotiated, they still may be ambiguous in their interpretation.

When a developer acquires a former gas station site that is also the subject of a remediation agreement between the state and the previous owner or operator, he or she typically continues to be liable for the remediation of the site within the scope of the agreement. In this situation, the purchase agreement will contain an access agreement or an easement entitling the former owner to enter the site to operate and maintain any remediation systems. The current owner must ensure that development and operation of the site will not disrupt the existing remediation systems or prevent the former owner from accessing the property.

A few states, including New Jersey and Connecticut, have laws that impose certain site assessment and cleanup requirements upon the sale, transfer or closure of certain industrial facilities. New Jersey’s Industrial Site Recovery Act (ISRA), published at New Jersey Administrative Code (N.J.A.C.) 7:26B, is famous for the substantial hurdles that it places on the transfer and redevelopment of industrial sites. However, gasoline stations are not included within ISRA’s definition of an “industrial facility” under N.J.A.C. 7:26B-1.4. Therefore, the New Jersey transfer statutes do not significantly impact the redevelopment of former gasoline stations. However, the laws of the particular state in question must be reviewed.

A thorough zoning analysis should be performed prior to redeveloping a former gasoline station. Significant zoning issues may exist, which require a developer to apply for variances, approvals and/or zoning changes—especially at older gas station sites where local zoning ordinances have changed over the years. The zoning process, including site plan review, may take many months to complete and may involve substantial public input.

**Action Points**

*For a Buyer:* An indemnification agreement should be obtained from the former owner/operator. These agreements should anticipate a broad spectrum of future uses and further excavation and site preparation; in addition, they should address, if possible, the needs of future tenants/users. These agreements should not be limited to known issues or be deemed satisfied upon completion of statutorily required governmental approvals; and, they should continue until the site is fully excavated, until new utilities are brought onto the site and until the site is compacted to a condition suitable for future development. In situations where such an indemnification agreement is not available (and even when an indemnification agreement is obtained), purchasers are well advised to budget for the unexpected.
For a Tenant: The tenant should obtain copies of all existing environmental studies and all indemnification agreements. Tenants should not assume any responsibility with respect to existing environmental conditions or for the enforcement of any existing indemnification agreements. Nor should a tenant’s recourse be limited to the landlord’s rights against the prior owners. Even if the tenant is accustomed to performing its own construction from the ground up, serious consideration should be given to requiring the landlord to deliver a fully compacted site, a poured concrete pad and all necessary utilities, pursuant to specifically enumerated specifications—before the tenant accepts possession of the property.

Conclusion
Many former gas stations are located on prime redevelopment sites. However, numerous issues must be investigated to assess the potential pitfalls involved with redeveloping these sites. Developers need to enter the transaction with their eyes open, and be prepared to encounter a variety of environmental and legal complications along the way.

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