

Brownfields Redevelopment: Structuring Incentives the Right Way

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INTRODUCTION

As defined by federal law, brownfields are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”¹ The Environmental Protection Agency (EPA) currently estimates that 450,000 such sites may exist in the United States.² EPA does not, however, give that number with much pretense of precision, and some of its other estimates have even put the total as high as 1 million.³

Brownfields encompass a diverse array of properties. The quintessential brownfield is the large urban plot which once hosted some sort of manufacturing or heavy industry, such as the 138-acre Atlantic Steel site near downtown Atlanta.⁴ Yet a significant percentage consists of small properties such as former gas stations or dry cleaners.⁵ Many brownfields are also found in rural areas, where activities such as mining or agricultural processing once took place.⁶

Brownfields redevelopment involves the elimination or mitigation of the site’s contamination and its subsequent return to productive use.⁷ What this process entails

¹ 42 U.S.C. § 9601(39)(A)

² U.S. Environmental Protection Agency, *Brownfields Cleanup and Redevelopment: About Brownfields* (2006), available at <http://www.epa.gov/brownfields/about.htm>.

³ KRIS WERNSTEDT ET AL., *THE BROWNFIELDS PHENOMENON: MUCH ADO ABOUT SOMETHING OR THE TIMING OF THE SHREWD?* 3 (2004).

⁴ *Id.* at 7; SUSAN OPP & SARAH HOLLIS, *CONTAMINATED PROPERTIES: HISTORY, REGULATIONS, AND RESOURCES FOR COMMUNITY MEMBERS* 11 (2005).

⁵ NATIONAL BROWNFIELD ASSOCIATION, *WHAT WORKS: AN ANALYSIS OF STATE BROWNFIELD AND VOLUNTARY CLEANUP PROGRAMS* 2 (2005).

⁶ WERNSTEDT ET AL., *supra* note 3, at 7.

⁷ U.S. Environmental Protection Agency, *supra* note 2.

will, of course, vary tremendously depending on the characteristics of the specific site at issue—such as its size, location, the extent of its contamination, and its intended future use.⁸

Brownfields redevelopment holds considerable promise as a tool for addressing social and environmental problems along with creating opportunities for economic growth. To begin, brownfields redevelopment involves the remediation of polluted properties, which removes and reduces the threats posed by substances hazardous to human and environmental health.⁹ To many, it is also a crucial means of reversing urban and inner city decay—attracting jobs, increasing land values, removing blight, making urban areas more attractive, and easing some communities’ sense of hopeless poverty and despair.¹⁰ To others, brownfields redevelopment also alleviates environmental racism, because, the reasoning goes, the negative externalities associated with brownfields are disproportionately thrust upon people of color, given that brownfields tend to be concentrated in areas where people of color predominate.¹¹ Others prefer to emphasize the economic benefits that brownfields redevelopment can potentially bestow—such as creating new investment opportunities and converting otherwise abandoned or underutilized land into a productive provider of housing and other necessary, often scarce,

⁸ TODD S. DAVIS, *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY* 96-98 (2d ed. 2002)

⁹ OPP & HOLLIS, *supra* note 4, at 1.

¹⁰ Scott Sherman, *Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer’s Pro Forma*, 11 N.Y.U. ENVTL. L. J. 317, 317 (2003); Heidi Gorovitz Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can’t Lure Business to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1078-79 (1999); UNITED STATES CONFERENCE OF MAYORS, *RECYCLING AMERICA’S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT* 13 (2005)

¹¹ WERNSTEDT ET AL., *supra* note 3, at 8; Samara F. Swanston, *Brownfields Cleanup Standards: Consistency with the Principles of Environmental Justice Can Result in Clean Cleanups and Economic Development Too*, 11 FORDHAM ENVTL. L. J. 857, 857 (2000)

services.¹² Finally, from a more policy-oriented perspective, brownfields redevelopment is a vehicle for increasing local tax revenue and controlling urban sprawl, as property values rise and development unfolds in already established urban areas as opposed to undeveloped land on the suburban frontier.¹³

Almost all states, along with the federal government, have created programs offering incentives to those who redevelop brownfields.¹⁴ These programs stem from the assumption that without such incentives brownfield sites will remain abandoned or underutilized, that the incentives are necessary to lure private capital and expertise to otherwise undesirable real estate.¹⁵ They aim, therefore, to craft incentives which offset the additional cleanup costs and legal liability thrust upon the developers who work with contaminated brownfield properties.¹⁶ The programs must, in addition, facilitate functional partnerships between private developers and the public agency or agencies providing the incentives.¹⁷

Currently, brownfields redevelopment is more often than not the primary jurisdiction of state government, although the federal government and many local governments are both highly active as well.¹⁸ For example, in a relatively substantial recent project in Los Angeles, participants included at least five city agencies and four

¹² UNITED STATES CONFERENCE OF MAYORS, *supra* note 10, at 13; Sherman, *supra* note 10, at 317.

¹³ Robertson, *supra* note 10, at 1078-79; Terri L. Carver, *Remediation of Brownfields Under the Colorado Voluntary Cleanup and Redevelopment Act*, 78 DENV. U. L. REV. 1, 27-28 (2000)

¹⁴ Charles Bartsch, *Brownfields State of the States in 2004* (2004), available at http://www.environews.com/Brownfields%20Section/brownfields_sos_2004.htm; Carver, *supra* note 13, at 1.

¹⁵ Sherman, *supra* note 10, at 317, 323.

¹⁶ Sherman, *supra* note 10, at 318

¹⁷ NATIONAL BROWNFIELD ASSOCIATION, *supra* note 5, at 1.

¹⁸ NATIONAL BROWNFIELD ASSOCIATION, *supra* note 5, at 3; Carver, *supra* note 13, at 1; OPP & HOLLIS, *supra* note 4, at 11-12; U.S. Environmental Protection Agency, *Partnering for Progress—Los Angeles' Showcase Community* (2002), available at http://www.epa.gov/brownfields/success/la_showcase.pdf; U.S. Environmental Protection Agency, *Brownfields Redevelopment Re-energizes East Palo Alto* (2002), available at http://www.epa.gov/brownfields/pdf/ss_epalo.pdf.

federal agencies, along with various state agencies and community organizations.¹⁹

While this vast array of participants is admirable, it also produces a considerable amount of unnecessary bureaucracy, inefficiency, and confusion.²⁰ As a result, developers often lose time and money trying to contact and communicate with their far-flung public partners, which, in turn, threatens the viability of brownfields redevelopment projects.²¹

To remedy this problem, brownfields redevelopment programs should be streamlined. Furthermore, cooperation should be institutionalized both amongst participating public agencies as well as between the private developer and the public sector. The necessary first step is transferring primary responsibility for brownfields redevelopment from state government to local, preferably county, government. A county or comparable agency will then be the primary point of access for the developer to the bureaucracy, as well as the location where all actual and potential public sector participants make inquiries, offer advice, and otherwise conduct business. Federal and state governments will by no means have their power usurped under this system, for they will still establish the framework through which local government operates by providing funding, promulgating regulation, and other means.

Part II and Part III of this paper will lay the foundation for the subsequent analysis in Part IV. Part II focuses on the private real estate developer—describing first how developers operate under normal circumstances, and then how brownfields affect that process. Part III will evaluate various incentives offered for brownfields redevelopment. Part IV—the body of the paper—will commence by making a case for local (county) control of brownfields redevelopment programs. Part IV will then analyze three

¹⁹ U.S. Environmental Protection Agency, Los Angeles, *supra* note 18.

²⁰ TODD S. DAVIS, *supra* note 8, at 4.

²¹ *Id.* at 4, 96-98.

hypothetical brownfields sites—a large urban, a small urban, and a rural site—attempting to show, through its discussion of the various incentives best suited to each circumstance, that a mentality of flexibility and creativity is needed in crafting incentives for brownfields redevelopment, because every brownfield is unique and therefore requires its own distinct treatment.

II. THE DEVELOPER

Brownfield redevelopment programs take on a considerable challenge—to make developers invest in sites in which they normally would not.²² Simply put, such programs must offer incentives that will transform an otherwise unattractive development option into a promising and potentially profitable opportunity.²³ In order to do so, the programs must understand their target—the real estate developer. In particular, how does brownfields redevelopment appear from the developer’s perspective? Part II attempts to answer this question by describing how developers normally operate and how dealing with brownfields renders that process more problematic.

A. What Developers Do—In a Nutshell

Developers acquire land and make improvements to it.²⁴ Upon completion of the improvements, developers either sell the land or retain it as an asset that produces cash flow via rents or other means.²⁵ Real estate is often expensive, and when it is it requires substantial investment to acquire and significant effort to sell.²⁶ Consequently, real estate developers must navigate an environment of considerable risk, where expense is high,

²² UNITED STATES CONFERENCE OF MAYORS, *supra* note 10, at 10.

²³ Sherman, *supra* note 10, at 370-71.

²⁴ TODD S. DAVIS, *supra* note 8, at 68-69.

²⁵ *Id.*

²⁶ *Id.* at 68-72.

sale difficult, return on investment delayed, but potential profits large.²⁷ Redevelopment, because it involves so much uncertainty, is an area particularly dominated by concerns of risk management and mitigation.²⁸

Developers, like as all private businessmen, seek to maximize profits. To do so, they must consider three basic figures: the cost of acquiring the property, the investment required for improving the property (including that for any potential liability or other contingent downstream costs), along with the profits reaped either by sale or operation—each of which is ascertained through an evaluation of the basic factors that typically determine the market value of real property.²⁹ These factors include: site location, site accessibility, site configuration, nature of existing buildings, proximity to reliable infrastructure, relevant tax and zoning regulations, utility rates, crime rates, access to markets, access to and cost of labor, and many more.³⁰

B. How Brownfields Affect What Developers Do

The classification of a property as a brownfield is in essence only another factor on the long list of items that affect the market value of real property. It is, however, a very prominent factor—one which often profoundly impacts the costs required to acquire and improve property, as well as the potential profits realized from its subsequent disposition or operation.

A property's classification as a brownfield will reduce acquisition costs—making it cheaper, easier to acquire, and thus presumably more attractive to the developer.³¹ But

²⁷ *Id.*

²⁸ Richard G. Opper, *Managing Risk at Brownfields Sites*, NAT. RESOURCES & ENV'T. 32 (Vol. 20, No. 3, 2006)

²⁹ Robertson, *supra* note 10, at 1091.

³⁰ *Id.* at 1092.

³¹ TODD S. DAVIS, *supra* note 8, at 57-58, 60-62.

developers do not consider these costs in isolation, for brownfield sites also require substantially greater investment for improvements than their counterparts.³² Most of this is associated with detecting and remediating environmental contamination, along with the assumption of any potential liability that may result from harms caused by such contamination in the future.³³

Developers are reluctant to redevelop brownfields because of the extra investment required. According to a 2003 survey conducted by the United States Conference of Mayors (USCM), developers see high cleanup costs, concerns over liability, and the need for environmental assessments as the major obstacles to the redevelopment of brownfields.³⁴ A similar Wisconsin survey revealed that the great majority of developers consider the high cost of cleanup an “important” or “very important” restraint on brownfield redevelopment.³⁵ They trouble developers especially because the nature of the property’s contamination is often extremely difficult to predict.³⁶ Developers thus fear the extent to which such hidden cleanup costs can increase the cost to build and ultimately transform a brownfield site into something marketable.³⁷

Developers also worry about the influence, even after cleanup has been completed, that a property’s former classification as a brownfield may have on its marketability.³⁸ In the eyes of many, there is a general stigma attached to former brownfield sites, along with more specific fears of lingering contamination and the

³² *Id.* at 63, 68-76

³³ *Id.*

³⁴ UNITED STATES CONFERENCE OF MAYORS, *supra* note 10, at 12.

³⁵ WERNSTEDT ET AL., *supra* note 3, at 9.

³⁶ TODD S. DAVIS, *supra* note 8, at 63-65, 72-76.

³⁷ Sherman, *supra* note 10, at 333.

³⁸ *Id.*

potential legal liability associated with it.³⁹ These beliefs help explain why many developers feel that the market disfavors former brownfield sites.⁴⁰ For, if the public does in fact harbor them, the developer will not command the price that might otherwise be obtained upon disposition or operation of the property.⁴¹ Put another way, market aversion to former brownfield sites poses yet another risk that developers must confront and manage.⁴²

III. INCENTIVES FOR BROWNFIELDS REDEVELOPMENT

There are numerous types of incentives for brownfields redevelopment—each of which deploys different tactics designed to shape developer behavior and overcome the obstacles to brownfields redevelopment.⁴³ Each type of incentive, therefore, operates in its own somewhat unique manner.⁴⁴ Part III will analyze several prevalent types of brownfields incentives, which can be divided into four broad categories—liability relief, tax breaks, grants, and regulatory relief.

A. Liability Relief

Brownfields make developers apprehensive, largely due to the specter of unknown, potentially crushing liability looming over the assumption of control over them.⁴⁵ Stated simply, oftentimes no one knows how polluted they are or how much investment remediation will require.⁴⁶ Developers thus fear the uncertainty and the risk

³⁹ Robertson, *supra* note 10, at 1091; Opper, *supra* note 28, at 33.

⁴⁰ Opper, *supra* note 28 at 33; Sherman, *supra* note 10, at 333.

⁴¹ Opper, *supra* note 28 at 33; Sherman, *supra* note 10, at 334.

⁴² Opper, *supra* note 28, at 34.

⁴³ Sherman, *supra* note 10, at 317-18.

⁴⁴ *Id.*

⁴⁵ Robertson, *supra* note 10, at 1088; WERNSTEDT ET AL., *supra* note 3, at 2; UNITED STATES CONFERENCE OF MAYORS, *supra* note 10, at 10. Many blame CERCLA, RCRA, and related state statutes for inadvertently subverting progress towards redeveloping brownfields, because they impose potential liability on those who hold or participate in the management of polluted sites.

⁴⁶ TODD S. DAVIS, *supra* note 8, at 63-65, 72-76.

associated with them, especially the ever-present possibility of being saddled with an enormous cleanup bill.⁴⁷ Developers, consequently, prize predictability when dealing with brownfields, which means, the ability to estimate *ex ante* what costs they will incur and to what extent of liability they will be exposed.⁴⁸ The following incentives—no further action letters, certificates of completion, and covenants not to sue—all seek to provide that treasured predictability.⁴⁹

No further action letter. This certifies that a site has been cleaned up in accordance with applicable standards.⁵⁰ It generally does not offer assurance against future enforcement actions.⁵¹ A no further action letter will, however, often contain a list of conditions, called “reopeners,” only under which the state may require the party responsible for cleanup to perform additional work.⁵² Reopeners are seldom exercised, and in practice only done so for reasons such as fraud, change in land use, or previously unknown contamination.⁵³ Additionally, many states will issue no further action letters that contain a covenant not to sue.⁵⁴

Certificate of completion. This certifies that a site has been cleaned up in accordance with applicable standards.⁵⁵ In most states, it does not provide a bar against

⁴⁷ WERNSTEDT ET AL., *supra* note 3, at 2; Robertson, *supra* note 10, at 1080.

⁴⁸ TODD S. DAVIS, *supra* note 8, at 63-65, 72-76.

⁴⁹ Robertson, *supra* note 10, at 1085.

⁵⁰ MATTHEW BENDER, BROWNFIELDS LAW AND PRACTICE, GLOSSARY OF TERMS 14 (Michael B. Gerrard ed., 2003)

⁵¹ *Id.*

⁵² MATTHEW BENDER, BROWNFIELDS LAW AND PRACTICE, STATE VOLUNTARY CLEANUP PROGRAMS, § 17-6 (Michael B. Gerrard ed., 2003)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ MATTHEW BENDER, *supra* note 50, at GLOSSARY OF TERMS 3.

future enforcement actions.⁵⁶ However, many states will issue a covenant not to sue along with a certificate of completion.⁵⁷

Covenant not to sue. These are given to those who clean up a brownfield consistent with applicable standards.⁵⁸ As opposed to certificates of completion, they also offer protection against future enforcement actions.⁵⁹ However, the protection is generally limited to actions related to the contaminants specifically addressed in the cleanup or known at the time when the cleanup agreement was forged.⁶⁰

Developers prize liability relief.⁶¹ The three forms of liability relief just discussed—no further action letters, certificates of completion, and covenants not to sue—all bring a certain measure of closure to the remediation process, but fall short of providing a complete guarantee that the state, let alone other parties, will not take some future action against the developer for contamination.⁶² Furthermore, the value of these three common forms of liability relief may diminish in the future as the markets for environmental impairment liability (EIL) insurance and “guaranteed fixed price remediation” (GFPR) expand.⁶³ EIL insurance provides protection against environmental liability.⁶⁴ GFPR is a mechanism whereby a third party, for a set price, agrees to assume the cleanup and liability obligations associated with the brownfield site.⁶⁵ Both GFPR

⁵⁶ *Id.*

⁵⁷ MATTHEW BENDER, *supra* note 52, at § 17-6.

⁵⁸ MATTHEW BENDER, *supra* note 50, at GLOSSARY OF TERMS 5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ WERNSTEDT ET AL., *supra* note 3, at 18; ANNA ALBERINI ET AL., POLICIES FOR CLEANUP AND REUSE OF CONTAMINATED SITES: EVIDENCE FROM A SURVEY OF US REAL ESTATE DEVELOPERS 11 (2004).

⁶² MATTHEW BENDER, *supra* note 52, at § 17-5.

⁶³ WERNSTEDT ET AL., *supra* note 3, at 18; Robert J. Gilbert, *Environmental Impairment Insurance: Practical Considerations*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 380 (James B. Witkin ed., 2d ed., 1999).

⁶⁴ Gilbert, *supra* note 63, at 383.

⁶⁵ The Bureau of National Affairs, *Brownfields: Mechanism for Transferring Liability Risk to Third Parties Growing in Popularity*, WASTE CONTROL AND CLEANUP (Vol. 35, No. 46, 2004)

and EIL insurance allow developers to budget a specific, relatively reasonable amount for environmental liability, in effect eliminating the risk that unforeseen contamination will drive the redevelopment project into insolvency.⁶⁶ They also allow developers to reduce uncertainties at an earlier point, often before cleanup, when the unknowns, and consequently the risk of catastrophic liability, are greatest.⁶⁷ No further action letters, certificates of completion, and covenants not to sue, on the contrary, are typically granted once the developer completes remediation—a point by which uncertainty and risk have fallen dramatically.⁶⁸

B. Tax Breaks

Both state and federal government attempt to assist remediation efforts by offering tax incentives for brownfield redevelopment.⁶⁹ These incentives seek to off-set the extra costs associated with assessing and cleaning up hazardous substances, pollutants, and contaminants.⁷⁰ To most observers, the redevelopment of brownfields is emphatically in the public interest—a conviction which justifies the allocation of taxpayer money towards it.⁷¹ The following few paragraphs will discuss two prominent tax incentives for brownfields redevelopment.

IRC Section 198. As a general rule, a taxpayer may deduct from gross income the ordinary expenses incurred in the operation of his or her business, whereas the taxpayer cannot deduct from gross income capital expenditures, which are costs incurred for

⁶⁶ Gilbert, *supra* note 63, at 382-83.

⁶⁷ Sherman, *supra* note 10, at 332.

⁶⁸ *Id.*

⁶⁹ Kashif Haque, *Internal Revenue Code Section 198, The Tax Incentive for Brownfield Redevelopment: A Sheep in Wolf's Clothing*, 8 WASH. U. J. L. & POL'Y 371, 371, 378 (2002)

⁷⁰ Sherman, *supra* note 10, at 345.

⁷¹ WERNSTEDT ET AL., *supra* note 3, at 1-2; Robertson, *supra* note 10, at 1095-96.

permanent improvements that increase the value of property.⁷² When a capital expenditure increases the value of land, the taxpayer adds the value of the expenditure to his or her basis, thereby recovering its cost not immediately, as with ordinary expenses, but later, upon a disposition of the property.⁷³ The result is that the taxpayer's recovery shrinks somewhat, due to factors such as inflation as well as the time value of money.⁷⁴

Historically, how taxpayers were to treat environmental remediation expenditures was a source of some controversy.⁷⁵ Some authority suggested they were supposed to capitalize such expenses while other authority permitted the deduction of them.⁷⁶ Internal Revenue Code Section 198, enacted in 1997, eliminated all uncertainty by permitting taxpayers, at their election to deduct, instead of capitalize, expenditures on environmental remediation.⁷⁷ The intended effect is dual: first, to accelerate the deduction, and second, to offer a tax advantage meant to immediately offset cleanup costs.⁷⁸

Property tax abatement. Typically, the owner of a piece of real property must pay a percentage of the value of the property annually as a property tax.⁷⁹ Certain state statutes provide for a property tax abatement which reduces or in some cases eliminates the property tax assessed against a brownfield site subject to redevelopment.⁸⁰ The property tax abatement shares a common goal with the other tax incentive discussed

⁷² Kashif Haque, *supra* note 69, at 379-80; 26 U.S.C. § 263; 26 U.S.C. § 162(a).

⁷³ *Id.*

⁷⁴ Stephen F. Tucker & Kathleen M. Curtis, *Tax Aspects of Environmental Matters*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 391 (James B. Witkin ed., 3d ed., 2004).

⁷⁵ Kashif Haque, *supra* note 69, at 383; Sherman, *supra* note 10, at 344.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Sherman, *supra* note 10, at 344-45, 361.

⁷⁹ *Id.* at 339.

⁸⁰ *Id.*

above—to minimize the financial burden of brownfield redevelopment.⁸¹ Each incentive aims, in its own manner, to offset the additional costs of environmental remediation by reducing the developer’s operating expenses and consequently increasing his or her net operating income.⁸²

Property tax abatements also possess a more precise justification. Due to remediation and redevelopment, a brownfield site’s assessed value for property tax purposes may increase dramatically even before the developer has reduced the contamination to an acceptable level.⁸³ Property tax increases based on that higher assessed value may overburden the developer’s cash flow in the midst of the cleanup effort—a sensitive period where the property produces little or no income.⁸⁴ The property tax abatement, therefore, improves the project’s viability during its embryonic stages, providing the developer with a time cushion during which he or she can devote resources to improving the property instead of paying taxes.⁸⁵

C. Grants and Loans

Many state and federal programs also seek to aid remediation efforts through grants and low-interest loans for brownfield redevelopment.⁸⁶ The rationale justifying these programs essentially mimics that of tax incentives—to promote brownfields redevelopment by neutralizing the extra costs associated with it.⁸⁷ However, while tax breaks only compensate the developer for such costs indirectly and generally, grants and

⁸¹ *Id.* at 336.

⁸² *Id.* at 348.

⁸³ *Id.* at 336.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 338.

⁸⁷ *Id.* at 336.

loans aim to bankroll the specific extra expenses incurred as a consequence of the property's status as a brownfield site.⁸⁸

Low-interest loans. Some states may offer low interest loans for brownfield redevelopment.⁸⁹ These programs seek to neutralize the high costs that developers dealing with brownfields projects face when trying to obtain capital from lending institutions.⁹⁰ Those developers who qualify for such low-interest loans in effect lower their costs by reducing their debt service levels.⁹¹ The result, just as with the property tax abatement, is to offset the additional costs of brownfield remediation by reducing the developer's operating expenses.

Bonds. In some states, bonds may be floated to provide funds for brownfield redevelopment.⁹² Bonds operate in a manner similar to low-interest loans, by providing relatively inexpensive financing for brownfields redevelopment projects.

Other states allow for a bonding method called tax increment financing, where a bond is floated by the local government, and then increases in property tax revenues generated by the redevelopment are used to finance the bond debt.⁹³ The underlying rationale is that the redevelopment project deserves the increased property tax revenues, because, in its absence, the property tax revenues would have remained stagnant.⁹⁴

Grants for environmental assessment. Some state brownfields programs may provide for grants funding environmental assessments, during which qualified experts determine the extent and nature of the property's contamination before any construction

⁸⁸ *Id.*

⁸⁹ *Id.* at 338.

⁹⁰ *Id.* at 332. Costs are higher because there is greater risk involved with brownfields redevelopment than with uncontaminated sites.

⁹¹ *Id.* at 351.

⁹² WERNSTEDT ET AL., *supra* note 3, at 19.

⁹³ WILLIAM FULTON, *GUIDE TO CALIFORNIA PLANNING* 253 (2d ed., 1999)

⁹⁴ *Id.*

is undertaken.⁹⁵ These grants lessen the initial up front costs required to redevelop brownfields.⁹⁶

While developers in general welcome any subsidy that will positively impact their bottom line, many consider the reimbursement of the cost of a preliminary environmental assessment more important than other subsidies, because it is just as valuable even when the redevelopment project is discontinued.⁹⁷

Additionally, oftentimes brownfield sites branded with the stigma of contamination in reality have none or only nominal levels of it.⁹⁸ The developer learns this only as a result of the initial environmental assessment.⁹⁹ Therefore, the environmental assessment can even often spark interest in a site, by revealing that the site is not afflicted by contamination and is actually a fine investment opportunity.¹⁰⁰ This, in turn, reduces the need for other, more expensive, incentives.¹⁰¹

Grants for remediation, acquisition, and renovation. Grants for the remediation, acquisition, and renovation of brownfield sites in effect are tantamount to an equity contribution to the developer's project.¹⁰² This means, in turn, that the developer will carry less debt, which translates into lower annual debt service and a greater rate of return.¹⁰³

The relative value of grants for remediation will depend on how the markets for environmental impairment liability insurance (EIL) and guaranteed fixed-price

⁹⁵ Sherman, *supra* note 10, at 349.

⁹⁶ *Id.*

⁹⁷ ANNA ALBERINI ET AL., *supra* note 61, at 2, 11.

⁹⁸ OPP & HOLLIS, *supra* note 4, at 14.

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 14-15.

¹⁰¹ *Id.*

¹⁰² Sherman, *supra* note 10, at 351.

¹⁰³ *Id.*

remediation (GFPR) develop. EIL and GFPR both allow the developer, for a set price, to enter into a contract in which an insurance company (EIL) or a third-party (GFPR) agrees to assume the cleanup obligations associated with the site.¹⁰⁴ If these arrangements become popular and cost-effective, then the significance of grants for remediation will likely decline, or, foreseeably, they could be replaced by grants equal to the payment of EIL insurance premiums or GFPR contract fees.

D. Regulatory Relief

Developers often complain about the difficulties they encounter when confronting the regulatory bureaucracy.¹⁰⁵ The process of securing agency approval for projects, acquiring permits, and the like is often laden with delays, red tape, and other headaches and inefficiencies.¹⁰⁶ The following are examples of various approaches taken to ease this regulatory burden for those dealing with brownfield redevelopment.

Tiered Remediation Standards. Many states have created tiered remediation standards for brownfield sites, which allow certain properties to be decontaminated to a lesser extent than would otherwise be allowed.¹⁰⁷ The remediation standards vary primarily according to the intended future use of the land, but also according to other factors, such as risk to human health, potential damage to the environment, and technological feasibility.¹⁰⁸ For example, sites earmarked for future residential use would require more stringent cleanup standards than sites intended for industrial or commercial use.¹⁰⁹ The goal is to establish remediation standards strict enough to make properties

¹⁰⁴ The Bureau of National Affairs, *supra* note 65; Gilbert, *supra* note 63, at 380.

¹⁰⁵ TODD S. DAVIS, *supra* note 8, at 11-13.

¹⁰⁶ *Id.*

¹⁰⁷ Robertson, *supra* note 10, at 1101, 1104.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1105; WERNSTEDT ET AL., *supra* note 3, at 3.

safe for their designated future use, but nothing beyond that—such that brownfield remediation is satisfactory, but not unreasonably expensive.¹¹⁰

Engineering Controls. Engineering controls involve the construction of physical barriers to human exposure to a hazardous substance, pollutant, or contaminant.¹¹¹ These involve techniques such as capping, paving, point of use treatment, and slurry walls.¹¹² In the brownfields redevelopment context, some engineering controls prohibited elsewhere may be permissible.¹¹³

Procedural Relief. Developers and others subject to government regulation often complain about the vagaries and burdens of regulatory procedure.¹¹⁴ Some brownfield programs, in response to this concern, offer developers various forms of procedural relief. For example, some waive the mandatory public hearing that a developer often must hold.¹¹⁵ Public hearings, in the eyes of some, often result in requirements that cut profit margins or retard real estate deals.¹¹⁶ Other states offer a sort of fast-track service, through which they dole increased regulatory attention on brownfields developers—essentially guaranteeing timely responses and the avoidance of costly delays for those involved with brownfields projects.¹¹⁷ Finally, some states delegate regulatory functions such as monitoring and oversight to licensed consultants.¹¹⁸

¹¹⁰ Robertson, *supra* note 10, at 1104.

¹¹¹ *Id.* at 1101.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ TODD S. DAVIS, *supra* note 8, at 11-13.

¹¹⁵ ANNA ALBERINI ET AL., *supra* note 61, at 9, 11.

¹¹⁶ WERNSTEDT ET AL., *supra* note 3, at 12.

¹¹⁷ NATIONAL BROWNFIELD ASSOCIATION, *supra* note 5, at 3.

¹¹⁸ WERNSTEDT ET AL., *supra* note 3, at 3.

PART IV: A FEW PROPOSALS

It may be cliché to say that each piece of real estate is unique, but it is nonetheless accurate. The same axiom applies with equal force to brownfields—it holds that no two brownfield sites are identical. It would, in turn, make little sense to adopt some ironclad formula for brownfield redevelopment and to apply it uniformly in all situations without sensitivity to the particularities of each brownfield site.

This paper therefore argues for a flexible approach to conceiving incentives for brownfields redevelopment. Brownfields incentives must be crafted with the characteristics of a specific site in mind, for what triggers redevelopment at one property may be ill-suited to do so elsewhere. One must understand how each brownfield incentive operates, and then use it in a manner befitting the nature of and the goals for the site at issue.

That determination is best made by local, preferably county, governments. Local governments know the properties at issue and the character of their neighborhoods better than their state and federal counterparts. They are impacted most profoundly by whether or not, or the manner in which, the brownfield site is rebuilt, because they will deal more directly than anyone else with the consequences. They also have the greatest financial stake in brownfields redevelopment projects—because, where state and federal governments typically allocate money towards the brownfields projects and move on, local governments can potentially benefit through increased tax revenue, as well as through the other positive consequences of redevelopment, such as job creation and general economic growth.¹¹⁹ Further, the redevelopment of a brownfield is in essence a

¹¹⁹ OPP & HOLLIS, *supra* note 4, at 1.

real estate deal, and local governments are best suited to such matters because they have the most experience with such them.¹²⁰

A. What the Brownfields Infrastructure Should Look Like

Each county in the United States should contain its own brownfields office. These offices should become the point of access for anyone interested in any manner in a brownfields redevelopment project. Developers looking to present their visions for transforming contaminated properties into productive sites, state regulators checking for compliance with statutory cleanup guidelines, federal officials seeking promising destinations for federal grant money, community groups hoping to have their voices heard, and anyone else with any stake in a brownfield redevelopment project should be able to contact the local county brownfields office and conduct the business that they must. This county-based system will bring efficiency and simplicity to the process of brownfields redevelopment.

Already, several ad hoc brownfields committees have been created that are similar in function to the county offices advocated for above.¹²¹ In Atlanta's Atlantic Steel redevelopment, the City of Atlanta took the lead in negotiating with the various organizations and entities involved—the Georgia Environmental Protection Division, the federal EPA, local neighborhood groups, developers, and many others.¹²² In East Palo Alto, a economically depressed city located 30 miles south of San Francisco, the so-called Ravenswood Industrial Brownfields Stakeholders Group, composed of, among others, residents, business owners, property owners, and regional experts, conducted

¹²⁰ WERNSTEDT ET AL., *supra* note 3, at 2.

¹²¹ OPP & HOLLIS, *supra* note 4, at 11-12; U.S. Environmental Protection Agency, East Palo Alto, *supra* note 18.

¹²² OPP & HOLLIS, *supra* note 4, at 12.

research, disseminated information, and made recommendations for the redevelopment.¹²³ Both the Atlanta and the East Palo Alto projects were considered great successes.¹²⁴ The point of using them as examples is to show that local control is an important, almost necessary, ingredient in the redevelopment of brownfields sites. By creating local (county) brownfields offices, local control will be institutionalized and will benefit all brownfields redevelopment projects.

B. What Brownfields Redevelopment Incentives Are Best

Each county brownfields redevelopment office should possess the capacity and the discretion to deploy any combination of the incentives discussed in Part III. They should be bounded only by the limited resources that they will undoubtedly be saddled with, along with whatever obligations state and federal regulations impose upon them. But which incentives, if any, should the county offices prefer? That, the remainder of the paper will seek to establish, shall depend on the circumstances. The following few pages will analyze three hypothetical brownfield properties—an old downtown steel mill, a former corner dry cleaners, and an abandoned rural mining facility—seeking to show that each brownfields project deserves its own unique treatment. Each county brownfields office should, as a result, approach brownfields redevelopment projects with a mentality of flexibility and creativity, seeking to apply the combination of incentives which would be most cost-effective in luring developers to brownfields sites.

The Old Downtown Steel Mill. A classic example of this type of brownfield is the 138-acre former Atlantic Steel Company site in downtown Atlanta.¹²⁵ First founded in

¹²³ U.S. Environmental Protection Agency, East Palo Alto, *supra* note 18.

¹²⁴ OPP & HOLLIS, *supra* note 4, at 11-12; U.S. Environmental Protection Agency, East Palo Alto, *supra* note 18.

¹²⁵ OPP & HOLLIS, *supra* note 4, at 11.

1901, by World War II Atlantic Steel produced over 700,000 tons of steel a year and employed more people than anyplace else in Georgia.¹²⁶ But in the early 1980s dust waste caused by the plant's electric air furnace resulted in a RCRA closure, and in 1998 all manufacturing operations on the site ceased permanently.¹²⁷

A development company purchased the Atlantic Steel property in 1998 and soon thereafter performed detailed site assessments and demolished most of the structures on the 138 acres.¹²⁸ The assessments revealed contamination in the site's soil and groundwater.¹²⁹ Groups such as the Georgia Environmental Protection Division, Atlanta City officials, neighborhood groups, realtors, and the developer discussed the site's future at a series of public meetings.¹³⁰

Engineering controls were installed to prevent the escape of contaminated groundwater, then to treat the water and direct it to the Atlanta sewer system.¹³¹ Also, remediation involved the removal of over 20,000 truckloads of contaminated soil from the site and the reduction of contamination levels to "background," meaning, the level naturally present at any site.¹³² The total bill for the remediation cost \$10 million.¹³³

Incentives granted for the redevelopment of the Atlantic Steel site included a "no further action" letter which declared the site clean and released the developer from all future liability.¹³⁴ Additionally, the Atlanta Development Authority issued \$85 million in bonds backed by a tax increment financing scheme, which were applied towards site

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 11-12.

¹³³ *Id.* at 12.

¹³⁴ *Id.*

cleanup and new infrastructure.¹³⁵ Increased tax revenues from rising property values and increased sales would be used to finance the bond payments.¹³⁶

Sites such as Atlantic Steel possess several dominant characteristics. First, their size, which enables the construction of a large, integrated development that can possess many buildings with multiple uses. Next, their proximity to downtown means that they are located in the midst of a compact urban environment, which, in turn, should enable the sites to support dense, multi-story development. Their proximity to downtown might simultaneously equal proximity to poverty-stricken, crime-ridden neighborhoods. However, while this concern is no doubt legitimate, developments such as Atlantic Steel, because of their sheer size, possess a power to transform their surroundings, or at the very least to insulate themselves from them.

Which incentives work best on large, centrally-located sites such as Atlantic Steel? To begin, such projects are quite expensive in all regards—in terms of acquisition, remediation, as well as construction of the end product. Acquisition costs are high because of the property's size and central location.¹³⁷ Remediation costs are high because of the property's size, of course, and because of its often serious level of contamination. Construction costs are high because redevelopment typically involves building inherently expensive structures such as condominium complexes, office buildings, and shopping centers.

Given the magnitude of the costs associated with the redevelopment of large, centrally-located brownfields, grants for assessment, remediation, and acquisition will not

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 11. The 138-acre Atlantic Steel site was purchased in 1998 by Jacoby Development for \$79 million, and that was in the relatively inexpensive Atlanta real estate market.

likely play a significant role, unless, somehow, a state or the federal government has allocated millions of dollars towards the redevelopment of a certain high-profile, politically-sensitive project, or in the situation where site assessment or remediation is a relative bargain. Otherwise there will not be enough grant money available to even make a dent in the total anticipated budget for site assessment, remediation, or acquisition.

Therefore, because such an extensive investment is required, a bond is the best financial incentive for a large redevelopment project such as Atlantic Steel. Bonds enable the issuer to raise substantial amounts of capital, and a typical large redevelopment project will require financing at least in the neighborhood of \$100 million.¹³⁸ Possibly the bond could even be backed by some sort of tax increment financing scheme, where increased property tax revenues brought in by rising land values are applied towards servicing the bond payments. Tax increment financing might be particularly preferable in situations where: heavy investment in infrastructure is required, property values are almost certain to increase substantially, and possibly the developer needs some additional incentive to undertake the entire project. Finally, financing a large scale project could always involve some combination of conventional bonds, tax increment financing, and possibly even some other financial incentive, such as a low-interest loan. Again, the focus should be on creativity and flexibility—deploying the available resources in the most advantageous, cost-effective manner possible.

What other incentives would make sense in the context of a large, centrally-located redevelopment project? A property tax abatement might be appealing to the developer. Most property tax abatements with respect to brownfields phase out over the course of a few years—possibly offering a full property tax rebate in year one, then a

¹³⁸ *Id.*

75% discount in year two, 50% in year three, a 25% discount in year four, and no discount at all in year five.¹³⁹ The value of the property, once the redevelopment process begins, will likely increase dramatically well before it becomes ready to market to purchasers or lessees. Therefore, the developer could benefit considerably from being relieved of his or her property tax burden during the early years of the project, especially considering that the property tax bill for a large site like Atlantic Steel could climb well over \$1 million per year. However, if a tax increment financing scheme is employed, the city, county, redevelopment agency, or whoever the bond issuer is must ensure that the property tax abatement, if any, does not jeopardize the servicing of the tax increment finance bonds. That means, the property tax abatement cannot be generous enough to threaten the flow of funds necessary to satisfy the bondholders.

Some form of liability relief will also appeal to the developer in this situation. As with the Atlantic Steel project, the developer should receive a no further action letter with a covenant not to sue, or some comparable alternative, upon the completion of a satisfactory cleanup. The covenant not to sue, however, will only shield the developer from future state cleanup actions, not from private lawsuits.¹⁴⁰ Therefore, considering the quantity of people who will likely use the development after construction is completed, the developer might want to purchase some form of EIL insurance. As an incentive, the government could pay all or part of the premium on an EIL insurance policy intended to protect the developer from future lawsuits brought by private third parties.

Finally, in terms of incentives that should not be offered in the context of a large, centrally-located brownfields redevelopment project, waiving the public hearing

¹³⁹ Sherman, *supra* note 10, at 339.

¹⁴⁰ MATTHEW BENDER, *supra* note 50, at GLOSSARY OF TERMS 5.

requirement or allowing for tiered remediation standards and engineering controls would likely be a mistake. With respect to the public hearing, the future of large, centrally-located developments is a topic of great public concern. Thus, openness and input from a broad range of sources are valued commodities here. Furthermore, an enormous project like Atlantic Steel will cost a considerable amount and take many years regardless of whether the public hearing is waived or not, so holding it will not cause unnecessary delays or otherwise cause a detriment material to the progress of the redevelopment effort. Engineering controls or tiered remediation standards will likewise be undesirable in this context, provided that the site's contamination level, geology, drainage, soil type, and such are not particularly amenable to them. Given that there will likely be residential units contained within the development, tiered remediation standards might be unavailable irrespective of whether or not they are desirable.¹⁴¹ Additionally, with a property as large as Atlantic Steel, with as much potential to cause harm through the unforeseen consequences of its contamination, it is usually within the interest of public health and safety to clean the property to background.¹⁴²

The Corner Dry Cleaners. A site like a former corner dry cleaners will possess several general characteristics, such as its small size, its urban location, and its often relatively low levels of contamination.¹⁴³ In fact, some sites like this possess none or only nominal contamination, for while the stigma surrounding them prevents investment, they are in reality wonderful investment and development opportunities.¹⁴⁴

¹⁴¹ Robertson, *supra* note 10, at 1101, 1104, 1105; WERNSTEDT ET AL., *supra* note 3, at 3.

¹⁴² MATTHEW BENDER, *supra* note 50, at GLOSSARY OF TERMS 3.

¹⁴³ OPP & HOLLIS, *supra* note 4, at 13-14.

¹⁴⁴ *Id.* at 14; Robertson, *supra* note 10, at 1090.

Because the capital investment required to assess, remediate, and acquire relatively small brownfields such as former dry cleaning facilities is relatively low, financing incentives such as grants and low-interest loans begin to play a much more useful role than bonds. In particular, grants for assessment would be particularly valuable, given that oftentimes a site assessment reveals that a site contains little or no contamination. Also, grants for assessment would be inexpensive for a small site, so they should be a favored incentive in this context.

Grants and low-interest loans for remediation might also be considered. Lack of clean up funds is often perceived as one of the major deterrents in this area, so providing them may be a major means of spurring the redevelopment of brownfields.¹⁴⁵ However, in many instances remediation costs are quite expensive.¹⁴⁶ For example, one developer once spent \$225,000 per acre for the testing, remediation, and preparation of a brownfield site, and estimated that he would have spent only \$40,000 per acre for a comparable project at a suburban greenfield site.¹⁴⁷ Thus, unless remediation is inexpensive, or, for whatever reason, a certain small redevelopment project is crucial, subsidized low-interest loans should be the preferred incentive here, because the costs of grants for site remediation are often simply too exorbitant.

In terms of additional incentives, a no further action letter or a certificate of completion with a covenant not to sue should be granted upon the completion of a cleanup consistent with applicable standards. An initial property tax abatement might be feasible and desirable as well, especially considering that the property's assessed value may increase substantially during the first stages of the redevelopment effort. Allowing

¹⁴⁵ UNITED STATES CONFERENCE OF MAYORS, *supra* note 10, at 12; WERNSTEDT ET AL., *supra* note 3, at 9.

¹⁴⁶ OPP & HOLLIS, *supra* note 4, at 13-14; Robertson, *supra* note 10, at 1090.

¹⁴⁷ *Id.*

for some sort of tiered remediation might also be a valuable incentive in the context of a former dry cleaning operation, because the building will likely remain in commercial or light industrial use, and thus a stringent cleanup would not be necessary or required, as it would if the building was converted to residential use.

The Rural Mining Facility. Rural brownfields differ from their urban counterparts primarily because the viable end uses for them are substantially more restricted. While the prospects for urban brownfields are far from boundless, for rural brownfields the prospects are quite slim. Rural brownfields offer relatively few opportunities that a developer could potentially profit from economically. Furthermore, because the supply of available undeveloped land is so plentiful in rural areas, as well as being relatively inexpensive, those wishing to develop in rural areas can simply avoid brownfields at their leisure. In urban areas, on the contrary, the supply of land is often rather constrained and expensive, making brownfields sites more appealing to developers.

Several non-economic end uses have become popular for rural brownfields. The site can be restored to its natural habitat or made into a wildlife preserve. It can also be redesigned for recreational use. A representative, though not-specifically-brownfields, example is the federal “Rails to Trails” program, where abandoned railroad tracks were converted into bicycle paths.¹⁴⁸ A better example comes from an old Montana mining town called Anaconda, where a contaminated copper smelter site was remade into a golf course designed by Jack Nicklaus.¹⁴⁹

Which incentives would be most effective in the context of a rural brownfield, such as an old mining site? Simply put, the government will need to subsidize the project

¹⁴⁸ Rails to Trails Conservancy, About Us, at <http://www.railtrails.org/about/default.asp>.

¹⁴⁹ Old Works Golf Course, Course and Club, History, at <http://www.oldworks.org/history.aspx>.

as much as possible—providing grants for site assessment and remediation. Tiered standards might be especially useful here, often with the goal being to remove the danger to environmental health posed by the site’s contamination. Liability relief, in the form of covenants not to sue, will also be a valuable incentive to the developers of rural brownfields, as it typically is in all brownfields situations.

CONCLUSION

Brownfield redevelopment programs should be directed by a county or a comparable local agency, which will be the primary point of access for the developer to the bureaucracy, as well as the location where all actual and potential public sector participants make inquiries, offer advice, and otherwise conduct business. This will streamline the brownfields redevelopment process and will institutionalize cooperation amongst participating public agencies as well as between the private developer and the public sector. These local agencies should approach brownfields redevelopment with a mentality of flexibility and creativity, because that is the mindset necessary to craft proper incentives for diverse, distinct properties that each deserve their own unique treatment.