

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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HOUSE BILL 1121

Short Title: Brownfields Property Reuse Act.

(Public)

Sponsors: Representatives McComas; Allred, Cansler, and Morris.

Referred to: Environment, if favorable, Appropriations.

April 21, 1997

A BILL TO BE ENTITLED

1 AN ACT TO PROMOTE THE SAFE REUSE OF PROPERTIES WHERE ACTUAL
2 CONTAMINATION, OR THE POSSIBILITY OF CONTAMINATION, HAS
3 IMPEDED REDEVELOPMENT AND TO CREATE THE BROWNFIELDS
4 STUDY COMMISSION.
5

6 The General Assembly of North Carolina enacts:

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

8 (1) There are abandoned, idle, and underused properties in North Carolina,
9 often referred to as "brownfields", that may have been or were
10 contaminated by past industrial and commercial activities, but that are
11 attractive locations for redevelopment.

12 (2) The reuse, development, redevelopment, transfer, financing, and other
13 use of brownfields is impaired by the potential liability associated with
14 the risk of contamination.

15 (3) The safe redevelopment of brownfields would benefit the citizens of
16 North Carolina in many ways, including improving the tax base of local
17 government and creating job opportunities for citizens in the vicinity of
18 brownfields.

19 (4) Potential purchasers and developers of brownfields and other parties
20 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.**

11 **“§ 130A-310.50. Short title.**

12 This Part may be cited as the North Carolina Brownfields Property Reuse Act.

13 **“§ 130A-310.51. Definitions.**

14 (a) Unless a different meaning is required by the context, the definitions in G.S.
15 130A-2 and G.S. 130A-310 apply throughout this Part and, in addition, the following
16 definitions apply throughout this Part and shall control in the event of a conflict between
17 definitions in this Chapter:

- 18 (1) ‘Affiliated’ has the same meaning as provided in G.S. 58-19-5.
19 (2) ‘Brownfield agreement’ means an agreement under this Part that:
20 a. Is between a prospective developer and the Department;
21 b. Provides for cleanup, remediation, or other activities at a
22 brownfields property;
23 c. Ensures the property is made and kept safe for its actual use; and
24 d. Provides liability protection for persons consistent with this Part.
25 (3) ‘Brownfields property’ or ‘brownfields site’ means abandoned, idled, or
26 underused property at which expansion or redevelopment is hindered by
27 actual environmental contamination or the possibility of environmental
28 contamination and that is or may be subject to remediation requirements
29 under any of the State programs designated under Chapter 130A or
30 Chapter 143 of the General Statutes, or under the Comprehensive
31 Environmental Response, Compensation and Liability Act of 1980, as
32 amended (42 U.S.C. § 9601).
33 (4) ‘Contaminant’ means a regulated substance released into the
34 environment.
35 (5) ‘EPA’ means the United States Environmental Protection Agency or its
36 successor agency.
37 (6) ‘Local government’ means a town, city, or county.
38 (7) ‘Person’ means an individual, firm, corporation, association, partnership,
39 consortium, joint venture, commercial entity, authority, nonprofit
40 corporation, interstate body, or other legal entity that is recognized by
41 law as the subject of rights and duties. The term includes the federal
42 government, state governments, political subdivisions, and State
43 instrumentalities.

- 1 (8) 'Potentially responsible party' means a person who is or may be liable
2 for remediation under a remedial program.
- 3 (9) 'Prospective developer' means any person who desires to either buy or
4 sell a brownfield property for the purpose of developing or redeveloping
5 that and who did not cause the contamination at the brownfields
6 property.
- 7 (10) 'Regulated substance' means a hazardous substance or a contaminant
8 regulated under any remedial program.
- 9 (11) 'Remedial program' means a program implemented by the Department
10 for the remediation of any contaminant, including the North Carolina
11 Inactive Hazardous Sites Act in Part 3 of this Article, the North Carolina
12 Superfund Program in Part 4 of this Article, and the Oil Pollution and
13 Hazardous Substances Control Act in Article 21A of Chapter 143 of the
14 General Statutes.
- 15 (12) 'Remediation' means action to clean up, mitigate, correct, abate,
16 minimize, eliminate, control, or prevent the spreading, migration,
17 leaking, leaching, volatilization, spilling, transport, or further release of
18 a contaminant into the environment in order to protect public health or
19 the environment.
- 20 (13) 'Responsible party' means a potentially responsible party that admits
21 liability or is adjudged to be liable for contamination under a remedial
22 program.

23 **"§ 130A-310.52. Liability protection.**

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

- 34 (1) Any person under the direction or control of the prospective developer
35 who directs or contracts for redevelopment or remediation of the
36 property.
- 37 (2) Any future owner of the property.
- 38 (3) A person who develops or occupies the property.
- 39 (4) A successor or assign of any person to whom the liability protection in
40 this part applies.
- 41 (5) Any lender or fiduciary that provides financing for remediation or
42 redevelopment of the property.

1 (b) A person who conducts an environmental assessment or transaction screen on a
2 property is not a person responsible for remediation.

3 A prospective developer who completes the remediation or redevelopment required of
4 the developer pursuant to a brownfields agreement shall not be required to under take
5 additional remediation at the brownfields property unless any one or more of the
6 following apply:

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

10 (2) New information indicates the existence of previously unreported
11 contaminants or an area of previously unreported contamination on or
12 associated with the brownfields property. If the brownfields agreement
13 sets target concentrations for contaminants, and new information
14 indicates the existence of previously unreported areas of these
15 contaminants, further remediation shall be required only if (i) the levels
16 of previously unreported contaminants exceed the contaminant target
17 concentrations set in the brownfields agreement, or (ii) the areas of
18 previously unreported contaminants raise the risk of the contamination
19 to public health or the environment.

20 (3) The level of risk is increased beyond the acceptable risk range at or in
21 the vicinity of the brownfields property due to changes in exposure
22 conditions, such as a change in land use from nonresidential to
23 residential use.

24 (4) The Department obtains new information about a contaminant
25 associated with the property or exposures at or around the property that
26 raises the risk of the property beyond an acceptable range and in a
27 manner or to a degree not anticipated in the brownfields agreement.
28 Any person who changes the use of the brownfields property causing
29 the level of risk to increase beyond this acceptable risk range may be
30 required by the Department to undertake additional remediation
31 measures under the provisions of this Part.

32 (5) The owner fails to file a timely and proper Notice of Brownfields
33 Development under this Part.

34 **"§ 130A-310.54. 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 property is located of planned
37 remediation and redevelopment activities. The prospective developer shall submit a
38 notice of intent to redevelop a brownfields property to the Department that provides, to
39 the extent known, a legal description of the location of the property, a map showing the
40 location of the property, a description of the contaminant or contaminants involved and
41 their concentrations in the media of the property, a description of the intended future use
42 of the property and any proposed investigation and remediation measures. After approval
43 of the notice of intent by the Department, the prospective developer shall provide a copy

1 of the notice to all local governments having jurisdiction over the property and shall
2 publish a summary of the notice of intent in a newspaper of general circulation serving
3 the area in which the property is located. The Department shall publish an
4 acknowledgment noting receipt of the approved notice of intent in the North Carolina
5 Register.

6 (b) Publication of the approved notice of intent in the North Carolina Register and
7 a newspaper of general circulation shall begin a period of public and local government
8 comment during which the public and local government may provide input into the
9 redevelopment plans and remediation plans for the property. The public comment period
10 shall continue for at least 60 days.

11 (c) Prior to entering into a brownfields agreement, the Department shall take into
12 account the views of the community and local government in which the brownfields
13 property is located by incorporating to the extent practicable their written comments on
14 the issues of current or future land use or land use plans, employment needs, and
15 preferences in terms of methods to achieve levels of remediation provided for in the
16 brownfields agreement where such comments are supported by or based on technical
17 information concerning the proposed means of remediation.

18 **"§ 130A-310.55. Land use restrictions in deed; notice.**

19 (a) In order to reduce or eliminate the danger to public health or the environment
20 posed by a property being addressed under this Part, a purchaser of a brownfields
21 property that is not otherwise noted in the chain of title as a property on which
22 contaminants are located shall submit to the Department a survey plat of areas designated
23 by the Department that has been prepared and certified by a professional land surveyor,
24 and entitled 'Notice of Brownfields Property'. The notice shall include a legal
25 description of the property that would be sufficient as a description in an instrument of
26 conveyance, shall meet the requirements of G.S. 47-30 for maps and plats, and shall
27 identify all of the following:

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

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

32 (3) Any restrictions on the current or future use of the property that are
33 necessary or useful to maintain the level of protection appropriate for
34 the designated current or future use of the property and that are
35 designated in the brownfields agreement. These restrictions may apply
36 to activities on, over, or under the land, including, but not limited to,
37 building, filling, grading, excavating, and mining. Where a brownfields
38 property encompasses more than one parcel or tract of land, a composite
39 map or plat showing all parcels or tracts may be recorded.

40 (b) After the Department approves and certifies the notice of brownfields property
41 under subsection (a) of this section, the owner shall file the certified copy of the notice in
42 the register of deeds' office in the county or counties in which the land is located within

1 30 working days of the later of the party's receipt of the Department's approval of the
2 notice.

3 (c) The register of deeds shall record the certified copy of the notice and index it
4 in the grantor index under the names of the owners of the lands, and, if different, also
5 under the name of the person conducting the redevelopment of the property.

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

10 (e) A notice of brownfields property filed pursuant to this section may, at the
11 request of the property owner, be cancelled by the Secretary of Environment, Health, and
12 Natural Resources after the hazards have been eliminated as a result of the remediation
13 work performed and pursuant to receipt of written approval by the Secretary. If
14 requested in writing by the property owner and if the Secretary concurs with the request,
15 the Secretary shall send to the register of deeds of the county where the notice is recorded
16 a statement that the hazards have been eliminated and request that the notice be cancelled
17 of record. The Secretary's statement shall contain the names of the landowners as shown
18 in the notice and reference in the plat book and page where the notice is recorded. The
19 register of deeds shall record the Secretary's statement in the deed books and index it on
20 the grantor index in the name of the landowner as shown in the Notice and on the grantee
21 index in the name 'Secretary of Environment, Health, and Natural Resources'. The
22 register of deeds shall make a marginal entry on the notice showing the date of
23 cancellation and the book and page where the Secretary's statement is recorded, and the
24 register shall sign the entry. If a marginal entry is impracticable because of the method
25 used to record maps and plats, the register of deeds shall not be required to make a
26 marginal entry.

27 (g) Any restriction on the current or future use of the brownfields property filed
28 pursuant to this section shall be enforced by any owner of the property or other
29 responsible party and also may be enforced by the Department or any unit of local
30 government having jurisdiction over any part of the property. A restriction shall not be
31 declared unenforceable due to lack of privity of estate or contract or due to lack of benefit
32 to the particular land.

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

35 **"§ 130A-310.56. Appeals.**

36 A decision by the Department not to enter a brownfields agreement shall be
37 reviewable under the contested case provisions of the North Carolina Administrative
38 Procedure Act, Chapter 150B of the General Statutes.

39 **"§ 130A-310.57. Enforcement.**

40 Any person who knowingly provides false information establishing a property's
41 eligibility for application of this Part or who knowingly omits to provide or falsifies
42 information required by a brownfields agreement shall be guilty of a Class I felony,
43 which may include a fine of fifty thousand dollars (\$50,000) for each separate violation,

1 in addition to any other penalty provided by law. Each day a violation occurs is a
2 separate violation.

3 **§ 130A-310.58. Construction of Part.**

4 (a) This Part does not affect the ability of local governments to regulate land
5 development under Article 19 of Chapter 160A of the General Statutes and Article 18 of
6 Chapter 153A of the General Statutes. The use of the identified brownfields property and
7 any deed restrictions used as part of a redevelopment plan shall not be inconsistent with
8 local land development controls adopted under those statutes.

9 (b) This Part is not intended to nor shall it be construed to:

10 (1) Amend, modify, repeal, or otherwise alter any provision of any remedial
11 program or other provision of this Chapter or Chapter 143 of the
12 General Statutes relating to civil and criminal penalties or enforcement
13 actions and remedies available to the Department, or

14 (2) Amend, modify, repeal, or alter the authority of the Department to take
15 appropriate civil and criminal action under remedial programs, except as
16 provided in a brownfields agreement.

17 (c) The provisions of this Part do not prevent or impede the immediate response of
18 the Department or responsible party to an emergency that involves an imminent or actual
19 release of a regulated substance that threatens public health or the environment.

20 (d) Nothing in this Part relieves a person receiving protection from remediation
21 liability under this Chapter from any liability for contamination later caused by that
22 person on a brownfields property.

23 (e) Except for the performance of further remediation of the property, nothing in
24 this Part affects the ability or authority of any person to seek any relief available against
25 any party who may have liability with respect to the brownfields property. This Part does
26 not affect the ability or authority to seek contribution from any person who may have
27 liability with respect to the property and who did not receive cleanup liability protection
28 under this Part.

29 (f) The provisions of this Part do not prevent the State from enforcing specific
30 numerical cleanup standards, monitoring, or compliance requirements specifically
31 required to be enforced by the federal government as a condition to receive program
32 authorization, delegation, primacy, or federal funds.

33 (g) The provisions of this Part do not create a defense against the imposition of
34 criminal and civil fines or penalties or administrative penalties otherwise authorized by
35 law and imposed as the result of the illegal disposal of waste or for the pollution of the
36 land, air, or waters of this State on a brownfields property.

37 (h) No action or inaction by the State in negotiating, entering, monitoring, or
38 enforcing a brownfields agreement or a notice of brownfields property under this Part
39 shall be deemed a tort or otherwise constitute a waiver of the sovereign immunity of the
40 State.

41 (i) Nothing in this Part relieves a person of any liability for failure to exercise due
42 diligence and reasonable care in performing an environmental assessment or transaction
43 screen.

1 **"§ 130A-310.59. Legislative reports.**

2 Beginning October 1, 1997, and thereafter, concurrently with every report on the
3 Inactive Waste Sites program, the Department shall conduct and submit to the
4 Environmental Review Commission an evaluation of the effectiveness of this Part in
5 facilitating the cleanup and reuse of existing industrial and commercial properties. This
6 evaluation shall include any recommendations for additional incentives or changes, if
7 needed, to improve the effectiveness of this Part in addressing such properties."

8 Section 3. G.S. 130A-310.7 is amended by adding the following new
9 subsection to read:

10 "(c) The liability protection under G.S. 130A-310.52 applies to any party who
11 successfully completes a remediation to the current standards of contamination of any site
12 under any remedial program administered by the Department. For purposes of this
13 section, 'remediation to the current standards' means that cleanup and remediation
14 activities at the site substantially comply with standards, guidance, or established
15 methods that have been adopted or published by the Department or EPA, either at the
16 time the activities are begun or prior to the completion of those activities. A change in
17 those standards, guidance, or established methods prior to completion of the work at the
18 site shall not preclude such liability protection so long as the party meets these standards,
19 guidance, or established methods in effect at the time the work was begun. Any party
20 eligible for the liability protection under this section may request and receive from the
21 Department a written statement confirming that protection upon completion of the work
22 and payment of the fees specified in G.S. 130A-310.69."

23 Section 4. (a) The Brownfields Study Commission is created. The Commission
24 shall be composed of six members. Three members shall be appointed by the Speaker of
25 the House of Representatives: one of whom shall be an environmental engineer who
26 specializes in site remediation, one of whom shall be a developer, one of whom shall be a
27 representative of the North Carolina Citizens for Business and Industry. Three members
28 shall be appointed by the President Pro Tempore of the Senate: one of whom shall be a
29 representative of the State's financial institutions, one of whom shall be a representative
30 of the North Carolina League of Municipalities, one of whom shall be a representative of
31 the organized environmental community. The Secretary of Environment, Health, and
32 Natural Resources shall appoint one ex officio member who shall be an employee of the
33 Department of Environment, Health, and Natural Resources. The Commission shall,
34 with the assistance and support of the Department of Environment, Health, and Natural
35 Resources, study and report to the 1998 Session of the General Assembly and to the
36 Environmental Review Commission, no later than the first day the General Assembly
37 convenes, on all of the following:

- 38 (1) The probable number of sites in North Carolina that meet the EPA
39 definition of a "Brownfield", but are not eligible for brownfields
40 cleanup agreements pursuant to Part 5 of Article 9 of Chapter 130A of
41 the General Statutes, as enacted by Section 2 of this act, and the bases
42 for and effects of extending liability protection to potentially responsible
43 parties who participate in a brownfields cleanup, but who are not

1 provided liability protection by Part 5 of Article 9 of Chapter 130A of
2 the General Statutes, as enacted by Section 2 of this act.

3 (2) The feasibility of extending liability protection to all potentially
4 responsible parties, including any person who caused or contributed to
5 contamination or pollution at a brownfields site.

6 (3) The probable number of sites in North Carolina that are likely eligible
7 as subjects of brownfields cleanup agreements pursuant to Part 5 of
8 Article 9 of Chapter 130A of the General Statutes, as enacted by Section
9 2 of this act.

10 (4) Actions that the State takes to encourage the remediation of all
11 contaminated sites, including providing incentives under North Carolina
12 income taxes, providing incentives under North Carolina franchise
13 taxes, providing for reductions or waivers of real estate taxes, providing
14 grants or low interest loans for use in performing remediation activities,
15 specifying preferred treatment for purposes of receiving economic
16 development incentives and permits for development or operation of
17 any facility or activity at the site, and engaging in other similar
18 legitimate means for the State to take to encourage remediation of these
19 sites.

20 (5) On the basis of experience under Part 5 of Article 9 of Chapter 130A of
21 the General Statutes, as enacted by Section 2 of this act, the resource
22 needs of the Department of Environment, Health, and Natural Resources
23 and the propriety of imposing different or additional constraints on the
24 Department's review of documentation submitted for brownfields
25 cleanup.

26 (6) The need to adopt site-specific, risk-based cleanup standards that can
27 provide alternative bases for remediation of eligible sites.

28 (b) The Speaker of the House of Representatives shall appoint a Chair. The
29 Commission shall meet at least monthly at the call of the Chair. Members appointed to
30 the Commission shall serve until the Commission makes its final report. A vacancy on
31 the Commission shall be filled in the same manner as the original appointment. Upon
32 filing its report, the Commission shall terminate.

33 (c) The Commission may contract for consultant services as provided by G.S. 120-
34 32.02. Upon approval of the Legislative Services Commission, the Legislative
35 Administrative Officer shall assign professional and clerical staff to assist in the work of
36 the Commission. Clerical staff shall be furnished to the Commission through the offices
37 of the House and Senate supervisors of clerks. The Commission may meet in the
38 Legislative Building or the Legislative Office Building upon the approval of the
39 Legislative Services Commission. The Commission, while in the discharge of official
40 duties, may exercise all the powers provided under the provisions of G.S. 120-19 through
41 G.S. 120-19.4.

42 (d) Members of the Commission shall receive per diem, subsistence, and travel
43 allowances as follows:

- 1 (1) Commission members who are also members of the General Assembly,
2 at the rate established in G.S. 120-3.1.
- 3 (2) Commission members who are officials or employees of the State or
4 local government agencies, at the rate established in G.S. 138-6.
- 5 (3) All other Commission members, at the rate established in G.S. 138-5.
- 6 Section 5. There is appropriated from the General Fund to the General
7 Assembly, the sum of fifty thousand dollars (\$50,000) for the 1997-98 fiscal year for the
8 costs of the Brownfields Study Commission, as created in Section 4 of this act,
9 conducting its work under this act.
- 10 Section 6. This act becomes effective July 1, 1997.