

ENVIRONMENTAL LAW UPDATE



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“Clearing Hurdles During Redevelopment and the Site Profile Process” Article

The site profile process is designed to screen for contaminated sites and to ensure that remediation of a site is completed (or at least managed) before redevelopment. Although often considered a routine step, submitting a site profile can have significant implications for the owner of property planning redevelopment, including unexpected investigation, remediation, and construction delays.

It is critical that consultants retained to assist with this process be fully apprised of the various issues that may arise.

Site profiles: When are they triggered?

A person seeking municipal approval for zoning or development of land that the person knows, or reasonably should know, is or was used for “industrial or commercial activity” must provide a site profile to the applicable municipality. ¹ A site profile must also be provided on an application for a permit to remove soil, and on an application for a demolition permit respecting any structure that the person knows, or reasonably should know, was used for industrial or commercial activity.

Schedule 2 of the Contaminated Site Regulation (CSR) includes a list of prescribed “industrial or commercial activity,” which

generally corresponds with operations that have the potential to cause contamination (e.g., chemical manufacturing). However, it also includes sites which have been, or likely have been, contaminated by substances migrating from other properties. Therefore, even innocent owners who are the victims of contaminant migration have an obligation to submit a site profile.

The requirement to provide a site profile is determined based on the owner’s knowledge of the past historical use/activities at the site. The test is both subjective and objective—it is based on the owner’s actual knowledge, but also on what a reasonable person ought to know, requiring some due diligence to be performed by the owner.

If it is determined that a site profile was required but not submitted, this may result in the revocation of past municipal permits issued for redevelopment, which could have serious consequences for the property owner. Penalties could also be imposed.

The “freeze” and “release” provisions

The submission of a site profile triggers a “freeze” on the permit application process, requiring the owner to take steps to obtain a “release.” This, in some circumstances, can entail costly investigation, remediation and pursuit of an instrument from the Ministry.

In the circumstances in which an innocent owner of property impacted by neighbouring contamination is required to take such steps at its expense, the owner will have a cause of action against the polluter under the cost recovery provisions of the Environmental

Management Act.

Duties owed

The applicable municipality and the director owe a number of duties to the owner of the land when processing a site profile, including both procedural and substantive rights. For instance, subsection 7(1) of the CSR provides that once a site profile is received by a director, the director must, within 15 days, notify the municipality and the owner whether or not he or she intends to require a preliminary site investigation or a detailed site investigation. If the director chooses not to order a site investigation, the municipality is no longer prohibited from approving the permit application for the site (i.e., there is a "release"). On the other hand, if an investigation is ordered, the "freeze" remains in effect.

There is little guidance about when a site investigation will be required (and thus, the freeze continues). The owner will look to the consultant in this regard, and it is important that the owner be advised of the discretion afforded to the director in requiring an investigation and that such a decision can be appealed.

Obtaining a release

If the director determines that a site investigation is required as a condition of the release of the permit, it is then up to the consultant, in conjunction with the owner, to obtain the "release."

While further guidance is provided as to when a release is likely to be obtained under different scenarios, these are far from exhaustive and few circumstances fit neatly into the factual parameters of each. This can result in further uncertainty for the owner of the site and, potentially, further delay in redevelopment.

Conclusion

The site profile process can present a

number of hurdles for the owner of a site planning redevelopment. It is important that consultants, often retained to assist in navigating this process, be fully informed of the issues that may arise and the legal rights flowing therefrom.

We hope you found this update useful.

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