Ordinances and Acquisition: 
Control Your Site, Control Your Future

Darsi Foss
Director, Remediation and Redevelopment, WDNR

Art Harrington
Attorney, Godfrey & Kahn, S.C.
Controlling Your Destiny: Kenosha, WI
Today’s presentation

• Overview of hypothetical
• Share with you what we learned
• Describe what tools worked
• What we would do differently today
Overview of Hypothetical

- Insolvent Paper Company shuts down operations
- Secured lenders have $25M outstanding debt
- 1 million sq. ft. facility operated for over 90 years
- Unknown asbestos and PCB building components
- Estimated value of contents/components - $2 Million
- Paper Company files for Chapter 128 receivership and seeks liquidation
- Receiver wants to solicit contract to conduct an auction for machinery and seek RFP for removing remaining scrap value from building
Issues for Interested Parties

- The City
- The Secured Creditors
- The Receiver
- The DNR
- The Auctioneer
- The Demolition Contractor
The City’s Perspective

• Ensure proper performance by a responsible contractor
• Interest in completion of demolition of all structures in accordance with laws
• Get site ready for future redevelopment at a highest and best use
• Seek cleanup of legacy contamination
DNR/EPA Perspective

• Clean up all legacy contamination under the buildings
• Ensure the buildings are demolished in accordance with applicable environmental laws
• Ensure that equipment is properly decommissioned before removal
• Ensure that there are responsible parties that can fulfill these responsibilities
The Secured Creditors’ View

- Maximize equipment resale
- Maximize scrap value of building components
- Avoid liability for pre-existing contamination
- Exit site as soon as possible to avoid building upkeep expense
- Sell building/land to highest bidder regardless of proposed use
Receiver’s perspective

• Take the least cost provider of auction and demolition contractors
• Maximize value of equipment and scrap values
• Avoid expenses that are not “value added” for the estate
• Minimize contamination liability for estate
• Sell or seek to abandon building/land ASAP to avoid administrative expenses
Auctioneer’s Perspective

- Quick Auction (Time is Money)
- Maximize value of sale of equipment
- Get the equipment out of the building with least removal expense
- Minimize auction expense for licensing/bond/insurance requirements
RFP Demolition Contractor

- Avoid conducting demolition activities that are not “value added”
  - Non-recyclable portions of buildings
  - Activities that create high disposal/reprocessing costs
- Strong financial incentive to remove high value recyclables at front end of the project
- Avoid liability associated with activities that are high risk
  - Asbestos containing
  - PCB impacted building components
  - Removal of foundations and other site barriers
The Perfect Storm for the Public

- Responsible party is insolvent for legacy cleanup
- Valuable equipment sold to the highest bidder
- Buildings are stripped of valuable recyclable components
- Structures containing high risk liability and removal cost remain on the property as legacies for the community if no buyer.
- Secured creditors “walk” from the property relying on the lender liability exemption
- Valueless property remains a ‘dead zone’ for decades
Background: Kenosha Engine Plant

- Over hundred years manufactured autos
- Closed production in October 2010
- As many as 16,000 employees in 1960’s
- 107 acres in downtown Kenosha
- Within a half mile:
  - 3,700 residential-related properties
  - Environmental justice area
  - 2,300 single family homes
  - 8, K-12 schools
Kenosha: Tools to Control Site

- Acquisition agreement
- Access agreement
- Structural Ordinance
- Legal tools, such as bankruptcy proof of claim
- Superior Lien
Acquisition and Access

- Work with owner to gain reasonable access
- Use police powers if necessary
- Inspect interior and exterior of property
- Consider acquisition of site using exemptions
If there is a bankruptcy

- Work with DNR & EPA
- Gain access
- Inspect, with DNR
- File proof of claim
- Use other tools, such as liens and superior liens and salvage ordinance for leverage
Concerns to Address

- Existing equipment and chemicals in building
- Trespass
- Who will operate remediation systems
- Salvage operations and equipment removal
- New waste generation
- Others remove the value and leave the LGU with costly “remains”
Tool Developed: Model Ordinance

- Model Structural Ordinance – RR 989
- For vacated, non-residential structures
- Requires of owner and salvagers:
  - Permit
  - Financial assurance
  - Insurance
  - Standard protocols for salvaging
  - Notices and inspections
  - Reporting
What this prevents – another WI LGU:

- Post 2009, salvagers on foundry property
- Mix elemental mercury with PCBs
- EPA Superfund called in
- $500,000 in cleanup costs for interior
- Windfall lien
Lessons Learned

• Pass structural ordinance - can save you big $
• No company too big to fail
• Many times, acquisition makes sense.
• Form your team: LGU, state, and federal govts.
• LGU: consider hiring on-site inspector for salvage
• Gain access, inspect, and continue to inspect
• If bankruptcy, file proof of claim
• Control your destiny; you are your own best advocate