

## TRANSACTION COUNSELING AND BROWNFIELDS

Kazmarek Mowrey Cloud Laseter LLP (KMCL) lawyers have engaged and allocated environmental risks in literally thousands of commercial, real estate and lending transactions. We believe our ability to resolve environmental issues in corporate, real estate and associated financing transactions is one of our principal strengths. We work all over the country and in several foreign jurisdictions. We pride ourselves on being practical problem solvers and fight to get the deal done, an attitude that has helped us in salvaging countless deals others dismissed as doomed because of environmental complications. We strongly believe that there is simply no "one size fits all" approach to contaminated property transactions; each situation may demand its own customized solution to create the most value for our client.

Our transactional services include:

- Counseling buyers, seller and lenders on optimum deal structures to limit liability and maximize value;
- Working with sellers to address environmental issues in advance of marketing in order to minimize the impact on price and time to closing;
- Advising buyers of individual properties, bundled transactions and large portfolios regarding cost effective and time efficient methods to value potential environmental risks;
- Hiring consultants and managing due diligence, including, for example, Phase I and II assessments, wetlands and NEPA studies;
- Drafting and negotiating traditional representations and warranties and indemnities, as well as specialty contracts, such as pre- and post-closing escrows and holdbacks for remediation of contaminated properties;
- Evaluating environmental compliance and arranging for timely transfer of a wide variety of permits and licenses;
- Notifying and negotiating with federal, state and local agencies for NFA letters and similar governmental approvals; and
- Obtaining environmental insurance when it makes sense.

KMCL attorneys have literally written the book on the environmental aspects of commercial mortgage-backed securities (CMBS). As exclusive environmental counsel to both servicers and lenders, we have been involved in the environmental assessment, response, and management of thousands of contaminated properties throughout the United States. Our services have included management of technical personnel, environmental compliance cost calculation, development of contractual terms and conditions to address complex environmental problems, and analysis of not only federal but hundreds of state and local environmental laws.

In the specialty area of brownfields redevelopment, KMCL is a recognized leader. We have enrolled and managed the cleanup and closure of contaminated sites under voluntary cleanup and brownfields programs in dozens of jurisdictions. In the process, we maximize opportunities for available liability protections, including perfecting innocent and bona fide prospective purchaser protections.

Of special note, we represented an industrial advocacy organization in passage of the groundbreaking Georgia Voluntary Remediation Program Act of 2009 (VRP), which for the first time brought expedited risk based corrective action to hazardous site cleanups in Georgia. Our attorneys led the legislative drafting effort and were key players in agency and stakeholder negotiations. And we were instrumental in getting the VRP effectively opened for business in April 2010 by adoption of a new and revised application process. We are the first lawyers in Georgia to enroll a client utilizing the new and revised VRP application process.

We also have considerable depth in using environmental insurance products to solve problems in transactions. We have worked both on the placement of environmental insurance and on claims arising under those policies. This experience makes us especially well suited to understand the important differences between buying insurance and actually getting a carrier to pay for an environmental problem. Likewise, KMCL lawyers are also experienced in exploiting less commonly employed cost recovery sources to bridge economic gaps in transactions caused by environmental problems, such as negotiated settlements with liable parties outside the transaction in question and even government assistance to pay for investigation and cleanup.

### Representative Matters

- Environmental counsel for developer of \$2 billion mixed-use project involving legacy environmental issues. Provided comprehensive support services from start to finish, and we are overseeing the post-closing remediation effort to obtain final regulatory closure.
- Currently act as national environmental counsel for special servicers in CMBS transactions and asset managers for distressed property portfolios in which role the firm has managed environmental matters for more than 10,000 properties located throughout the United States.
- Assisted a national real estate company in making a successful bid on a portfolio with nearly six hundred properties under a due diligence window allowing only 90 days. During this effort, we developed a system for rapid assessment and valuation of environmental risks that provided the client with information sufficient to craft a bid with a specific dollar discount for all environmental risks and no environmental contingencies, a feature which proved central in winning the bid.
- Brought in to support environmental due diligence in client's massive divestiture of millions of acres of timberlands, including oil and gas carve-outs, and structuring of complex remediation mechanisms for impacted locations, and innovative carbon sequestration allocations.
- Represented a major corporation in the environmental due diligence and compliance aspects of a \$1 billion acquisition.
- Represented a foreign manufacturing company in the due diligence associated with expanding its operations into the United States through the acquisition of numerous United States plants and facilities. Among the difficulties typical of such acquisitions, this particular transaction involved resolving the transfer of dozens of environmental permits, including permits for facilities whose operations were out of compliance.
- In connection with a combined city and county redevelopment project, managed the environmental due diligence and successfully enrolled the site under the state brownfields program. Negotiated with agency to obtain fast-track NFA determination that allowed the deal to close by year-end deadline.

- Represented independent power producers in connection with environmental and regulatory matters related to the development or acquisition of peaker power plant projects in the Southeast.
- Ongoing regulatory support for a national convenience store/gasoline retail company in real property acquisitions involving USTs and environmental impacts. Successfully negotiated disputed state trust fund reimbursements.
- Environmental representation of international lending and investment institutions in various domestic and international transactions ranging from equity deals and joint ventures to base-load lending work and distressed property workouts. Recently, helped get a difficult retail portfolio financing closed by negotiating a private indemnification agreement with a third-party multinational that operated an adjacent contaminated site.
- Represented a real estate investment company buying one of the first sites ever removed from Georgia's hazardous site inventory in securing environmental insurance to protect against the risk that the state agency might change its mind. When the state did, in fact, change its mind and re-listed the property, we successfully secured coverage under the environmental insurance policy for the costs of defending against both the state claim and a toxic tort claim brought by an adjoining landowner. Several years later, we helped the client sell the property at full fair market value.
- Assisted one of the largest industrial real estate developers in the U.S. with acquisition, development, leasing and disposition of its trucking distribution centers. Recently developed internal leasing protocols for international hazardous materials shippers.
- Represented the seller of a heavily contaminated property located in a historic district, which prevented use of conventional clean up methods. Working with the technical consultants, the team developed a comprehensive clean up and redevelopment strategy that included (1) a renegotiation of applicable clean up standards; (2) development of innovative clean up methods; (3) development of comprehensive set of real estate controls and restrictions that permitted redevelopment of the property in a way that protected human health and the environment; and (4) development of a contractual package with the purchaser that gave it the comfort needed for itself and its lenders. The parcel is now a model for urban redevelopment within the city.
- Ongoing representation of client in the acquisition and resale of several 100-year old closed industrial brownfields sites in Canada and the U.S., including oversight of Phase I and II assessments, structuring and oversight of pre- and post-closing remediation plans, and obtaining pollution liability and cost cap environmental insurance.
- Representation of numerous private and municipal entities in landfill gas transactions, including all aspects of drafting and negotiating offtake, acquisition, and EPC agreements.
- In an especially unusual Brownfield transaction, represented a rapidly growing suburban church land-locked by an abutting city hall property. Directly across the street from the church, however, sat a partially vacant contaminated property mired in receivership both because of the environmental problem and the loss of its anchor tenant. KMCL attorneys helped the church buy the mortgage on the property across the street from a CMBS pool using a limited liability company. Through a complex series of transactions, the church doubled the size of its campus, and the municipal government gained a greatly expanded city hall complex.
- Successfully represented a major convenience store company that sold over 75 locations. Numerous issues arose regarding corrective actions.

- Assisted a Fortune 100 telecommunications company with its more complicated UST sites, especially in connection with preparing the properties for sale, assisting with marketing properties and negotiating the terms of sale. The work has involved supervision of environmental consultants to ensure speedy remediation and compliance with applicable laws and regulations, including trust fund reimbursement requirements. We negotiated environmental indemnities with buyers of the UST sites as well as negotiated the cleanup requirements with environmental regulators.
- Have represented numerous buyers and sellers of gas station/ convenience store and other UST sites across the Southeast, including portfolios involving hundreds of sites. In these transactions, we conduct preliminary environmental due diligence, including review of environmental compliance histories and review of remedial work performed at sites. We evaluate the status of funding of remedial work through environmental insurance and state UST trust funds and negotiate provisions of purchase and sale agreements related to UST issues, including environmental representations and warranties, environmental covenants and complex special environmental indemnity apportioning UST (and other) liabilities between the parties.
- Represented an environmental consulting firm, who in turn represented the seller of a contaminated industrial park. In a negotiated three-way liability transfer agreement, the consultant agreed to assume liability for the property and to perform a clean up pursuant to the state voluntary clean up program. In addition, we negotiated an environmental insurance policy that protects the consultant from the potential for the cost of clean up to exceed current estimates and from third-party liability.
- On behalf of a utility client sued by the current owner of a former site, we orchestrated the acquisition of a defaulted mortgage, foreclosed on the property to determine diminution in value claims and thereby precipitated a settlement. We then managed the clean up of the site to anticipate the redevelopment to include various commercial uses. The client then sold the property subject to restrictive covenants at a price representing a profit over the reacquisition costs.
- A client owned an industrial building that had been used for a dying and weaving facility for approximately 20 years. Facing a long list of stringent environmental requirements, and lacking any viable regulatory alternative, the parties agreed to proceed with the sale of the property without formal Brownfield protection subject to a post-closing remediation agreement under which the client purchased environmental insurance to protect both the buyer and itself from third party claims, and the client agreed to perform whatever clean up was affirmatively required by the government.
- Represented a client in the purchase and lease of dozens of properties for military housing projects, including negotiation and compliance counseling on asbestos and lead-based paint abatement, UST removal, pesticide use and cleanup, stormwater, wetlands and natural resources, and other environmental matters.
- Assisted a real estate company in buying a shopping center that had languished on the hazardous site inventory for approximately eight years and which had been the subject of numerous notices and deficiencies, a consent order, and finally an administrative order. As part of the acquisition, we achieved EPD approval in four weeks of a prospective purchaser corrective action plan, thereby securing a Brownfield limitation of liability.
- Represented the former owner of a site that had been impacted by residues of the client's historical operations, as well as by the remnants of a former municipal incinerator and a railroad.

The site was further complicated because it was underlain by fractured bedrock (making a clean up technically difficult), was adjacent to a river (making possible "ecotoxicity" effects a matter of concern), and was scheduled to be part of a riverfront urban redevelopment project. We overcame all of these obstacles, leading to successful redevelopment.

- On behalf of a "brownfield" purchaser in Georgia, we negotiated the pre-litigation assumption of clean up responsibility on the part of a major chemical company that was one of several potentially responsible parties at the site of a spill of chlorinated solvents. In addition, we assisted the client in submitting an application for a limitation on liability under the state Brownfield law, and counseled on the availability of tax abatement to recoup further costs.
- KMCL attorneys have acted as exclusive outside environmental counsel to a real estate special servicer firm, supervising thousands of due diligence efforts per year for a variety of commercial, industrial, and multi-family properties throughout the United States.