

Remediating the Brownfield Brownout: Why Brownfield Legislation Falls Short and How a Clustered Approach Can Help

By Joel Wimbiscus

Introduction

During the past few decades, an exodus of industrial jobs from the urban core of our nation's cities has left behind a slew of contaminated properties referred to as "brownfields." Various state and federal legislative acts have sought to remedy the contamination and encourage redevelopment by providing incentives to local government and developers. This paper explains the effects that brownfields have on the urban environment, the city tax base and suburban sprawl. It traces the history of brownfield legislation and explains strengths, weaknesses and oversights of this legislation. Because brownfield acts give local governmental entities leeway in deciding how to best implement brownfield redevelopment, this paper explores some of the better ideas that different states have created, focusing on New Jersey's successful cluster approach. Finally, the paper concludes with the suggestion that the federal government allocate increased funding to regional planning organizations and developers that seek to redevelop brownfield clusters that surround new urban transit projects. Such an improvement would enhance Congress' attempt at cleaning up a greater number of brownfields while also reinvigorating a city's tax base, improving public services and stemming suburban sprawl.

I.

The Effects of Brownfields

Brownfields are often found in urban areas where vibrant industry, yesterday's new economy, once lined walkable urban neighborhoods. The industrial revolution created a large

base of urban manufacturing in cities such as Detroit, Cleveland and Pittsburgh. As industry became increasingly mechanized and sought lower-salaried populations, many cities experienced a flight of factories from the urban core. Once lively communities watched as boarded up factories and white-fighting families sought greener pastures in the growing suburbs. Less restrictive environmental regulations resulted in the contamination of the land where these factories stood. Abandoned, contaminated brownfield properties led to the deterioration of urban neighborhoods, encouraged suburban sprawl, and eroded the tax base that supports basic services such as education.

The United States Environmental Protection Agency (EPA) defines brownfields as “abandoned, idled, or under-used industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.”¹ Brownfields may be abandoned factories, office buildings, gas stations, dry cleaners, parking lots or other facilities that potentially have contaminated the underlying soil. All abandoned properties are possible brownfields where testing is needed to determine the level of contamination. Only a minority of properties qualify for the Superfund National Priorities List, which contains properties with such severe contamination that immediate remediation is necessary.² However, while the majority of brownfields do not qualify for this list, they still must undergo costly testing and remediation before they can be reused.³ If contamination is present, it may seep into

¹ Small Business Liability Relief and Brownfield Revitalization Act , Pub. L. No. 107-118, 115 Stat. 2356 (2002) [hereinafter SBLRBRA], (adding 42 U.S.C. § 9601 (39) (2002)).

² See Faith R. Dylewski, *Ohio’s Brownfield Problem and Possible Solutions: What is Required for a Successful Brownfield Initiative?*, 35 Akron L. Rev. 81.

³ Todd S. Davis & Kevin Margolis, *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property* (Todd S. Davis & Kevin Margolis, eds., 1997). As of 1997, only 1250 superfund sites had been listed on the National Priority List. This number is greatly exceeded by the number of brownfields in the United States.

the ground water and present health risks to nearby residents.⁴ If the site is not cleaned up, contamination may spread to neighboring properties.⁵

In addition to the environmental risks, brownfields worsen a city's social and economic troubles. Contamination lowers the property values of a brownfield because potential buyers are wary of purchasing a property that must undergo assessment and remediation. Many brownfield owners simply abandon the property instead of paying for assessment and cleanup costs.⁶ Abandoned properties are not maintained and bring down the value of the surrounding properties because people do not want to live next to an eyesore.⁷ This devaluation is a double-edged sword as it creates a decline in the income tax base due to the loss of jobs and a decline in the property tax revenue due to the drop in property value.

Social decline often comes hand in hand with the economic decline. Vacant properties may draw arson, loitering, drug activity or prostitution. Vacant properties frequently become a canvas for area graffiti artists. Such activity drives away present and prospective homeowners.

The domino effect created by brownfields produces a cycle that is difficult to stop. The loss of industry lowers the tax base which lowers funding for the local schools, police force, and other city services. The abandoned property has the effect of a black hole, sucking the vitality, safety and property value out of the surrounding neighborhood. This process encourages those residents who are able to relocate to move to "greener" pastures. New industry is discouraged

⁴ Joel B. Eisen, *Brownfields of Dreams'?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. Ill. L. Rev. 888.

⁵ Charles Bartsch & Elizabeth Collaton, *Preface to Brownfields: Cleaning and Reusing Properties* vii (1997) [hereinafter *Brownfields: Cleaning and Reusing*]. If hazardous materials that are stored in buried barrels, contamination may leak and become even more severe.

⁶ Gabriel A. Espinoza, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 Vill. Envtl. L.J. 9. If an owner takes the initiative to test his or her property and finds contamination, he is obligated to report that contamination.

⁷ *Brownfields: Cleaning and Reusing*, supra note 4, at 2. Vacant property costs municipalities potentially "hundreds of jobs, millions of tax dollars, and hundreds of thousands of dollars in wages that might circulate through the area, bringing still more economic benefits."

from reusing the abandoned properties because of extensive assessment and cleanup costs.⁸ Brownfields, while not the only cause of suburban sprawl, have greatly contributed to the settlement and asphaltting of outlying rural areas. Federal tax money is diverted from the inner city to the new suburbs in order to build new roads, sewers, and schools.⁹ This duplication of infrastructure not only leads to higher taxes, but also leaves the urban infrastructure to rot. Furthermore, this sprawl extends cities, disperses the population and creates greater traffic congestion and longer commutes. Additionally, sprawl's effect is more damaging because it is becoming so exacerbated at a time when the world's ability to supply petroleum is declining. In order to stop this cycle, the government must create an incentive to curtail contamination, redevelop and repopulate these areas.

II.

History and Present State of Brownfield Legislation

In order to slow urban abandonment and suburban sprawl, and to protect the health of those who live in the vicinity of brownfields, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980. The earliest version of CERCLA aimed to clean up contaminated "Superfund" properties that posed an imminent public health risk. The cleanup is funded by imposing liability on potentially responsible parties (PRP). PRPs may include present owners, past owners, or even banks that fund the mortgages on such properties.¹⁰ While the main thrust of CERCLA may appear to be

⁸ Brownfields: Cleaning and Reusing, *supra* note 4, at 3. The delay caused by assessment and remediation adds to the cost of development, making the property less desirable. Additionally, adjacent parcels may be added to create a developable site.

⁹ Brownfields: Cleaning and Reusing, *supra* note 4, at 3. Effective transportation planning can encourage urban growth while stemming suburban growth. There would be no need for the reproduction of infrastructure.

¹⁰ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) [hereinafter CERCLA]. The potentially liable parties are liable unless they can prove that the damage

the cleanup of highly contaminated properties, the main effect was to guard against future contamination by imposing strict liability on industrial polluters.¹¹ With the slow and steady progress being made in the cleanup of Superfund sites, CERCLA cast a shadow of doubt over abandoned industrial properties that could contain contamination. Not wanting to risk possibly expensive liability, developers shied away from brownfield redevelopment and looked to outlying greenfields as a safer and easier place for a successful investment.¹² Present owners, unable to sell a potentially contaminated property, often would let a mortgage company foreclose or deed a property over to a municipality instead of attempting redevelopment. These properties sit vacant and decaying due to the fear of potential liability.¹³

The 1990 Eleventh Circuit decision, US v. Fleet Factors Corp., demonstrated the extent of CERCLA's reach by imposing liability on a party who "participated in the financial management of a facility to a degree indicating capacity to influence the corporation's treatment of hazardous wastes."¹⁴ This decision further scared off lenders and insurers who would otherwise support the remediation and redevelopment of brownfield properties. By the early 1990s, it was clear that CERCLA was effectively maintaining the contaminated state of brownfields instead of inspiring their cleanup. In 1993, the Clinton administration introduced the Brownfields Pilot Program. While Congress defeated the program, it signaled the commencement of a string of attempts by the EPA to facilitate the remediation and

was caused by (1) an act of God, (2) an act of war, or (3) a third party's act or omission. § 107(a), 42 U.S.C. § 9607 (b).

¹¹ See *New York v. Shore Realty Corp.*, 759 F.2d 1044 (2d Cir. 1985) (holding that CERCLA imposes strict liability without required a showing of causation.) In this case, the court imposed liability on the owner of contaminated property. Even though the owner did not cause the contamination, he did know of its presence. The court said that Congress specifically rejected a causation requirement in the development of CERCLA.

¹² See Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 *Ecology L.Q.* 705, 717 (1984).

¹³ Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 *B.C. Envtl. Aff. L. Rev.* 601, (1998). (Noting that the fear of liability effectively persuades many developers to build in greenfields.)

¹⁴ *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (holding that when creating CERCLA, Congress intended to hold secured creditors liable if they participated in the management of the brownfield facility).

redevelopment of brownfields that did not rise to the level of Superfund sites. The EPA made available a limited amount of money for assessment and cleanup. By early 1999, the EPA had funded a total of 228 brownfield assessments.¹⁵

While definitely a step in the right direction, this pace fell short of what many brownfield advocates had hoped.¹⁶ In 2004, the Government Accounting Office (GAO) estimated that there were between 450,000-1,000,000 brownfields within the United States.¹⁷ With our cities sprawling at a greater rate than ever before, many brownfields sat on the sidelines while farms were quickly paved over. In 2001, Congress, realizing that CERCLA had misfired, enthusiastically approved sweeping changes that provided unprecedented incentives for brownfield redevelopment.

The 2001 Small Business Liability Relief and Brownfield Revitalization Act (2001 Act) provides liability relief and increased financial incentives for remediation and redevelopment of brownfields.¹⁸ The threat of liability imposed by the 1980 version of CERCLA was one of the principal reasons developers kept clear of potentially contaminated properties.¹⁹ The amendments aimed to remove hurdles that kept brownfields dark.

The 2001 Act exempts three categories of property owners from liability based on stated criteria.²⁰ The first category is the Contiguous Property Owner whose land has become contaminated due to seepage from an adjoining lot. Of the eight conditions that the contiguous property owner must meet in order to qualify for the exemption, the second category is the Bona

¹⁵ See Environmental Protection Agency, Region IX Brownfields Partnership Action Agenda (Jan. 7, 1999).

¹⁶ 147 Cong. Rec. H10893-01 (noting that increased funding and restrictions on liability would provide a great incentive to increase the number of remediated brownfields).

¹⁷ See United States Government Accountability Office, Report to Congressional Requesters: Brownfield Redevelopment (Dec. 2004).

¹⁸ SBLRBRA, (adding 42 U.S.C. § 9607 (o) and 42 U.S.C. § 9604 (k) (2002)).

¹⁹ See Heidi Gorovitz Robertson, One Piece of the the Puzzle: Why State Brownfields Programs Can't Lure Business to the Urban Cores without Finding the Missing Pieces, 51 Rutgers L. Rev. 1075 (1999).

²⁰ SBLRBRA, (adding 42 U.S.C. § 9607 (q) (2002), § 9601 (35) (2002), § 9601 (40) (2002)).

Fide Prospective Purchaser (BFPP).²¹ To qualify as a BFPP, an individual must meet seven criteria to receive exemption.²² Most importantly, the buyer must have purchased the property after the enactment of the amendment and after the property has undergone removal of all contamination. The third category of exempt parties is the Innocent Landowner. Under this category, a purchaser of contaminated property that, after making all appropriate inquiries, had no reason to know of the presence of contamination will be exempt from liability.²³ Also, in order to qualify, the landowner upon finding contamination must take all steps to contain the release and prevent any risk of harm to humans.²⁴

The 2001 Act also provides financial incentives totaling \$200 million per year for assessment and remediation of brownfields which are not sufficiently contaminated to be included in the National Priority List.²⁵ The funding provided incentives that were not present before the 2001 amendment. While some money was made available in the 1990s by the EPA for brownfield redevelopment, \$200 million per year is a significant increase. The funding must fall through a few levels before it reaches the brownfield. The EPA, at its discretion, may distribute funding to local governmental agencies or Indian tribes to perform assessment, inventory and planning of brownfields.²⁶ This amount should not exceed \$200,000 per brownfield, unless the EPA grants a waiver due to the complexity or size of the brownfield.²⁷ In that instance, the amount may rise to \$350,000. The EPA may distribute up to \$1 million to a local government to perform site remediation on a brownfield that it owns.²⁸ The local agency may also receive and re-distribute grants of up to \$200,000 (with the same waiver exception) to

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ SBLRBRA, (adding 42 U.S.C. § 9604 (k) (2002)).

²⁶ Id.

²⁷ Id.

²⁸ Id.

developers or non-profit groups for site assessment. Lastly, individual developers may only receive loans, not grants, from local agencies for their remediation efforts.²⁹

Another important aspect of the 2001 Act is the enforcement bar it places on federal response actions under CERCLA for properties that are remediated under state brownfield programs.³⁰ However, the EPA may still police state clean up programs through five different “reopeners” that the statute provides.³¹ The EPA may take enforcement actions in state brownfield projects only where (a) the state requests such federal action, (b) contamination has migrated across a state line or onto property controlled by the United States; and after taking into consideration the response actions already taken, (c) where a release may present an imminent and substantial endangerment to public health and environment, and (d) where additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release, or (e) where information not known by the state, on the earlier of the date cleanup was approved or completed, has been discovered regarding the contamination or conditions at the facility such that the contamination or conditions present a threat requiring remediation to protect public health, welfare of the environment.³²

III.

The Failure of the 2001 Amendments

The Senate passed the 2001 Act by a total of 99-0.³³ There was much excitement over the expected acceleration of brownfield redevelopment. This came at a time when suburban sprawl was just becoming an urgent topic of debate in American cities, and reuse of vacant urban land was on the agenda of every large city. In supporting the 2001 Act, Rep. (NJ) Pallone stated

²⁹ Id.

³⁰ SBLRBRA, (adding 42 U.S.C. § 9601 (41) (2002)).

³¹ Id.

³² Id.

³³ <http://www.epa.gov/brownfields/sblrbra.htm>

that the Act would “provide an opportunity for more jobs while at the same time cleaning up the environment, protecting public health and curbing suburban sprawl.”³⁴ Will the amended CERCLA have the effect that legislators desired? Time will judge the success of the 2001 Act, but in the meanwhile, there are some evident shortcomings.

Overall, liability relief is a good attempt at fixing the inadequacies of brownfield legislation. In its original form, CERCLA imposed liability on past or present landowners, banks or whoever had a hand in ownership. The rollback of much of the liability allows owners and developers to breathe easier and move forward with redevelopment.³⁵ The 2001 Act, however, is not without its shortcomings. The contiguous property owner defense is written vaguely.³⁶ In order to qualify for this defense, a property owner must satisfy multiple requirements if contamination is found on its property. The third requirement states that the owner “take reasonable steps to stop continuing releases, prevent future releases, and prevent or limit human, environmental or natural resource exposure to any hazardous substance.”³⁷ Scholars have bemoaned the unclear standard procedure required to comply with this requirement.³⁸

Other concerns raised deal with the fact that individual state EPAs will decide when a site is adequately remediated.³⁹ While some worry that state EPAs will bow to developers’ wishes to require less than adequate remediation, others worry that some states will require more. Either way, the federal EPA still has the power to take enforcement actions in certain situations. This worries some because even though a developer has complied with the state-required cleanup

³⁴ 147 Cong. Rec. H10893-01

³⁵ Lynn Singaband, *Brownfield Redevelopment Legislation: Too Little, But Never Too Late*, 14 *Fordham Envtl. L.J.* 313 (2003). States that relief from liability will encourage more developers to clean up and build on brownfields.

³⁶ See Robert D. Fox & Paul McIntyre, *Summary and Analysis of the Federal Small Business Liability Relief and Brownsfields Revitalization Act*, 21 *Temp. Envtl. L. & Tech. J.* 19 (2002) .

³⁷ SBLRBRA, (adding 42 U.S.C. § 9607 (o) (2002)).

³⁸ See Fox & McIntyre, *supra* note 36.

³⁹ *Id.*

standard, the EPA may still take action.⁴⁰ Scholars see a practicality issue with the fourth re-opener condition. Under the fourth re-opener, the EPA may take action if the developer discovers that a contaminant is slightly greater than first reported after the assessment.⁴¹ Oftentimes, other contaminants are found during remediation. Therefore, the developer would be subject to federal EPA action in this instance even though the new contamination is not significant and the developer acted in good faith.⁴²

Perhaps the most problematic aspect to the 2001 Act is that the funding is insufficient and not tailored to address the market forces that guide brownfield redevelopment.⁴³ If Congress does not change the incentive structure, the 2001 Act's brownfield provisions will fail to stimulate redevelopment and waste a good-intentioned governmental effort towards removing contamination and curbing suburban sprawl.

In its most recent report in December 2004, the GAO reported that revolving loan programs were frequently underused by developers.⁴⁴ The intention behind many public works projects is to stimulate private investment. While local governments willingly accept federal dollars to perform assessments, comparatively few developers have come forward seeking the zero-interest or below-market rate loans that are offered by the 2001 Act.⁴⁵ Below market loans are like mana from heaven to developers. The fact that developers are not taking advantage of this governmental subsidy suggests that there are other factors which dampen their interest in brownfield redevelopment. In attempting to isolate these factors, the 2001 Act's various incentives must be examined. As stated above, the relief from liability has been a great

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ See Gorovitz Robertson, *supra* note 19.

⁴⁴ See United States Government Accountability Office, Report to Congressional Requesters: Brownfield Redevelopment (Dec. 2004).

⁴⁵ Id.

improvement of CERCLA because prospective purchasers of brownfields have greater certainty that they will not be held liable for contamination if they comply with the stated standards. If the liability scheme is sufficient, then the structure and or amount of the financial incentives must be inadequate.

In regards to the financial incentives, it is clear that Congress' hopes for developer involvement have not been met. Is the amount of the financial incentives not high enough to procure a return on the developer's investment? Or are there other issues involved in brownfield redevelopment that the 2001 Act has yet to properly address?

One possible problem with the 2001 Act is that it focuses too much on brownfields without taking into consideration how the particular brownfield patch is woven into the fabric of the city.⁴⁶ Developers consider many factors before deciding to build.⁴⁷ Those factors include not only the environmental hurdles and costs, but financial, structural and location issues also figure into the final decision. Oftentimes, greenfields provide the developer with a much easier project that is also more economically viable. While many have blamed CERCA's environmental regulations for chasing developers into the suburbs, many non-environmental factors even before CERCLA led developers away from the urban core and its brownfields. Whether or not CERCLA had been passed, suburban areas would still see an increase in development. By confronting the non-environmental issues that mothball many brownfields, Congress can streamline the process towards the redevelopment of the fading urban core.

In the 2001 Act, Congress provides grants for local governments and loans to private developers, however, the amount allocated is oftentimes not sufficient to make the project

⁴⁶ D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *The Challenge of Brownfield Clusters: Implementing a Multi-Site Approach for Brownfield Remediation and Reuse*, 12 N.Y.U. *Envtl. L.J.* 111 (2003).

⁴⁷ See Gorovitz Robertson, *supra* note 19.

economically viable.⁴⁸ Funding is available only for site assessment and remediation.

Brownfields require many more administrative filings and procedures that add time and cost to a project.⁴⁹ Oftentimes, old buildings must be demolished and the site must be cleared. Further environmental filings and testing slow the construction process.⁵⁰ Developers need to expedite planning and construction for a project to be profitable. Greenfields are much easier to develop. Generally, they are already cleared and pose little to no of risk of contamination.⁵¹ Zero-interest loans for brownfield remediation are an incentive, but they do not compare to the greenfield's significantly lower cost of demolition, site clearing and environmental clean up.

Congress has turned its back on the simple reality that money is not everything. Studies show that developers consider many issues other than financial incentives when developing a property. One study of industrial businesses that were looking to relocate showed that physical infrastructure, proximity to suppliers, and political and tax incentives were the most important factors when deciding where to build anew.⁵² Another study focused on non-industrial businesses that were looking to relocate. That study showed that real estate costs were the most important factor, followed by the presence of a highly educated workforce, proximity to freeways and tax incentives.⁵³

A study conducted of Cleveland, Ohio, area businesses further evidences the fact that the brownfield incentives are not structured to address the factors considered by developers and

⁴⁸ See Gorovitz Robertson, *supra* note 19. On one brownfield reuse project, a developer had to spend \$225,000 per acre for site testing, remediation and preparation. If this project had been done on a Greenfield site, it was estimated that the developer would have only spent \$40,000 per acre for the same procedures.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Robert. H. Abrams, *Superfund and the Evolution of Brownfields*, 21 *Wm. & Mary Envtl. L. & Pol'y Rev.* (1997).

⁵² Toby N. Gooley, *The Geography of Logistics*, *Logistics & Distribution Rep.*, Jan. 1998.

⁵³ Steve Bergsman, *Incentives, Location & Quality of Life: All Figure into the Site Selection Equation*, *Nat'l Real Est. Inv.*, Oct. 1993.

businesses.⁵⁴ This study showed that site location was the most important factor considered by businesses. Also important was site size and configuration, crime, access to transportation and the ability to attract a suitable workforce. Many businesses said that environmental concerns were not the principal factors into their decisions.⁵⁵

Various factors affect the decision of where to house a business. The factors that led industrial businesses to locate in urban areas in the early part of last century have changed. Today's business climate demands larger spaces, more parking, proximity to freeways, skilled workforce, etc. When the United States became an industrial power, cities looked much different than they do today. Industry depended on rail lines to move their product. Rail lines still criss-cross through large cities today. However, many lines are now abandoned as the highway has taken over as the principal means of transit. Yesterday's industry did not rely upon a specially-trained workforce that much of today's industry needs. Efficient public transit was the norm as most of the population did not own automobiles. Also, there were many more smaller-scale industrial firms that did not need as much space, locating in whatever corner of the city they could find. The decay of older industry leaves brownfields in odd locations on small lots. These lots are not attractive due to their size and location.⁵⁶ Additionally, many older industries dotted residential areas. After the onset of Euclidean zoning, some of those areas were zoned for residential development. Legal attempts at rezoning can be expensive. Buildings that older industries used were built in a time when building codes were not as demanding as they are today. Furthermore, present industry uses different machinery and businesses may not fit older industrial buildings that were designed for a different age of technology.⁵⁷

⁵⁴ See Gorovitz Robertson, *supra* note 19.

⁵⁵ *Id.*

⁵⁶ See Gorovitz Robertson, *supra* note 19.

⁵⁷ See Michael Porter, *The Competitive Advantage of the Inner City* 14 (1994).

With the recent change in housing trends, many people have become interested in city living. Developers are meeting this market with new housing units in and near downtowns. While cities such as Nashville, Tennessee did not grow up until the latter part of the 20th century, other cities such as Cleveland, Ohio and Detroit, Michigan thrived during the peak of America's industrialization. With the flight of factories overseas and to the south, many cities have varying levels of urban abandonment. Nashville did not grow up on industry and therefore does not have acres upon acres of brownfields. Cleveland and Detroit both have large areas of town where once proud factories have fled, leaving behind urban eyesores and contamination. Cleveland is repopulating those areas with housing, however it is not always an easy task. Because brownfields are often clustered, developers may not want to start a project because there is no assurance that the rest of the neighborhood will also be redeveloped.⁵⁸ New townhouses do not sell very well when surrounded by vacant lots and crumbling industrial shells. In the 2001 Act, Congress fails to contemplate a strategy for such situations. A piecemeal approach to brownfield redevelopment is not likely to be successful. Brownfields cause problems because of what they do to the surrounding neighborhood. Many of the brownfields that are optimally located have been scooped up by intelligent developers who have taken advantage of the CERCLA incentives and have not had to worry about the progress of the surrounding properties.⁵⁹ Most brownfields do not have this luxury, and therefore are considered too risky for developers, even with 2001 Act's incentives.⁶⁰ If an additional amendment to CERCLA could address how to encourage redevelopment in areas that have closely situated brownfields, the intent behind the original legislation could finally come to fruition.

IV.

⁵⁸ See D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *supra* note 46.

⁵⁹ Bradley M. Campbell, NJDEP, Policy Directive 2002-03: Acceleration of Brownfield Cleanup and Reuse (Nov. 25, 2002), at <http://www.nj.gov/dep/newsrel/releases/bfpolicy.htm>.

⁶⁰ D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *supra* note 46.

Successful Ideas From Other States

Various states have not waited for the federal government to enact changes. Several states in the northeast and the midwest have taken the lead with innovative incentives and legislation that aims to remedy the brownfield problem.⁶¹ Due to the greater industrialization of those areas in the past century, states such as New Jersey, Ohio, Michigan, Pennsylvania and New York have urban cores that are weighed down by numerous brownfields. Some of these states have addressed the inadequacies that plague current CERCLA regulations and can offer constructive examples as federal legislators continue to seek ways to improve brownfield incentives.⁶²

One easy and expensive way to help spur development is to provide greater funding for redevelopment projects. In 1996, New York State approved a \$200 million bond issue that would allow greater funding for remediation. In 2000, Ohio followed suit by voting to allow the state to sell bonds to help finance brownfield projects. Although the Clean Ohio initiative mandated that the budget allocate \$50 million per year for remediation and cleanup, Governor Taft has cut the funding to \$25 million.⁶³ State funds are important, especially in states that have a large number of brownfields.

Another way to help spur development and ensure that a greater number of contaminated sites are remediated is to set less stringent cleanup standards. Previously, there was only one standard scale by the EPA. However, because redeveloped brownfields are used for various purposes, a sliding scale has been employed by some states to lower remediation costs.⁶⁴ If a property is to be reused for an industrial purpose, then the cleanup standard will be lower than it

⁶¹ See Faith R. Dylewski, *Ohio's Brownfield Problem and Possible Solutions: What is Required for a Successful Brownfield Initiative?*, 35 *Akron L. Rev.* 81.

⁶² *Id.*

⁶³ Julie Carr Smyth, "Clean Ohio Fund to get only half of proposed budget", *Plain Dealer*, December 1, 2004.

⁶⁴ Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 *J. Envtl. L. & Litig.* 1 (2001).

would be if the site were to be redeveloped for residential use.⁶⁵ The goal of these moderated standards is to require a level of cleanup that is sufficiently stringent to make properties safe for the owners' intended future use while encouraging more redevelopment. The risk in this concept is that the land may have a different use in the future and that the standard may no longer be safe for the new use.⁶⁶ However, if states want to encourage further redevelopment, they must take into consideration the non-environmental barriers that curtail brownfield cleanup.⁶⁷ Connecticut, Colorado, Indiana and Ohio are all states that have implemented these moderated standards.⁶⁸

While less stringent clean up standards and greater financial incentives focus on the particular brownfield's needs, New Jersey has adopted a plan that tackles issues concerning the brownfield's relation to its surrounding neighborhood. Brownfield incentives, in varying levels, have been in place for almost a decade. The first generation of projects has featured the redevelopment of many of the more attractive brownfields. These are properties that may have been redeveloped without any governmental incentive at all due to their prime location. With the depletion of the low hanging fruit, New Jersey has realized that brownfield incentives must change in order to meet the different challenges faced by the remaining, more complicated brownfields. New Jersey's cluster approach is a significant step that realistically recognizes the issues that many of the remaining brownfields present. While not a panacea, New Jersey's solution effectively enhances the economic viability of many brownfield projects that would not be as enticing under the 2001 Act. Early successes with the cluster approach mark it as a plan worth emulating by other states.

Realizing that many of the remaining undeveloped brownfields are often found clustered in inner city neighborhoods, New Jersey developed the Brownfield Development Area (NJBDA)

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

plan that addresses the issues faced by brownfield properties that are closely-clustered with other brownfields.⁶⁹ These properties are at a disadvantage because a developer does not have the confidence that surrounding properties also will be redeveloped. Without such a hope, a remediated brownfield's value will depreciate as its contaminated neighbors scare away potential clients or investors. The NJBDA attempts to avoid this problem through a multi-faceted process that identifies committed groups that will work together successfully to redevelop a cluster of brownfields.⁷⁰

The first step in the NJBDA approach is a competitive application process. A steering committee of relevant stakeholders (which may consist of property owners, residents, developers, community organizations, etc.) submits a plan describing the future reuse of the properties.⁷¹ The New Jersey Department of Environmental Protection (NJDEP) considers groups of 4-10 brownfields as the optimal number, though no specific number is mandated by the program.⁷² The NJDEP selects the NJBDAs that have the widest range of community, private and public support. Next, the NJDEP assigns one case manager to oversee the remediation process and another case manager to manage the NJBDA's planning and economic incentive aspects.⁷³ The managers guide the steering committee in implementing the community-based remediation and reuse plan.

In formulating the BDA initiative, the NJDEP anticipated that it would increase efficiency and effectiveness in three areas: (1) investigation and remediation of the

⁶⁹ D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *supra* note 46.

⁷⁰ *Id.*

⁷¹ New Jersey Department of Environmental Protection [hereinafter NJDEP], Brownfield Development Area Initiative Application Guidance 3 at http://www.state.nj.us/dep/srp/brownfields/bda/bda_appguide.pdf.

⁷² D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *supra* note 46.

⁷³ See N.J. Admin. Code tit. 7, § 1-1.2(k) (Supp. 2003); Site Remediation Program, NJDEP, Brief Synopsis of NJDEP's Brownfield Development Area Initiative, at http://www.state.nj.us/dep/srp/bda/bda_synopsis.htm.

contamination; (2) broad-based involvement of parties in the remediation and reuse; and (3) the reuse of brownfields for a broad range of complementary purposes.⁷⁴

The NJBDA program, while still in its infancy, has increased the efficiency and the effectiveness of the assessment and remediation process.⁷⁵ By encouraging a cluster approach, adjacent brownfields are remediated that would otherwise continue to threaten public health and the tax base.⁷⁶ Also, developers are sometimes less likely to clean up a brownfield if the adjacent lot is contaminated. Contamination, especially through groundwater, can easily migrate miles from the source. A remediated brownfield can become re-contaminated unless an adjacent contaminated property is cleaned up during the same timeframe. NJBDAs give property owners the confidence that their remediation efforts will not be in vain. Furthermore, other brownfield programs have multiple state workers that work on the different regulatory steps of the remediation and reuse. The NJBDA shortens the time length of the project by utilizing only one case manager that fully understands all aspects of the project.⁷⁷ This had led to a streamlined process that helps developers' bottom lines.

Another strength of the NJBDA process is the consensus that it builds among the property owners, community organizations, neighbors and local government that is a pre-requisite for NJBDA selection.⁷⁸ NJBDA applicants who do not portray the ability to work together will not be selected by the NJDEP. While individual property owners will always have control over their property, the group chooses to work together for a project that will benefit all stakeholders.

⁷⁴ D. van Hook, *Area-Wide Brownfields Planning, Remediation and Development*, 11 *Fordham Envtl. L.J.* 743 (2000).

⁷⁵ D. Evan van Hook, Judith Auer Shaw & Kenneth J. Kloo, *supra* note 46.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

The cluster approach has improved the rate of brownfield remediation and reuse.⁷⁹ Without the cluster plan, many of these properties would have remained in their contaminated state, chronically land-locked by their decaying brownfield neighbors. The NJDEP helps build the confidence of property owners by completing a preliminary environmental assessment of the property's contamination.⁸⁰ Even if the owner provided his or her own assessment, he or she would not know of the condition of the surrounding properties. The cluster approach reduces the uncertainty that prevents developers and their financiers from moving forward with a project.⁸¹ The NJBDA process also brings together different state agencies that offer either project technical expertise or financial incentives.⁸² Without the NJBDA, developers would have not had the benefit of a coordinated governmental effort behind their projects. Lastly, due to the varying types of ownership and lot sizes within a cluster, some lots would not be remediated due to a lack of marketability. The collective nature of the project encourages owners to be creative in the way the lots are used in order to provide the best overall plan.⁸³

V.

Ideas to Spur Faster Redevelopment of Brownfields

As the state of the nation's brownfields change, CERCLA legislation must mature to meet the different needs they present. Ohio, New York and several other states have taken up where the federal government has left off as they have increased the funding used to redevelop brownfields. New Jersey has stepped to the forefront of legislation innovation with its NJBDA program that has more accurately diagnosed the illness that keeps brownfields in their

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

contaminated state. For the 2001 Act to function as it was intended to, Congress needs to learn from the successes and failures of the states' brownfield initiatives.

The cluster approach should be adapted to fit into the states' brownfield strategy. The GAO's statistics show that CERCLA's loan fund has been greatly underutilized by developers.⁸⁴ This fact points out that many developers are still wary of brownfield redevelopment. While liability has been greatly scaled back, private investment still remains below expectations. Unless brownfield redevelopment becomes more attractive to developers by addressing the issues that truly scare away investors, brownfield loan programs will continue to gather dust. New Jersey's cluster approach, if implemented by other states, would ensure that a greater number of brownfields would be redeveloped. This legislation encourages players to forge a cohesive partnership and develop a unified plan that will develop brownfield clusters in contrast to the piecemeal approach which will leave many clusters chronically contaminated. With continued success, it is likely that more states will follow New Jersey's lead.

Congress can also help to foment change in state brownfield programs. Grants are available to governmental groups or agencies and loans are available to private developers. The governmental groups are using the money that is offered, but the private developers are not taking advantage of the loan programs. Private developers should be permitted to receive federal grants, not just loans, if they take part in a cluster program to help allay the costs of remediation. Grants should be contingent upon the project coming completely to fruition.

Congress should also provide a higher level of funding to brownfield redevelopment projects that lay near new federally-funded urban transit projects.⁸⁵ In the past five years, there has been a substantial increase in light transit projects throughout the United States. In 2004

⁸⁴ See United States Government Accountability Office, Report to Congressional Requesters: Brownfield Redevelopment (Dec. 2004).

⁸⁵ Ann Eberhart Goode, Elizabeth Collaton & David Smallen, Brownfield Redevelopment and Transportation Policy.

alone, voters approved over \$40 billion for forty different transit projects.⁸⁶ Also, many cities have received large amounts of funding to rebuild their inner city highway system. These projects receive a hefty investment of federal dollars.⁸⁷ To ensure a return on this investment through spin off development, Congress should provide greater funding for brownfields projects that lay within a reasonable distance from the new transit project. The transit investment will reach its full potential only if brownfield issues are correctly addressed and developers have assurance that their project will be profitable.

The recent surge in urban mass transit projects is accompanied by a renewed interest in urban living. Both young professionals and empty nesters are moving back to the city at a pace not seen since before the mass introduction of the automobile. With the oncoming wave of baby-boomers looking for smaller, urban living quarters, cities need to act quickly to accommodate demand. If this demand is not satisfied, faux-urbanism communities will sprout up on greenfields on the outskirts of the suburbs. Areas such as Celebration Florida and Crocker Park are examples of lost opportunities where new urbanism is actually giving rise to greater suburban sprawl.⁸⁸ Even though these are medium density projects, in most cases they do not create a living space that defeats the long commutes that their residents face for work and basic services. This is an important opportunity for cities to redefine themselves before it is too late. With combination of an emerging interest in urban living, a wave of new urban transit projects, unprecedented high oil prices coupled with a declining supply, and the availability of brownfield

⁸⁶ http://www.lightrailnow.org/news/n_railvote2004-usa.htm

⁸⁷ http://euclidtransit.org/euclid_corridor_project/funding.asp Euclid Corridor Project is funded with \$82.8 million from the federal government.

⁸⁸ Celebration, Florida is a main street-style town that was built by Walt Disney Corp. on the outskirts of Orlando, Florida. Crocker Park is a mixed-use, new urbanism project built the Cleveland suburb of Westlake. Both projects provide dense urban-like living with shops and offices in walking distance. Celebration was built in the 1990s and Crocker Park opened in the fall of 2004. The irony of the projects are that many people have to drive long distances to work to Orlando's and Cleveland's downtowns. The benefits of urban living are lost because neither of the towns are connected to the rest of the city via mass transit, and most shopping has to be done outside of the town. While cosmetically these towns are new urbanism, they fail to function as a walkable, sustainable development.

funding, cities need to get smaller before an eventual energy shortage deals transportation a critical blow.

In Cleveland, Ohio, there are two such transit projects that could serve to stem sprawl, clean up brownfields, improve the city tax base, and save tax dollars that would have been used to build the infrastructure needed to continue sprawl. One project has already begun while another is still in the planning stage. The first project will use bus rapid transit to link the downtown with University Circle, the area's second largest center of employment.⁸⁹ The five-mile stretch between these two areas is littered with brownfields that dot each side of Euclid Avenue. Many criticize the project, saying that there is no need for the federal government to spend \$200 million dollars on mass transit. Only time will tell if the project will serve to improve traffic and spur development. If a cluster-like project with enhanced funding could be implemented, the project's chance at success could be greatly improved. With greater funding and mass transit at the brownfield's doorstep, many contaminated properties could be remediated and reused for urban housing. An occasional townhouse project has sprouted up along this route in the past decade, but this development is not sufficient to spark a trend. With proper incentives, this area could become a model for implementing mass transit with brownfield remediation and new urbanism. The opportunity for tens of thousands of new urban residences along this route would take advantage of an existing infrastructure that, in contrast, would have to be duplicated if the growing population's only available housing were built in outer ring suburbs. Coupling a new mass transit system and a mixed-use neighborhood that arises from the

⁸⁹ With over 16,000 students, three major hospitals, many research institutions and various museums and other cultural attractions, University Circle draws a lot of traffic. Over 2.5 million alone come to visit the museums and other cultural attractions. http://www.universitycircle.org/uc_about.asp. Bus Rapid Transit (BTR) is a hybrid between light rail and bus. Streets are redesigned so that electric hybrid busses run on dedicated lanes. Sensors on the bus signal oncoming traffic lights to change in order to expedite transit. Passengers pre-pay at elevated stations that reduces the amount of time that they would spend climbing stairs onto the bus and searching their pockets for the fare.

ashes of remediated brownfields, this new neighborhood would displace thousands of commuters each day from their cars onto a much more environmentally-sustainable transit system.

Another Cleveland project is the proposed Opportunity Access Boulevard.⁹⁰ The new boulevard would straddle a train corridor, linking I-77 with University Circle. Forty-three Superfund sites and a large amount of brownfields populate the area where the boulevard would be located. The traversed area, known as the Forgotten Triangle, is littered with abandoned factories that served to make Cleveland an industrial giant in the early twentieth century. While the new boulevard would serve as an access route for the growing job and tourism base in University Circle, the brownfields along the route could serve as excellent locations for light industrial factories that now seek greenfields for space. The new road will be an incentive, but the great amount of contamination will scare off many developers from trying to redefine the Forgotten Triangle. If greater funding could be given to a Opportunity Access Boulevard brownfield cluster program, the new road could be a tremendous success on many levels. If done correctly, the project would bring decreased contamination levels, greater access to Cleveland's second downtown, an increased tax base via new industrial jobs and help slow suburban sprawl. Without better incentives, CERCLA's loan fund may sit on the sideline while millions of federal dollars are invested in a project that could ultimately be a failure. If the incentives are better structured, no additional budget allocation is needed to induce greater redevelopment along a significant federally-funded transit project.

While Cleveland pins its dreams on what might be, Portland, Oregon already has a shining example of how new transportation projects and brownfields can make excellent

⁹⁰ The Ohio Department of Transportation is spending up to one billion dollars to revamp, repair and improve Cleveland's highway system. One possible alternative that is being strongly considered is the University Circle Access boulevard.

bedfellows.⁹¹ With a large swath of brownfields sitting dormant and the separate need for a connector highway nearby, local officials persuaded federal officials that the new highway should not be built over wetlands but, instead, through the brownfield area. The construction of the highway helped link a large industrial area to the I-5 freeway. After the project was completed, the area property values rose by 63% and new leases and land sales more than doubled.⁹² City officials estimate that the new improvements will bring 9,000 new jobs to the area.⁹³ Cities such as Portland and Seattle have thriving economies. While this project did succeed without enhanced incentives, it demonstrates that combining brownfield reuse with well-planned transit projects can lead to great successes. Also, Portland has a strong economy with very innovative land use principles. Other cities, especially those in the rustbelt, do not have the advantages that help spur development in Portland. With increased funding to innovative brownfield cluster groups that work together with transit planners, many cities may be able to clean up contaminated properties, stem suburban sprawl and bring jobs back to the urban core at a much faster pace than the 2001 Act presently has set.

Conclusion

The various versions of the brownfield acts have unfortunately led to an effect contrary to the intent: developers are discouraged from cleaning up abandoned land and are embracing the farmlands for development. With each amendment, Congress seems to be getting closer to the desired effect of making urban areas safer and more useful. While local governments have been given some control over the sites that can be redeveloped, the process is disjointed. Brownfields often appear in clusters on a map and the piecemeal attempt at redevelopment leaves developers with little assurance that surroundings parcels will also be remediated. If local governments are

⁹¹ Eberhart Goode, Collaton & Smallen, supra note 85.

⁹² Id.

⁹³ Id.

given the opportunity to implement a cluster approach to brownfield remediation, developers will have greater confidence that their investment will not fail. By concentrating funding and encouraging development in a focused area, a greater number of brownfields could be cleaned up and restored to productive use. This will help regions curb sprawl, spend less on infrastructure extensions and re-develop their urban core. The 2001 Act is an improvement over previous incarnations of CERCLA, but Congress needs to understand and address the hurdles that developers face in brownfield redevelopment.