

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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HOUSE BILL 1121
Committee Substitute Favorable 5/14/97

Short Title: Brownfields Property Reuse Act.

(Public)

Sponsors:

Referred to:

April 21, 1997

1 A BILL TO BE ENTITLED
2 AN ACT TO PROMOTE THE SAFE REUSE OF PROPERTIES WHERE ACTUAL
3 CONTAMINATION, OR THE POSSIBILITY OF CONTAMINATION, HAS
4 IMPEDED REDEVELOPMENT.

5 The General Assembly of North Carolina enacts:

6 Section 1. Findings. – The General Assembly makes the following findings:

- 7 (1) There are abandoned, idle, and underused properties in North Carolina,
8 often referred to as "brownfields", that may have been or were
9 contaminated by past industrial and commercial activities, but that are
10 attractive locations for redevelopment.
11 (2) The reuse, development, redevelopment, transfer, financing, and other
12 use of brownfields is impaired by the potential liability associated with
13 the risk of contamination.
14 (3) The safe redevelopment of brownfields would benefit the citizens of
15 North Carolina in many ways, including improving the tax base of local
16 government and creating job opportunities for citizens in the vicinity of
17 brownfields.
18 (4) Potential purchasers and developers of brownfields and other parties
19 who have no connection with the contamination of the property,

1 including redevelopment lenders, should be encouraged to provide
2 capital and labor to improve brownfields without undue risk of liability
3 for problems they did not create, so long as the property can be and is
4 made safe for appropriate future use.

- 5 (5) Public and local government involvement in commenting on the safe
6 reuse of brownfields will improve the quality and acceptability of their
7 redevelopment.

8 Section 2. Article 9 of Chapter 130A of the General Statutes is amended by
9 adding a new Part to read:

10 **“PART 5. BROWNFIELDS PROPERTY REUSE ACT.**

11 **“§ 130A-310.30. Short title.**

12 This Part may be cited as the Brownfields Property Reuse Act of 1997.

13 **“§ 130A-310.31. Definitions.**

14 (a) Unless a different meaning is required by the context or unless a different
15 meaning is set out in subsection (b) of this section, the definitions in G.S. 130A-2 and
16 G.S. 130A-310 apply throughout this Part.

17 (b) Unless a different meaning is required by the context:

18 (1) ‘Affiliate’ has the same meaning as in 17 Code of Federal Regulations §
19 240.12b-2 (1 April 1996 Edition).

20 (2) ‘Brownfields agreement’ means an agreement between the Department
21 and a prospective developer that meets the requirements of G.S. 130A-
22 310.32.

23 (3) ‘Brownfields property’ or ‘brownfields site’ means abandoned, idled, or
24 underused property at which expansion or redevelopment is hindered by
25 actual environmental contamination or the possibility of environmental
26 contamination and that is or may be subject to remediation under any
27 State remedial program or under the Comprehensive Environmental
28 Response, Compensation and Liability Act of 1980, as amended (42
29 U.S.C. § 9601 et seq.).

30 (4) ‘Contaminant’ means a regulated substance released into the
31 environment.

32 (5) ‘Local government’ means a town, city, or county.

33 (6) ‘Parent’ has the same meaning as in 17 Code of Federal Regulations §
34 240.12b-2 (1 April 1996 Edition).

35 (7) ‘Person’ means an individual, firm, corporation, association, partnership,
36 consortium, joint venture, commercial entity, authority, nonprofit
37 corporation, interstate body, or other legal entity that is recognized by
38 law as the subject of rights and duties. The term includes the federal
39 government, state governments, political subdivisions, and state
40 instrumentalities.

41 (8) ‘Potentially responsible party’ means a person who is or may be liable
42 for remediation under a remedial program.

- 1 (9) 'Prospective developer' means any person who desires to either buy or
2 sell a brownfields property for the purpose of developing or
3 redeveloping that brownfields property and who did not cause or
4 contribute to the contamination at the brownfields property.
- 5 (10) 'Regulated substance' means a hazardous waste, as defined in G.S.
6 130A-290; a hazardous substance, as defined in G.S. 143-215.77A; oil,
7 as defined in G.S. 143-215.77; or other substance regulated under any
8 remedial program other than Part 2A of Article 21A of Chapter 143 of
9 the General Statutes.
- 10 (11) 'Remedial program' means a program implemented by the Department
11 for the remediation of any contaminant, including the Inactive
12 Hazardous Sites Response Act of 1987 under Part 3 of this Article, the
13 Superfund Program under Part 4 of this Article, and the Oil Pollution
14 and Hazardous Substances Control Act of 1978 under Part 2 of Article
15 21A of Chapter 143 of the General Statutes.
- 16 (12) 'Remediation' means action to clean up, mitigate, correct, abate,
17 minimize, eliminate, control, or prevent the spreading, migration,
18 leaking, leaching, volatilization, spilling, transport, or further release of
19 a contaminant into the environment in order to protect public health or
20 the environment.
- 21 (13) 'Responsible party' means a potentially responsible party that admits
22 liability or is adjudged to be liable for contamination under a remedial
23 program.
- 24 (14) 'Subsidiary' has the same meaning as in 17 Code of Federal Regulations
25 § 240.12b-2 (1 April 1996 Edition).

26 **"§ 130A-310.32. Brownfields agreements.**

27 (a) The Department may, in its discretion, enter into a brownfields agreement with
28 a prospective developer who satisfies the requirements of this section. A prospective
29 developer shall provide the Department with any information necessary to demonstrate
30 that:

- 31 (1) The prospective developer, and any parent, subsidiary, or other affiliate
32 of the prospective developer has substantially complied with:
- 33 a. The terms of any brownfields agreement or similar agreement to
34 which the prospective developer or any parent, subsidiary, or
35 other affiliate of the prospective developer has been a party.
- 36 b. The requirements applicable to any remediation in which the
37 applicant has previously engaged.
- 38 c. Federal and state laws, regulations, and rules for the protection of
39 the environment.
- 40 (2) As a result of the implementation of the brownfields agreement, the
41 brownfields property will be suitable for the uses specified in the
42 agreement while fully protecting human health and the environment.

1 (3) There is a public benefit commensurate with the liability protection
2 afforded under this Part.

3 (4) The prospective developer has or can obtain the financial, managerial,
4 and technical means to fully implement the brownfields agreement and
5 assure the safe use of the brownfields property.

6 (5) The prospective developer has or will comply with all applicable
7 procedural requirements.

8 (b) In negotiating a brownfields agreement, parties may rely on land-use
9 restrictions that will be included in a Notice of Brownfields Property required under G.S.
10 130A-310.35. A brownfields agreement may provide for remediation standards that are
11 based on those land-use restrictions.

12 (c) A brownfields agreement shall specify remediation to be conducted and the
13 desired results of remediation of the brownfields property; guidelines, including
14 parameters, principles, and policies, within which the desired results are to be
15 accomplished; resources that the prospective developer will make available; remediation
16 standards and the times and methods by which remediation is evaluated; and the
17 consequences of achieving or not achieving the desired results.

18 **"§ 130A-310.33. Liability protection.**

19 (a) A prospective developer who enters into a brownfields agreement with the
20 Department and who complies with the brownfields agreement shall not be held liable for
21 remediation of areas of contaminants identified in the brownfields agreement except as
22 specified in the brownfields agreement, so long as the activities conducted on the
23 brownfields property by or under the control or direction of the prospective developer do
24 not increase the risk of harm to public health or the environment. The liability protection
25 provided by this Part applies to all of the following persons to the same extent as to a
26 prospective developer, so long as these persons are not otherwise potentially responsible
27 parties or parents, subsidiaries, or affiliates of potentially responsible parties:

28 (1) Any person under the direction or control of the prospective developer
29 who directs or contracts for remediation or redevelopment of the
30 brownfields property.

31 (2) Any future owner of the brownfields property.

32 (3) A person who develops or occupies the brownfields property.

33 (4) A successor or assign of any person to whom the liability protection in
34 this Part applies.

35 (5) Any lender or fiduciary that provides financing for remediation or
36 redevelopment of the brownfields property.

37 (b) A person who conducts an environmental assessment or transaction screen on a
38 brownfields property and who is not otherwise a potentially responsible party is not a
39 potentially responsible party as a result of conducting the environmental assessment or
40 transaction screen unless that person increases the risk of harm to public health or the
41 environment by failing to exercise due diligence and reasonable care in performing the
42 environmental assessment or transaction screen.

1 (c) A prospective developer who completes the remediation or redevelopment
2 required under a brownfields agreement or other person who receives liability protection
3 under this section shall not be required to undertake additional remediation at the
4 brownfields property unless any of the following apply:

5 (1) The prospective developer knowingly or recklessly provides false
6 information that forms a basis for the brownfields agreement or that is
7 offered to demonstrate compliance with the brownfields agreement.

8 (2) New information indicates the existence of previously unreported
9 contaminants or an area of previously unreported contamination on or
10 associated with the brownfields property. If the brownfields agreement
11 sets maximum concentrations for contaminants, and new information
12 indicates the existence of previously unreported areas of these
13 contaminants, further remediation shall be required only if the areas of
14 previously unreported contaminants raise the risk of the contamination
15 to public health or the environment.

16 (3) The level of risk is unacceptable at or in the vicinity of the brownfields
17 property due to changes in exposure conditions, including (i) a change
18 in land use that increases the probability of exposure to contaminants at
19 the brownfields property (ii) or the failure of remediation to mitigate
20 risks as planned in the brownfields agreement.

21 (4) The Department obtains new information about a contaminant
22 associated with the brownfields property or exposures at or around the
23 brownfields property that raises the risk associated with the brownfields
24 property beyond an acceptable range and in a manner or to a degree not
25 anticipated in the brownfields agreement. Any person whose use,
26 including any change in use, of the brownfields property causes an
27 unacceptable risk may be required by the Department to undertake
28 additional remediation measures under the provisions of this Part.

29 (5) A prospective developer fails to file a timely and proper Notice of
30 Brownfields Development under this Part.

31 (6) The owner of the brownfields property or an agent of the owner violates
32 the land-use restrictions set out in the Notice of Brownfields Property
33 required under G.S. 130A-310.35.

34 **"§ 130A-310.34. Public notice and community involvement.**

35 (a) A prospective developer who desires to enter into a brownfields agreement
36 shall notify the public and the community in which the brownfields property is located of
37 planned remediation and redevelopment activities. The prospective developer shall
38 submit a Notice of Intent to Redevelop a Brownfields Property and a summary of the
39 Notice of Intent to the Department. The Notice of Intent shall provide, to the extent
40 known, a legal description of the location of the brownfields property, a map showing the
41 location of the brownfields property, a description of the contaminants involved and their
42 concentrations in the media of the brownfields property, a description of the intended
43 future use of the brownfields property, any proposed investigation and remediation, and a

1 proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.
2 The summary of the Notice of Intent shall include a statement as to the public availability
3 of the full Notice of Intent. After approval of the Notice of Intent and summary of the
4 Notice of Intent by the Department, the prospective developer shall provide a copy of the
5 Notice of Intent to all local governments having jurisdiction over the brownfields
6 property. The prospective developer shall publish the summary of the Notice of Intent in
7 a newspaper of general circulation serving the area in which the brownfields property is
8 located and shall file a copy of the summary of the Notice of Intent with the Codifier of
9 Rules, who shall publish the summary of the Notice of Intent in the North Carolina
10 Register.

11 (b) Publication of the approved Notice of Intent in the North Carolina Register and
12 a newspaper of general circulation shall begin a public comment period of at least 60
13 days. During the public comment period, members of the public, residents of the
14 community in which the brownfields property is located, and local governments having
15 jurisdiction over the brownfields property may submit comment on the proposed
16 brownfields agreement, including methods and degree of remediation, future land uses,
17 and impact on local employment.

18 (c) Prior to entering into a brownfields agreement, the Department shall take into
19 account the comment received during the comment period. The Department shall
20 incorporate into the brownfields agreement provisions that reflect comment received
21 during the comment period to the extent practical. The Department shall give particular
22 consideration to written comment that is supported by valid scientific and technical
23 information and analysis.

24 **"§ 130A-310.35. Notice of Brownfields Property; land use restrictions in deed.**

25 (a) In order to reduce or eliminate the danger to public health or the environment
26 posed by a brownfields property being addressed under this Part, a prospective developer
27 who desires to enter into a brownfields agreement with the Department shall submit to
28 the Department a proposed Notice of Brownfields Property. A Notice of Brownfields
29 Property shall be entitled 'Notice of Brownfields Property', shall include a survey plat of
30 areas designated by the Department that has been prepared and certified by a professional
31 land surveyor and that meets the requirements of G.S. 47-30, shall include a legal
32 description of the brownfields property that would be sufficient as a description in an
33 instrument of conveyance, and shall identify all of the following:

34 (1) The location and dimensions of the areas of potential environmental
35 concern with respect to permanently surveyed benchmarks.

36 (2) The type, location, and quantity of regulated substances and
37 contaminants known to exist on the brownfields property.

38 (3) Any restrictions on the current or future use of the brownfields property
39 that are necessary or useful to maintain the level of protection
40 appropriate for the designated current or future use of the brownfields
41 property and that are designated in the brownfields agreement. These
42 restrictions may apply to activities on, over, or under the land,
43 including, but not limited to, use of groundwater, building, filling,

1 grading, excavating, and mining. Where a brownfields property
2 encompasses more than one parcel or tract of land, a composite map or
3 plat showing all parcels or tracts may be recorded.

4 (b) After the Department approves and certifies the Notice of Brownfields
5 Property under subsection (a) of this section, a prospective developer who enters into a
6 brownfields agreement with the Department shall file a certified copy of the Notice of
7 Brownfields Property in the register of deeds' office in the county or counties in which
8 the land is located. The prospective developer shall file the Notice of Brownfields
9 Property within 15 days of the prospective developer's receipt of the Department's
10 approval of the notice or the prospective developer's entry into the brownfields
11 agreement, whichever is later.

12 (c) The register of deeds shall record the certified copy of the notice and index it
13 in the grantor index under the names of the owners of the land, and, if different, also
14 under the name of the prospective developer conducting the redevelopment of the
15 brownfields property.

16 (d) When a brownfields property is sold, leased, conveyed, or transferred, the deed
17 or other instrument of transfer shall contain in the description section, in no smaller type
18 than that used in the body of the deed or instrument, a statement that the brownfields
19 property has been classified and, if appropriate, cleaned up as a brownfields property
20 under this Part.

21 (e) A Notice of Brownfields Property filed pursuant to this section may, at the
22 request of the owner of the land, be cancelled by the Secretary after the hazards have
23 been eliminated. If requested in writing by the owner of the land and if the Secretary
24 concurs with the request, the Secretary shall send to the register of deeds of each county
25 where the notice is recorded a statement that the hazards have been eliminated and
26 request that the notice be cancelled of record. The Secretary's statement shall contain the
27 names of the owners of the land as shown in the notice and reference the plat book and
28 page where the notice is recorded. The register of deeds shall record the Secretary's
29 statement in the deed books and index it on the grantor index in the names of the owners
30 of the land as shown in the Notice of Brownfields Property and on the grantee index in
31 the name 'Secretary of Environment, Health, and Natural Resources'. The register of
32 deeds shall make a marginal entry on the Notice of Brownfields Property showing the
33 date of cancellation and the book and page where the Secretary's statement is recorded,
34 and the register of deeds shall sign the entry. If a marginal entry is impracticable because
35 of the method used to record maps and plats, the register of deeds shall not be required to
36 make a marginal entry.

37 (f) Any restriction on the current or future use of the brownfields property filed
38 pursuant to this section shall be enforced by any owner of the land or by any other
39 responsible party. Restrictions may also be enforced by the Department or any unit of
40 local government having jurisdiction over any part of the brownfields property. A
41 restriction shall not be declared unenforceable due to lack of privity of estate or contract,
42 due to lack of benefit to particular land, or due to lack of any property interest in
43 particular land.

1 (g) This section shall apply in lieu of the provisions of G.S. 130A-310.8 for
2 brownfields properties remediated under this Part.

3 **"§ 130A-310.36. Appeals.**

4 A decision by the Department as to whether or not to enter into a brownfields
5 agreement including the terms of any brownfields agreement is reviewable under Article
6 3 of Chapter 150B of the General Statutes.

7 **"§ 130A-310.37. Construction of Part.**

8 (a) This Part is not intended and shall not be construed to:

- 9 (1) Affect the ability of local governments to regulate land development
10 under Article 19 of Chapter 160A of the General Statutes and Article 18
11 of Chapter 153A of the General Statutes. The use of the identified
12 brownfields property and any deed restrictions used as part of a
13 redevelopment plan shall not be inconsistent with local land
14 development controls adopted under those statutes.
- 15 (2) Amend, modify, repeal, or otherwise alter any provision of any remedial
16 program or other provision of this Chapter, Chapter 143 of the General
17 Statutes, or any other provision of law relating to civil and criminal
18 penalties or enforcement actions and remedies available to the
19 Department except as may be provided in a brownfields agreement.
- 20 (3) Prevent or impede the immediate response of the Department or
21 responsible party to an emergency that involves an imminent or actual
22 release of a regulated substance that threatens public health or the
23 environment.
- 24 (4) Relieve a person receiving protection from liability for remediation
25 under this Chapter from any liability for contamination later caused by
26 that person on a brownfields property.
- 27 (5) Affect the ability or authority of any person to seek any relief available
28 against any party who may have liability with respect to the brownfields
29 property, except to compel remediation of the brownfields property
30 other than that required under the brownfields agreement.
- 31 (6) Affect the ability or authority to seek contribution from any person who
32 may have liability with respect to the brownfields property and who did
33 not receive cleanup liability protection under this Part.
- 34 (7) Prevent the State from enforcing specific numerical cleanup standards,
35 monitoring, or compliance requirements specifically required to be
36 enforced by the federal government as a condition to receive program
37 authorization, delegation, primacy, or federal funds.
- 38 (8) Create a defense against the imposition of criminal and civil fines or
39 penalties or administrative penalties otherwise authorized by law and
40 imposed as the result of the illegal disposal of waste or for the pollution
41 of the land, air, or waters of this State on a brownfields property.

1 (9) Relieve a person of any liability for failure to exercise due diligence and
2 reasonable care in performing an environmental assessment or
3 transaction screen.

4 (b) Notwithstanding the provisions of the Tort Claims Act, G.S. 143-291 through
5 G.S. 143-300.1 or any other provision of law waiving the sovereign immunity of the
6 State of North Carolina, the State, its agencies, officers, employees, and agents shall be
7 absolutely immune from any liability in any proceeding for any injury or claim arising
8 from negotiating, entering, monitoring, or enforcing a brownfields agreement or a Notice
9 of Brownfields Property under this Part or any other action implementing this Part.

10 **"§ 130A-310.38. Brownfields Property Reuse Act Implementation Account.**

11 The Brownfields Property Reuse Act Implementation Account is created as a
12 nonreverting interest-bearing account in the Office of the State Treasurer. The Account
13 shall consist of fees collected under G.S. 130A-310.39, moneys appropriated to it by the
14 General Assembly, moneys received from the federal government, moneys contributed
15 by private organizations, and moneys received from any other source. Funds in the
16 Account shall be used by the Department to defray a portion of the costs of implementing
17 this Part.

18 **"§ 130A-310.39. Fees.**

19 (a) The Department shall collect the following fees:

20 (1) A prospective developer who submits a proposed brownfields
21 agreement for review by the Department shall pay a fee of one thousand
22 dollars (\$1,000).

23 (2) A prospective developer who submits a final report certifying
24 completion of remediation under a brownfields agreement shall pay a
25 fee of five hundred dollars (\$500.00).

26 (b) Fees imposed under this section shall be credited to the Brownfields Property
27 Reuse Act Implementation Account.

28 **"§ 130A-310.40. Legislative reports.**

29 The Department shall prepare and submit to the Environmental Review Commission,
30 concurrently with the report on the Inactive Hazardous Sites Response Act of 1987
31 required under G.S. 130A-310.10, an evaluation of the effectiveness of this Part in
32 facilitating the cleanup and reuse of existing industrial and commercial properties. This
33 evaluation shall include any recommendations for additional incentives or changes, if
34 needed, to improve the effectiveness of this Part in addressing such properties. This
35 evaluation shall also include a report on receipts by and expenditures from the
36 Brownfields Property Reuse Act Implementation Account."

37 Section 3. G.S. 130A-26.1(g) is amended by adding two new subdivisions to
38 read:

39 "(5) Provides false information or fails to provide information relevant to a
40 decision by the Department as to whether or not to enter into a
41 brownfields agreement under Part 5 of Article 9 of this Chapter.

42 (6) Provides false information or fails to provide information required by a
43 brownfields agreement under Part 5 of Article 9 of this Chapter."

1 Section 4. G.S. 130A-310.7 is amended by adding the following new
2 subsection to read:

3 "(c) The liability protection under G.S. 130A-310.33 applies to any party who
4 successfully completes a remediation to the current standards of contamination of any site
5 under any remedial program administered by the Department. For purposes of this
6 section, 'remediation to the current standards' means that cleanup and remediation
7 activities at the site comply with standards, guidance, or established methods that have
8 been adopted or published by the Department, either at the time the activities are begun
9 or prior to the completion of those activities. A change in those standards, guidance, or
10 established methods prior to completion of the work at the site shall not preclude such
11 liability protection so long as the party meets these standards, guidance, or established
12 methods in effect at the time the work was begun. Any party eligible for the liability
13 protection under this section may request and receive from the Department a written
14 statement confirming that protection upon completion of the work and payment of the fee
15 required under G.S. 130A-310.39(a)(2)."

16 Section 5. This act shall not be construed to obligate the General Assembly to
17 make any appropriation to implement the provisions of this act. The Department of
18 Environment, Health, and Natural Resources shall implement the provisions of this act
19 from funds otherwise available or appropriated to the Department.

20 Section 6. This act is effective when it becomes law.