

ENVIRONMENTAL JUSTICE IN THE BROWNFIELDS ARENA

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At first blush, environmental justice and brownfield redevelopment initiatives seem to share common goals. Broadly speaking, both seek to eliminate environmental hazards and to promote healthier communities. Some question, however, whether brownfield redevelopments actually promote environmental justice. Still others “believe that assuring environmental justice creates conflicts with the policies and objectives of state brownfield laws.”¹ The debate turns, at least in part, on how one defines environmental justice.

This paper discusses three aspects of brownfields redevelopment that are often viewed as coming into conflict with environmental justice – selection of remedial standards, selection of post-remediation use of the property, and accrual of the economic and social benefits flowing from the redeveloped property. The paper begins with a brief discussion of the background of and definitions of environmental justice. The paper then briefly reviews the definition of brownfields, the scope of the brownfields problem and some of the processes use to promote the redevelopment of brownfields. Finally, the paper discusses three phases of a brownfield redevelopment project at which conflicts with environmental justice notions are most frequently noted.

I. Environmental Justice: Background and Definitions

A. Background

Toxic Waste and Race in the United States, the 1987 report of the United Church of Christ’s Commission for Racial Justice, is widely regarded as a seminal work in the environmental justice movement.² Among other things, that report concluded that race is the most significant variable in the national distribution of hazardous waste facilities and that as the number of people of color in a community increases, so does the probability of a waste facility within that community.³ Historic land use and zoning practices may in part account for some of the disparate impacts that the report identified. “From the late 19th century until well after the

¹ Nancy Perkins, *Smart Brownfield Redevelopment for the 21st Century*; Symposium Article: A Tale of Two Brownfield Sites: Making the Best of Times From the Worst of Times in Western Pennsylvania’s Steel Valley, 34 B.C. ENV’T L AFF. L. REV. 503 (2007) (hereinafter “Perkins”).

² See, e.g., United Church of Christ’s Commission for Racial Justice, *Toxic Waste and Race in the United States* (1987). See also Marianne Lavelle, *Race & Income: Variations on a Trend, the Minorities Equation*, NATIONAL L.J., September 21, 1992 at 52.

³ *Id.*

enactment of the Civil Rights Act of 1964, the property regulation, planning and zoning policies of many cities around the country had what must be called a negative impact on [environmental justice]. Restrictive covenants were enforced, density and use restrictions were imposed, and urban renewal and public housing policies were set in a way that often led to the location of minority communities in the vicinities of industrial uses (or vice versa).”⁴ In part, today’s environmental justice movement is attempting to reverse some of those patterns. Indeed, a “central effort today is to increase the political power of minority communities, and to use that power to adopt land use and other policies that improve the physical and economic environment of these communities.”⁵ Those efforts have included, among other measures, rezoning, development of “overlay zones and use restrictions designed to keep industrial uses out of minority communities and to clean up existing ones” and efforts to “attract new businesses that will be clean and create many new jobs for the community.”⁶

B. Definitions of Environmental Justice:

While there is a vast literature addressing the topic of environmental justice, no single, universally accepted definition of environmental justice has emerged. Some commentators have even declared environmental justice to be a “maddeningly vague” concept.⁷ Some definitions emphasize two elements: a substantive right to be free from disproportionate environmental impacts and a procedural right to participate in environmental decision-making. For example, a leading commentator on environmental justice has stated that the term basically embodies the “idea that minority and low-income individuals, communities, and populations should not be disproportionately exposed to environmental hazards, and that they should share fully in making the decisions that affect their environment.”⁸ The United States Environmental Protection Agency (“EPA”) also employs the same two elements, defining environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁹ Other definitions add elements of social and economic

⁴ Michael B. Gerrard, *Environmental Justice and Local Land Use Decision Making* in TRENDS IN LAND USE LAW FROM A TO Z, ADULT USES TO ZONING, Patricia E. Salkin, Editor (ABA 2001) p. 137 (hereinafter “Gerrard, *Decision Making*”).

⁵ *Id.* at 138.

⁶ *Id.*

⁷ See Christopher H. Foreman, Jr., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE, 122 (1998).

⁸ Gerrard, *Decision Making*, *supra* note 4 at 126.

⁹ EPA Environmental Justice, <http://www.epa.gov/compliance/environmentaljustice/index.html>.

distributive justice. For instance, the University of Michigan's Environmental Justice Information page defines environmental justice as:

The right to a safe, healthy, productive, and sustainable environment for all, where "environment" is considered in its totality to include the ecological (biological), physical (natural and built), social, political, aesthetic, and economic environments. Environmental justice refers to the conditions in which such a right can be freely exercised, whereby individual and group identities, needs, and dignities are preserved, fulfilled, and respected in a way that provides for self-actualization and personal and community empowerment. This term acknowledges environmental "injustice" as the past and present state of affairs and expresses the socio-political objectives needed to address them.¹⁰

II. Brownfields: Definition, Scope and Procedures

A. Definition

EPA defines the term "brownfields site" as "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."¹¹ There are a variety of legal and practical obstacles to the reuse or redevelopment of a brownfields site, including, among other things, "ambiguous legal liability, potentially substantial capital costs, insufficient financing, clouded environmental policies, absence of a consistent redevelopment framework, public opposition, [and] a limited demand for redeveloped sites [due to] competition from greenfields."¹² Those liability concerns grow out of federal and state statutes which hold current owners of contaminated property liable for clean-up costs, even if they did not cause or actively contribute to the pollution. Under the federal Comprehensive Environment Response, Compensation & Liability Act,¹³ ("CERCLA") the EPA either may order a "responsible party"¹⁴ to pay for remediation of contaminated property or undertake the remediation itself and then sue one or more of the other "responsible

¹⁰ <http://eelink.net/EJ/definitions.html> (last visited April 23, 2010). See also Nancy Perkins, *Smart Brownfield Redevelopment for the 21st Century; Symposium Article: A Tale of Two Brownfield Sites: Making the Best of Times From the Worst of Times in Western Pennsylvania's Steel Valley*, 34 B.C. ENVTL AFF. L. REV. 503 (2007) (evaluating two brownfield redevelopment sites "from an environmental justice perspective" including social and economic distributive justice factors.)

¹¹ 42 U.S.C. §9601(39)(A). See 42 U.S.C. § 9601(39)(B) for exclusions from the term "brownfields site.".

¹² Paul D. Flynn, Note, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463, 471 (2000).

¹³ 42 U.S.C. § 9601 *et seq.*

¹⁴ See 42 U.S.C. § 9607(a).

parties” to recover those response costs.¹⁵ Courts have interpreted CERCLA broadly to impose strict, joint and several liability.¹⁶ Many states have similar statutory schemes imposing strict liability on past and present owners or operators. Fearful of potential liability associated with simply taking title to contaminated property, developers tended to move toward previously undeveloped, uncontaminated properties (so called “greenfields”) for development. New, improved infrastructure, jobs, tax revenues and other benefits followed such development. The brownfields then sit abandoned and unproductive. “Visions of abandoned urban lots can stigmatize communities, since they embody many of the elements commonly associated with the decline of our cities: pollution and garbage, unemployment, poverty, racial isolation, crime, drugs, declining public services, and architectural eyesores.”¹⁷

B. Scope of the Brownfields Problem

The exact number of brownfields sites in the United States is not known. Some sources estimate the number at more than 450,000 comprising more than five million acres of land.¹⁸ The United States Conference of Mayors’ 2008 report on brownfields redevelopment noted that of the 209 cities providing information for the report,

188 estimated that they had more than 24,896 brownfields sites, with the average size of a brownfield site being 13.92 acres. There were 176 cities estimating 83,949 acres of land, which were idle or abandoned properties holding the potential to create jobs or produce tax revenue.¹⁹

That report further noted that the cities providing input for the survey estimated that “if their brownfields were redeveloped, they could realize nearly \$1.3 billion to \$3.8 billion annually in

¹⁵ *Id.* §§ 9606 & 9607.

¹⁶ *See, e.g., Kelly v. EPA*, 15 F.3d 1100, 1103 (C.D.C. 1994), *reh’g denied*, 25 F.3d 1088, *cert. denied*, 513 U.S. 1110 (1995)(CERCLA imposed strict liability on, among others, all prior and present owners and operators of hazardous waste sites); *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 484 (8th Cir. 1992)(CERCLA is a “remedial strict liability statute” focused on “responsibility, not culpability”).

¹⁷ Elizabeth A. Stringer, *Redeveloping Old Facilities*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, Michael B. Gerrard, ed. (1999) at 561 (hereinafter “Stringer”).

¹⁸ *See* EPA Brownfields Clean Up and Redevelopment, <http://www.epa.gov/brownfields/about.htm> (last visited April 23, 2010); U.S. Department of Housing & Urban Development, Brownfields Frequently Asked Questions, <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bfieldsfaq.cfm> (last visited April 23, 2010); *see also* Todd S. Davis, *Defining the Brownfields Problem*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY*, 3, 6 (Todd S. Davis, ed. 2002).

¹⁹ United States Conference of Mayors, *VII RECYCLING AMERICA’S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT*, at 9 (2008).

additional tax revenues.”²⁰ Additionally, “106 cities responded that over 191,338 new jobs could be created on brownfields sites with 75 cities reporting that 186,962 jobs have already been created from former brownfields sites (71,313 during redevelopment and 115,649 jobs created post development).”²¹ The overwhelming majority of the cities providing input to that report identified the following as areas requiring additional funding or assistance to promote redevelopment: demolition funds, grants for remediation and aid for sewer upgrades, brownfields technology training, job development and training, assistance in the planning process, and community needs assessment training.²²

C. Brownfields Redevelopment Programs

In an effort to try to promote redevelopment of brownfield sites, both federal and state governments have initiated a variety of programs including, among other things, voluntary remediation schemes and government sponsored redevelopment programs offering both financial and technical assistance. In 2002, the Small Business Liability Relief and Brownfields Revitalization Act²³ was signed into law. That Act’s declared purpose was to “provide certain relief for small business from liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, and to amend such Act to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, [and] to enhance State response programs. . . .”²⁴ The Act sought to promote brownfields redevelopment by providing \$200 million per fiscal year for grants to state and local governments for brownfields site characterization and remediation and by providing liability relief for those participating in clean-up of a site pursuant to a state voluntary remediation program.²⁵ The Act directed that a qualifying state voluntary remediation program must include, among other elements, “mechanisms and resources to provide meaningful opportunities for public participation,” including public access to documents that the “party conducting the cleanup is relying on or developing in making cleanup decisions or conducting site activities” and “prior notice and opportunity for comment on proposed cleanup plans and site activities. . . .”²⁶

²⁰ *Id.* at 9 – 10.

²¹ *Id.* at 9.

²² *Id.*

²³ Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified in various sections of 42 U.S.C.).

²⁴ *Id.*

²⁵ *Id.* §§ 211 & 231 (codified at 42 U.S.C. § 9601 & 9628)

²⁶ *Id.* § 231 (codified at 42 U.S.C. § 9628 (a)(2)(C)).

Today, nearly every state has adopted some form of voluntary remediation program to address brownfields.²⁷ While there are significant variations from state to state, there are elements which are fairly common among those programs. First, most programs expressly exclude their use to remediate sites listed on the Federal National Priorities list. As a consequence, most state programs tend to focus on remediation of less contaminated sites. Second, most voluntary remediation programs allow for relaxation of clean-up standards, authorizing the use of risk based standards or other criteria. Third, most voluntary remediation programs provide some measure of liability protection to the party that successfully completes the remediation and to that party's successors in interest.

Most voluntary remediation programs contain some provision for required public notice or public participation. Some programs simply provide for public notice requiring the party undertaking the remediation to obtain state environmental agency approval of the remediation plan and to then publish a notice in a local newspaper of general circulation describing that plan. Other statutes call for public notice and comment on the proposed remedial scheme. Still others require a public hearing on the proposed remedial plan. Typically, however, voluntary remediation programs do not require a party undertaking the remediation to disclose significant details regarding the post remediation uses of the property. Generic descriptions of the nature of the proposed land uses (*i.e.* commercial vs. residential) may be required, but not detailed site plans or identification of anticipated tenants.

In addition to state sponsored voluntary remediation programs, many municipalities have their own brownfields redevelopment programs.²⁸ Most of these programs receive grant funds from EPA.²⁹ These programs typically provide technical and financial assistance to private businesses and landowners, nonprofit organizations, and others for environmental assessments and remediation.

²⁷ See Kurt A. Frantzen & James N. Christman, *Cleanup Standards* in BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF CONTAMINATED LAND at 22-1, 22-11 (Michael B. Gerrard, ed., 2006)

²⁸ See, e.g., City of Portland Brownfield Program, <http://www.portlandonline.com/bes/index.cfm?c=35008>; City of Phoenix Brownfields Land Recycling Program, <http://www.phoenix.gov/BROWNFLD/brownfld.html>; City of Milwaukee Brownfields Redevelopment, <http://www.mkedcd.org/brownfields>; City of Austin Brownfields Revitalization Office, <http://www.ci.austin.tx.us/watershed/brownfields.htm>; City of Flagstaff, Brownfield Land Recycling Program, <http://flagstaff.az.gov/index.aspx?nid=582>; City of Missoula Brownfields Program, http://www.missoula.mt.us/opgweb/Grants/brownfield_program.htm; and City of Chicago, Brownfields Initiative, http://cityofchicago.org/city/en/depts./doe/supp_info/Chicago_brownfieldsinitiative.html. See also, Jessica Higgins, *Evaluating the Chicago Brownfields Initiative: The Effects of City-Initiated Brownfield Redevelopment on Surrounding Communities*, 3 NW. J.L. & SOC. POL'Y 240 (2008).

²⁹ As a consequence, these programs are subject to 40 C.F.R. § 7.36(b), which provides that a "recipient [of federal financial assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin or sex."

III. Brownfields Redevelopment and Environmental Justice – Areas of Conflict

As noted at the outset of this paper, depending how one defines the terms, the goals of brownfields redevelopment and environmental justice may not always synchronize or harmonize. Having addressed the background and definitions of brownfields and environmental justice, the paper will now briefly examine three areas in which brownfields redevelopment and environmental justice are often viewed as coming into conflict – selection of remedial standards, selection of post-remediation use of the property, and the accrual of economic and social benefits flowing from the redeveloped property. Each of these areas is discussed in turn below.

A. Public Participation in Remediation

In the context of brownfields redevelopment, significant controversy can develop concerning the extent of the clean up that is required. “Local communities are often concerned that EPA or states will lower cleanup standards in an effort to attract industry to an eroding urban center, which means that brownfield sites located near low-income or minority communities will remain permanently ‘dirty.’”³⁰ Typically, the concern focuses on the application of risk-and-use-based clean-up standards. Some argue that “these standards, which are normally less stringent than those mandated under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provide communities with ‘second-class’ cleanups.”³¹

On one side of the debate are those who believe that scarce public and private resources should not be devoted to addressing this remote risk, and would be better spent addressing more clear and present community health threats; that overly stringent clean up requirements add the actual affect of preventing both clean up and redevelopment, and sentencing brownfields to more decades of stagnation; and that clean ups pose risks of their own, such as accidents and fumes from the truck fleets that are required to haul away mountains of contaminated dirt. On the other side are those who argue that future generations should not be burdened with cleaning up our messes; that the minority communities where many brownfields are located should not be stuck with second-class clean ups; that risk assessments that project few or no current risks are unreliable and biased; and that money saved on more relaxed clean ups will not really go to addressing greater health threats.”³²

³⁰ Stringer, *supra* note 16, at 578.

³¹ Perkins, *supra* note 1 at 521 - 22.

³² Gerrard, *Decision Making*, *supra* note 4 at 138-39.

Opponents of relaxed clean-up standards also argue that such standards can “lock in industrial uses, forever barring a community from using the land for residential purposes.”³³ Beyond that “where cleanup standards are relaxed, it is not always certain that the benefits of jobs or tax revenues will outweigh the health risks associated with continued contamination.”³⁴

B. Public Participation in Defining Post-Remediation Uses

“In the opinion of many community members, redeveloping a brownfield site to facilitate further industrial use does nothing to rectify past environmental injustice. The determination of the future use of a site is, therefore, a very important decision.”³⁵ Many brownfield redevelopment programs or state voluntary remediation schemes, however, do not require detailed disclosure of, or public input on, the specifics of the post-remediation use of the property. Those schemes may require that the general nature of the proposed future use be identified (e.g. industrial or commercial as opposed to residential), but not the specifics of the proposed use (for example, high end retail, “big box stores,” mixed commercial and office uses, etc). The specifics of the post-remediation development plan may not be known at the time that the remediation plan is being submitted for approval. In fact, the party undertaking the remediation may not necessarily be the one that will ultimately develop the property. The specifics of the post-remediation development may frequently be determined by existing local zoning and land use requirements. If a site is already zoned for a particular use, the post remediation development may be able to proceed with little or no community input or involvement. If a zone change or variance is required, then the nature and extent of the community involvement in the development plan may be defined by (or limited by) the terms of the local zoning and land use codes.

Regardless whether the specifics of the post-remediation use must be addressed when the remedial plan is being developed and approved or at some later point, community attitudes and input will significantly impact a proposed development. Differing incentives for the various parties involved in or impacted by a proposed development shape the nature and extent of public input.

To the developer, brownfield developments are generally straightforward real estate projects. Anything that slows down the approval process or imposes restrictions on the nature or scale of development is unwelcome and costly, unless it confers tangible economic benefits of some sort. To neighbors, the fate of a site is often highly bound to the community’s aspirations for its future economic, social and environmental development. In the community’s eyes, a decision

³³ Perkins, *supra* note 1, at 521 - 22.

³⁴ Stringer, *supra* note 16 at 578.

³⁵ John C. Chambers, *Community Participation in Brownfields Redevelopment*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY, Todd S. Davis, ed., (ABA 2002) at 247.

made on purely economic grounds will miss many of the most important factors, and represents yet another violation of a community's right to self determination. . . [T]hese are ultimately political and social issues, and the legal framework only loosely determines the outer bounds of permissible modes of participation.³⁶

“Giving developers the freedom to make land use and remediation decisions may encourage and streamline the redevelopment process; however, the relatively brief history of these programs demonstrates that projects are more successful when developers act ‘with careful attention to the current and future needs of the cities in which sites are located, rather than proceeding in an *ad hoc* fashion.’”³⁷

The ends of community participation are just as important as the means. The ends include the substantive benefits mentioned above: the reflection of each neighborhood's sense of self in a project's design, and the enhancement of a community's self determination and empowerment upon the completion of development.³⁸

C. Social and Economic Benefits of Post-Remediation Uses

“The success of a brownfields project can be measured against a variety of criteria: job creation and retention, housing development, improvement to quality of life/services and amenities provided to the community, encouragement of additional investment in the area, improvement in the environmental health and safety of the community, and benefits to local government due to increased tax revenues.”³⁹ Those criteria are themselves subject to differing interpretations. Who received the newly created jobs and were the jobs minimum wage or high paying ones? Who benefitted from the housing development – existing community members or non-community members who were drawn to the site? In the words of one commentator, “[a]n environmentally just brownfield remediation policy will ensure that poor minority communities enjoy these benefits to the same extent as affluent white communities.”⁴⁰

Some commentators believe that promoting community involvement in the process that leads to redevelopment is one step toward equalizing the social and economic benefits flowing from that redevelopment. Those commentators, though, believe that focus on the process alone is not enough because “the most inclusive and well-intentioned procedural process may not yield

³⁶ Stringer, *supra* note 16 at 579.

³⁷ Perkins, *supra* note 1 at 528.

³⁸ *Id.* at 523.

³⁹ See Jessica Higgins, *Evaluating the Chicago Brownfields Initiative: The Effects of City-Initiated Brownfield Redevelopment on Surrounding Communities*, 3 NW. J.L. & SOC. POL'Y, 240 (2008).

⁴⁰ Perkins, *supra* note 1, at 521 - 22.

projects that empower communities and reflect their identity.”⁴¹ Those commentators advocate “[a]mending brownfields laws to integrate all three parameters of sustainable development--the environment, economy and equity. . . .”⁴²

In order for brownfield programs to generate these benefits in ways that alleviate the inequities between environmental justice and other communities, mechanisms must be in place to assess the political strength of communities well before a project begins. Further, communities with weak social capital must be provided with resources to help them identify concerns and bring them to the attention of developers. These objectives could be addressed in various ways. Area-wide planning for communities with multiple brownfields through the use of community-based steering communities would coordinate planning on a larger scale and integrate community perspectives into the brownfield process. Community relations specialists and non-profit organizations that facilitate brownfield development have also been touted as a means of guaranteeing community input more so where capital is weak.”⁴³

One suggestion, then, is for “environmental justice communities” to actively prepare for the arrival of brownfield developers. While some commentators suggest the communities take the initiative themselves, others advocate the state taking steps to promote such organizational activity. Under that approach, the state would identify candidate communities. Then,

a series of public hearings could be held to inform those communities about nearby brownfields, the brownfield process, and potential opportunities for development. States could also offer targeted funding to allow community organizations or other entities to help residents prepare vision statements and plans, and form leadership teams that could be taught collaborative decision-making skills. Communities benefiting from these initiatives would be prepared to hit the ground running when a developer comes to town, and might even receive some sort of state certification of brownfield readiness. It is not up to developers to engage in community readiness activities. Rather, it is up to the states to take steps and ensure that communities are prepared to guide developer decisions in ways that will maximize all of the benefits associated with brownfield development.⁴⁴

Critical to this approach is the notion that communities would identify leaders and formulate consensus based, community visions for brownfields in their area well before development decisions are made. “Interested developers would have the advantage of working with legitimate

⁴¹ *Id.* at 523.

⁴² *Id.* at 528.

⁴³ *Id.* at 529.

⁴⁴ *Id.*

participants from the outset; project development would not stall while an environmental justice community plays catch up, scrambling to try to understand what is happening to its neighborhood and to inject itself into the process.”⁴⁵

IV. Conclusion

While environmental justice concepts and brownfield redevelopment initiatives both seek to eliminate environmental hazards and promote healthier communities, conflicts can arise. Indeed, some question whether brownfield redevelopments promote environmental justice. Three phases of a brownfield redevelopment that frequently can give rise to conflicts with environmental justice goals are the selection of remedial standards, the selection of post-remediation use of the property, and the accrual of the economic and social benefits flowing from the redeveloped property. Improved processes for community input and involvement in the selection of both the remedial standards and post-remediation uses may synchronize brownfields redevelopment and environmental justice goals. Getting communities to formulate clear visions and plans for their brownfields well before development decisions are made so that they can then actively and timely participate in the process may help to promote the accrual of the economic and social benefits to the existing community from the redeveloped property.

⁴⁵ *Id.* at 530.