Getting Started with Brownfields -- Key Issues and Opportunities: What Communities Need to Know

by
Charles Bartsch

NORTHEAST-MIDWEST INSTITUTE
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FRAMING THE BROWNFIELDS ISSUE

Brownfields burst on the scene in the early 1990s, in the wake of several court decisions that entangled any site with any contamination, no matter how minor, in the web of Superfund regulations and policies. In a 2002 statute, Congress defined brownfields as sites where "real or perceived" contamination affects their potential for reuse. The actual number of underused or abandoned industrial complexes is difficult to tally, but the problem is significant and pervasive. Some experts have suggested that nearly 1 million sites nationwide -- ranging from obsolete manufacturing complexes to abandoned corner gas stations -- show evidence of at least some contamination which could trigger regulatory concerns and ultimately inhibit their owners from selling the site, securing financing, or proceeding with reuse. This situation has posed a major challenge for localities seeking to revitalize distressed neighborhoods and attract new investment to sites with prior uses.

The problems that typically plague these facilities, such as structural deterioration and environmental contamination, are virtually impossible to quantify beyond the community level. Public officials and private leaders can give examples of specific properties and describe the problems, but few are able to offer an overall estimate of their extent. Listings of vacant industrial and commercial space are readily available, but they include only properties for sale or lease, not property withdrawn from the market, or simply mothballed. Vacancy rates do not reveal the importance of a particular site to the local economy; neither to they convey its social or historical significance. Unless a property has been inspected, it is impossible to know if it is contaminated -- although if the facility housed an industrial operation prior to 1980, the likelihood is very high.

The obstacles, while daunting, are being gradually confronted by federal agencies, state and local governments, development organizations, and private interests. In spite of difficulties, the problems of reuse usually do not outweigh the benefits of returning the structures and properties to productive use. Older structures in inner-cities can provide affordable space for new and small enterprises that cannot pay for space in newly constructed suburban business parks or high-rent commercial areas. Large, often architecturally significant structures can become anchors for distinctive new redevelopment efforts.

The lack of large tracts of empty land and the inability to annex adjacent areas is forcing some cities to look closely at reusing old factory complexes and abandoned shopping centers. Older industrial and commercial buildings have the advantage of location in areas already developed, often close to town centers. Their reuse helps reduce suburban sprawl, with its land use and environmental impacts. Building on previously developed land rather than greenfield tracts reduces the potential for spoiling groundwater and wetlands. Site reuse takes advantage of existing infrastructure and avoids costly new public investments. In larger cities, brownfields are often in areas served by mass transportation, which makes them more accessible to economically disadvantaged persons, who have a greater need for public transportation to get to and from work.

THE BROWNFIELD ISSUE -- CONTEXT, GOALS, AND STRATEGIES

The convergence of the needs, issues, and opportunities of economic development and environmental improvement comes at a critical time for local officials struggling to craft community revitalization strategies targeted to old industrial areas. Many brownfields are caught in a vicious cycle of decline, which only exacerbates the problems local officials face.

- Older industrial properties -- even those with just small amounts of environmental contamination that could easily be remediated -- are placed at a considerable disadvantage in the real estate market, compared to clean greenfield locations.

- A property owner -- unable to sell a contaminated property -- simply abandons it, undermining the local tax base.

- Vacant facilities deteriorate and invite abuse -- unsupervised stripping of parts or material, vandalism or arson, and "midnight" dumping.

- Untended pollution may worsen and spread, further diminishing the property value and adding to its cleanup cost, as well as threaten the economic viability of adjoining properties.

- The site becomes an unwanted legal, regulatory, and financial burden on the community and its taxpayers.

Addressing the environmental and community development problems stemming from brownfield contamination is widely recognized by both public and private sectors to be a desirable and laudable objective, but doing so is not easy.

Barriers to Redeveloping Contaminated Sites. Brownfield sites face several

formidable barriers to reuse. The cost of environmental cleanup can also make brownfield sites economically uncompetitive, at least initially. The legal and procedural steps necessary to test, clean, acquire, and reuse contaminated sites is expensive and time consuming. The costs of preparing financing packages have tripled since 1980 because of environmental requirements. In practice, whether sites are cleaned and reused or not boils down to one of dollars and cents; even if a formerly used facility has only small amounts of contamination, site assessment and cleanup can add to the cost of a redevelopment project, making its economics much harder to justify.

In addition, even with liability clarifications for prospective purchasers and others put in place in the 2002 brownfield statute, uncertainty over liability remains a critical concern. The prospect of liability drives prospective site reusers away, and keeps companies from being able to borrow enough to clean up properties and modernize operations. In fact, many site owners still lack access to adequate, affordable levels of redevelopment capital. In most areas, adequate private financing to carry out both cleanup and redevelopment activities is simply not available. Even with lender liability addressed, financiers are still concerned about the impacts of contamination on collateral value and the ability of borrowers to repay their notes. These risks have made lenders wary, and this fear makes them reluctant to provide the resources needed to carry out site reuse projects.

Goals of Public-Sector Incentives in Promoting Reuse. In many cities, few needs are more pressing than that of restoring abandoned buildings and brownfield sites to useful life. Their continued deterioration will only worsen existing environmental problems and further weaken the local economic base. Therefore, in spite of the difficulties of brownfield projects, communities have little choice but to promote their reuse; the benefits of returning these sites and structures to productive reuse outweigh the option of inactivity. City agencies and local development organizations, as well as private interests, are increasingly being successful in their efforts to offer incenties that can address the obstacles that still face brownfields, however daunting.

The public sector can, in fact, do much to help level the economic playing field between greenfield and brownfield sites. Creatively crafted and carefully targeted incentives and assistance can help advance cleanup and reuse activities. Such strategies must recognize, however, that brownfield projects differ considerably in terms of barriers to investment and opportunities to redevelopment. Therefore, no one "best" public-sector approach will fit all needs. Clearly, a variety of incentives can make the most effective use of public-sector assistance, as well as improve the climate that invites private investment in brownfields. These incentives, used separately or in combination, should be able to meet several goals, including:

- Reducing the lender's risk, making capital more available by providing incentives to lending institutions (such as loan guarantees or due diligence

support) to help companies or projects at sites deemed riskier because of their prior uses;

- Reducing the borrower's cost of financing, for example, by making capital more affordable by subsidizing the interest charged on brownfield loans, by offering repayment "grace periods" that recognize additional up front costs needed to restore a brownfield site, or by establishing policies that reduce loan underwriting and documentation costs; and

- Easing the developer's or site user's financial situation by providing incentives, such as tax credits or abatements, or cash offsets such as training and marketing assistance, that can help improve the project's cash flow.

State and local governments, in many respects, are the innovators, often working in partnership with federal agencies to bring both environmental and economic development programs to bear at brownfield sites. Typically, brownfield success stories are found in places that have adopted their own site characterization and reuse tools and creatively built on the foundation provided by federal programs and policies.

Yet as important as these initial successes are, the potential exists for even greater activity. Many jurisdictions are starting to explore ways to help prospective re-users overcome the difficulties that contamination can bring to the redevelopment process, setting up finance programs to ease the cost or terms of borrowing, augmenting private funds, or filling funding gaps that the private sector will not bridge. Moreover, public-sector support does not have to be limited to helping specific companies; other related activities can be financed that help improve the broader brownfield investment climate. For example, localities can assume some of the responsibilities for site preparation and clean up, recovering some of their costs during subsequent site sale or development. And, jurisdictions can support such activities by earmarking tax revenues, loan repayments from other programs, and other sources of funds to pay for necessary project activities, such as site testing or soil removal.

THE BROWNFIELDS REVITALIZATION ACT OF 2002

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfield Revitalization Act into law – nearly eight years after the first brownfield bill was introduced into Congress. The new law has generated even greater interest in brownfield site reuse, in a couple of ways. As noted below, it has set the stage for new state-community-private partnerships that can resolve thorny practical liability issues that impede site reuse. A key aspect is that the act clarifies the state-federal relationship regarding cleanup finality.

The new law will also cities and private sector players overcome one of the most

significant hurdles they face when trying to acquire and redevelop contaminated property – the lack of capital to carry out essential early- stage activities, notably, site assessment, remediation planning, and the actual cleanup itself.

The brownfield act authorizes $200 million per year (thru fiscal 2006) for grants to states, local governments, and tribes, as well as entities such as quasi-public redevelopment agencies and authorities. This money to be used for:

- site assessment grants – typically, up to $200,000 per site, but EPA has discretion to bump this to $350,000 under some circumstances; and

- grants for cleanup – both to make direct remediation grants of up to $200,000, to governments or non-profits, or to capitalize cleanup revolving loan funds (RLFs), up to $1 million per applicant.

The 2002 law broadened the potential for local brownfield innovations in two significant ways. First, it permitted sites with petroleum contamination to participate in the brownfield grant programs – and stipulated that 25 percent of what Congress appropriates for the program (up to $50 million) may be used for sites with petroleum contamination. This is helping brownfield reuse proponents better address the realities of the reuse process, where mixed contaminants are the norm; it is also proving useful in small towns where the predominant type of brownfield is the abandoned gas station.

In addition, an expansion in grant-eligible activities now means that recipients will now be able to use a portion of their site assessment or cleanup grants to pay insurance premiums that provide coverage (such as for cleanup cost over-runs) for these sites. Little used to date, once this permeates the marketplace, it will help prospective site reusers secure private financing more readily, because environmental insurance can offer site reusers a more predictable way to better quantify and manage risk.

The Brownfield Revitalization Act also significantly increases EPA's support of state response programs (see also "*Voluntary Cleanup Programs*", below). This is proving critical, given the enhanced state role in deciding site cleanup finality, which includes strict limits on federal enforcement and cost recovery -- the so called "enforcement bar." Sites addressed thru state voluntary response program are protected from EPA enforcement and cost recovery actions under CERCLA, except in the case of only a few statutorily defined "reopeners". The new authorizes $50 million per year (thru fiscal 2006) for grants to states and tribes to establish and enhance state voluntary cleanup and other response programs – more than triple the pre-enactment level.

In addition to funding, the new law is encouraging more public-private partnerships with a common goal of site cleanup and reuse, because it clarifies vexing liability issues that deterred site acquisition and redevelopment. Specifically, the

Brownfield Revitalization Act:

- exempts from Superfund liability contiguous property owners – those who did not contribute to the contamination and who provide cooperation and access for the cleanup;

- clarifies the innocent landowner defense to Superfund liability, making it easier to use via a "checklist" to determine whether or not it applies; and

- exempts from Superfund liability prospective purchasers – those who did not know about the contamination at the time of acquisition, who are not responsible for contamination at the site, and who do not impede its cleanup (the law includes windfall lien provisions for sites where the government pays for cleanup, thus enhancing the fair market value of the property).

The latter is probably the most important provision in the new law. Liability protection for prospective purchasers, available for persons who acquire property after January 11, 2002, will remove a significant barrier to private sector participation in brownfield projects, and allow new owners to quantify their risk much more precisely.

EPA regulations governing the "all appropriate inquiry" that the law requires in order to get liability certainty go into effect on November 1, 2006. This should give local officials a good tool to promote site redevelopment – especially as it is linked with property assessment resources and technical assistance efforts.

Voluntary Cleanup Programs. Shortly after the brownfield issue emerged, following several court cases in the early 1990s which clouded the applicability of CERCLA liability, older cities with an extensive industrial legacy found themselves at a considerable competitive disadvantage because of the uncertainties over contamination and its potential legal impacts. Therefore, several states -- with encouragement from federal EPA, began to formulate what came to be known as voluntary response or voluntary cleanup programs (or VCPs). VCPs are state-level initiatives that have been put into place to encourage the voluntary cleanup of contaminated sites and expedite the site reuse process, and they carry various types of liability relief with them. The earliest recognized successful programs were found in New Jersey, Minnesota, Pennsylvania, and other traditional "rust belt"states.

No federal legislation required the creation of these state programs. VCPs differ from other environmental programs because they provide a way for owners or developers of a site to approach a state <u>voluntarily</u> to cooperatively work out a process by which the site can be cleaned up appropriately, incorporate innovative and more cost-efficient cleanup technologies or engineering controls to contain contamination, and made ready for new uses. All states now have some type of VCP in place, but many are very new;

only five of the programs existed before 1991, and more than two-thirds have been put in place since 1995. State VCPs are particularly popular because they allow private parties to initiate cleanups and work with state agencies to avoid some of the costs and delays that would likely occur if the sites were subject to enforcement-driven programs.

ROLE OF THE FEDERAL GOVERNMENT IN BROWNFIELD REVITALIZATION

For decades, federal economic development and finance mechanisms have been used to stimulate economic activity in certain geographic areas or industries, or under certain types of situations, or to nudge private capital markets when they chose not to participate. Brownfield projects at contaminated sites represent a logical extension of the mission of many of the programs that federal agencies currently operate. Federal programs could be better used to support brownfield reuse simply by taking a fresh look at what program administators view as eligible activities and how they deliver their financial and technical assistance services.

Over the past decade, local governments and community organizations, and private companies have used the federal tools noted below-- at one time or another, sometimes quite creatively -- to meet different site assessment, cleanup, preparation, and redevelopment needs. Nearly two dozen federal programs have been tapped, one way or the other, to support local brownfield efforts, but only three have "brownfields" specifically in their mission. They are EPA's site assessment and cleanup grant and loan programs, and HUD's brownfield economic development initiative (BEDI) program. A targeted brownfields tax expensing incentive was in place, but it expired at the end of 2005 (although there is congressional interest in reviving it)..

In the case of the rest, economic and social program missions have been linked to brownfield project needs. Besides the programs mentioned above, federal efforts most commonly brought to bear used in a brownfield context include HUD's Community Development Block Grant and Section 108 programs, EDA's public works and revolving loan fund programs, and historic rehabilitation tax credits. A more comprehensive listing of applicable federal financial assistance programs includes the following.

Loans

- EDA capital for local revolving loan funds
- HUD CDBG funds for locally determined loans and “floats”
- SBA microloans
- SBA Section 504 development company debentures
- EPA capitalized clean water state revolving loan funds
- EPA capitalized brownfield revolving loan funds
- USDA business and community facility loans

Loan Guarantees

- SBA Section 7(a) and Low-Doc programs
- HUD Section 108 loan guarantees

Grants

- HUD CBDG (for projects locally determined)
- EDA public works and economic adjustment
- DOT (various system construction and rehabilitatio programs)
- Army Corps of Engineers (cost-shared planning and development services)
- USDA business and community facility grants

Equity Capital

- SBA Small Business Investment Companies
- "New Market Tax Credit " investment/capital funds

Tax Incentives and Tax-exempt Financing

- Historic rehabilitation tax credits
- Low-income housing credits
- Industrial development bonds
- Targeted expensing of cleanup costs (through 12/31/05)

Tax-advantaged Zones

- HUD/USDA Empowerment Zones and Enterprise Communities (various incentives)

STATE FINANCING INCENTIVES

More than half the states now have some type of program in place to help finance brownfield reuse. What is interesting is their variety. States are putting many different – but equally effective – approaches in place to meet the diverse challenges and common goal of brownfield reuse.

About 23 states offer some sort of tax credits, abatements, and other tax incentives to encourage brownfield projects. These programs basically help with a project's cash flow, by allowing revenue to be used for brownfield purposes rather than for tax payments. State and federal tax incentives historically have been used to channel investment capital and promote economic development in areas that have needed it – and brownfield targeting is a natural evolution of this type of program tool. Most tax incentives are targeted to offset cleanup costs or to provide a buffer against increases in property value that would raise tax assessments before the site preparation costs are paid off.

Some 22 states offer financial assistance programs targeted directly to promote brownfield reuse. Capital gaps remain the biggest barrier to brownfield reuse, and more

than half the states have worked to address this issue by putting some sort of financing incentives in place – both direct financing tools, such as loans or grants, or indirect financing assistance such as tax abatements or credits.

Finally, more states are developing innovative -- and typically non-cash -- programs to support brownfield redevelopment by helping to level the economic playing field between unused and brownfield sites. These types of state activities build on very real and practical opportunities to promote linkages across programs and leverage additional resources more easily. About half a dozen state programs do this in various ways, by limiting risk or offsetting critical costs such as those for site assessments. They include:

- Michigan, which has authorized cities and counties to establish Brownfield Redevelopment Authorities, which have tax increment financing (TIF) and bonding authority

- Massachusetts**,** which offers an insurance incentive to brownfield site development in targeted areas.

- Wisconsin has adopted incentives aimed at the process side of the financing picture, including a mechanism to cancel delinquent taxes for new purchasers as part of an agreement to clean up contaminated property.

- Pennsylvania's "SiteFinder" program links brownfield sites to prospective purchasers or developers.

For a complete listing of state financial assistance programs, see EPA's brownfield web site.

The Challenge for Local Stakeholders: Confronting Environmental and Economic Issues Affecting Site Redevelopment

Underused or abandoned industrial facilities are a national concern. Confronting the environmental and economic issues affecting site reuse requires a deliberate, multi-dimensional approach that often does not neatly fit with the rules and procedures of federal, state, or local economic development or environmental programs. Financing has emerged as a key barrier to brownfield reuse. Site assessment and cleanup requires financial resources that many firms lack and find difficult to secure. And without financing, private reuse projects cannot go forward, even if their proponents want them to. This further undermines efforts to revitalize the distressed areas that are home to so many abandoned, contaminated sites.

Yet in spite of the barriers, communities all across the country have discovered

that brownfield reuse opportunities are real. To date, more than 50,000 sites have successfully completed state VCPs, and thousands of diverse projects have been documented, showing how they have been carried out in a way that makes both economic and environmental sense, and that builds on the competitive advantage that specific sites boast. Such success stories suggest that liabilities can be worked out, that financing can be secured, and that cleanup can be accomplished -- in short, that brownfield redevelopment can be achieved.