Brownfield Action: Questions about Brownfields

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What is a brownfield?

The cleanup and revitalization of brownfields represents one of the most exciting and challenging environmental and urban initiatives in the world. The United States EPA defines a brownfield as an “abandoned, idled, or under-used industrial or commercial facility where expansion or redevelopment is complicated by real or perceived environmental contamination.” A brownfield site is also defined as developed real estate, which is contaminated to some degree by years of use. The term “brownfield” was first used to distinguish developed land from unused suburban and rural land referred to as “greenfield” sites.

What has resulted in abandonment of brownfields?

Many factors have resulted in brownfield properties being abandoned in favor of developing "pristine" farmland or previously undeveloped land. Most significantly in the U.S. is the fear of the cost and liability for cleaning up any environmental contamination at the site. Prospective purchasers and developers are concerned that they will be held liable for the costs associated with cleaning up the property, even if they were not involved in the contamination. U.S. banks are often reluctant to issue loans on brownfield properties because of liability concerns or the fear that the cleanup costs will exceed the value of the property. This fear of environmental liability has resulted in properties that have lingering environmental problems or potential contamination being left idle.

Why is brownfield redevelopment important?

Many brownfield sites once provided economic vitality and jobs to urban communities and are now avoided by new industry, developers and lenders. Productively reusing brownfield sites prevents urban sprawl, encourages urban revitalization and creates new jobs for the surrounding communities. Redeveloping brownfields links economic vitality and jobs with environmental protection. Previously abandoned properties are returned to the tax base which increases the economic vitality of the urban communities. In addition, brownfields are often "eyesores" and can create havens for crime, illegal dumping and destruction, which further degrade our communities and potentially put our children at risk.
Who are the Stakeholders?

For successful brownfield redevelopment, the interested parties or "stakeholders" need to come together to identify interests, conflicts and problems. At the very minimum, interested parties will include:

- Property owner and, if it exists, operator;
- Brownfield redeveloper;
- The lender or financial backer;
- The regulators (state, and in some cases, federal);
- Local government planning and redevelopment agencies; and
- Representatives from the affected community.

Environmental Law

Although the environmental protection field in the U.S. is only about 27 years old, it is already quite complex. To address the risks posed by the release of hazardous substances into the environment, in 1980, the Congress of the U.S. enacted the Comprehensive Environmental Response, Compensation and Liability Act also known as “Superfund.” The federal Superfund Law identifies the parties responsible for cleaning up contaminated property. It creates liability schemes and establishes cleanup standards. The purposes of the federal statute is to investigate and clean up sites that have been contaminated by hazardous chemicals and to recover the costs from responsible parties. The "polluter pays" regardless of fault. Superfund tied all previous generators together for clean up under "joint and several" liability.

In order to do a "property transfer" (transferring ownership from the owner to the "new" owner), an environmental assessment is made of the property. Based on the results of the assessment, by an independent consultant, the owner usually looks for a legal opinion regarding pending property transaction. In the past because of the potential cleanup costs under "Superfund" buyers have been reluctant to purchase under existing environmental laws.

Ironically, these Superfund laws designed to cleanup contaminated land have been widely criticized as major stumbling blocks to cleaning up brownfields. There is a fear among property owners, operators, developers, lenders and others, about the potential cleanup costs from being associated with a "Superfund" site.

Most of the sites subject to remediation or clean up have resulted from practices that occurred at least 20 years ago. Some of these practices were legal, "state of the art" and not viewed as damaging to the environment at that time.
Liability

The Superfund laws create joint, several and strict liability for any current or previous owner or operator of the facility. This means that any person who currently or previously owned the property or operated on the property is liable for the entire cost of cleaning up the contamination whether or not they caused or contributed to the contamination.

Because of the cost of cleaning up the contamination can be enormous, the fear of being liable for the costs has served to deter potential purchasers from buying potentially contaminated properties.

Community Revitalization

In the past, neighborhoods in the U.S. were "redeveloped" by leveling land and building apartments or homes, businesses and shopping centers. In urban centers there are neighborhoods that contain brownfields. Recycling of urban land as opposed to developing precious "greenfields" is a serious matter for all communities. How we develop this property is becoming increasingly important to the revitalization of the neighborhood. Revitalization differs from redevelopment. Revitalization means coming alive or giving new life to the neighborhood or community. Seeing the health of a community or neighborhood as vital to the whole urban center. Redevelopment means developing again which may not add to the quality of life in the neighborhood.

Land Use Planning

Local governments work with planners to develop the highest use for the land within and surrounding our nation’s cities. This is why brownfield redevelopment is so important; we need to redevelop land in a responsible way that meets the needs of the community so that we can maintain surrounding "greenfields" for farming and agricultural use. The land that we have within our cities must be used efficiently.

When we analyze the "true costs" green field development or externalities such as air pollution, impacts on water resources and water quality and the reduction of arable land and topsoil, the costs are much greater to us all than the price of the land.

History of Risk in Environmental Cleanup

Historically, in the United States, the state and federal Superfund laws have required the parties responsible for property contamination to cleanup the property to "background" which is the level
of contamination that existed at the site before the release, or the "lowest feasible cleanup level." More recently, there have been laws enacted that require standards of cleanliness that protect human health and the surrounding environment. Generally, a risk assessment is done, which takes into account various factors, including predicted future uses of the land, in order to establish a reasonable standard for “clean.”

**Model Projects**

Portland, Oregon has several examples of brownfield properties that have been cleaned up and redeveloped for our use.

The South Waterfront Urban Renewal Area was a $30 million project. This brownfield redevelopment project once housed a power station, lumber mills and metal scrap yards.

For large concerts and professional basketball games, we go to the Rose Garden. It sits on a former brownfield. The land became contaminated when the site was an automotive service and fueling center. To clean this site up required soil removal.

Our newest transit system connecting Portland to urban areas passes through a variety of commercial and light industrial areas where soil removal, containment, soil treatment, groundwater treatment and removal of underground storage tanks have already taken place.

All across the United States and in many countries, citizens are taking inventory of their land. As land becomes more precious people want to "recycle" inner city land first and preserve their "greenfields".

Model projects are a good way to try out new possibilities in land redevelopment. Through model projects we can quantify and measure new processes, designs and products. If the ideas incorporated into a model project work, that’s good information and developers are more likely to try out these new concepts in their own projects. If things don’t work out as expected, that’s also good information and planners and developers can learn from these experiences also. Model projects are sometimes presented as “case studies.”

**Partnership**

One process for brownfield redevelopment that has proved to work well through model projects is partnership. Here are some potential goals that could be achieved by addressing brownfields through partnership:

- A "win" for the developer is also a win for the community.
• The community benefits in measurable ways, such as more affordable housing, expanded business opportunities, and/or more jobs.
• A healthier environment.
• Some form of community amenity
• Identify the answer to this question for all partners. How would individual partners measure success at the end of redeveloping a brownfield?
• Maximize the utility of available land into existing plans such as housing goals, job goals, and community objectives.
• Job creation
• Overall increase in tax base
• Community revitalization
• Everyone who invest benefits from the process
• Proactive effort on the part of the government to fund the cleanup of actual brownfields.

Environmental Justice and Brownfields

Throughout the United States, brownfields are overwhelmingly concentrated in people of color, low-income, and otherwise marginalized communities. By their very nature, Brownfields issues are inseparable from issues of social inequity, racial discrimination and urban decay.

The draft report by the national Environmental Justice Advisory Council entitled “Environmental Justice, Urban Revitalization, and Brownfields: the Search for Authentic Signs of Hope” suggests a number of key factors in working toward the goal of healthy and sustainable communities by redeveloping brownfields including the following:

Brownfields redevelopment should promote urban revitalization as opposed to urban redevelopment, defined as a bottom-up process which comes from a community-based vision of needs and aspirations that seeks to build capacity, partnerships and mobilize resources for public health, jobs, decent housing, and pollution prevention.

Understanding brownfields issues as a subset of intensifying systemic problems related to residential segregation, disinvestment of inner-city areas, urban sprawl, degradation of the urban environment and polarization between urban and non-urban communities.

The ecological importance of brownfield redevelopment to the health of both urban and rural communities presents an opportunity for the nation to embrace the concepts of reuse, recycling and revitalization, and ultimately cultural and spiritual rebirth of these communities.
Financing and Funding

The legacy of the United States industrial past is evident in communities all across the country. Often abandoned, usually contaminated industrial sites dot the cityscape. Bringing new activity to these brownfield sites can be a costly proposition. The complicated process and legal hurdles of acquiring, cleaning and reusing these sites can be expensive in terms of site preparation expenses and fees, and costly in terms of time delays. Site evaluation processes, testing, possible legal liabilities, and other factors serve to deter private participation in activities to bring old industrial sites back to productive use. In many situations, the private development and financial sectors are not able or willing to act on their own to ensure that the full economic potential of site reuse will be achieved.

Critical funding gaps are, in fact, the primary deterrent to site and facility reuse. The legal and procedural steps necessary to test, clean, acquire, and reuse contaminated sites are expensive and time consuming. In practice, whether sites are cleaned and reused or not boils down to one of dollars and cents; even if an old industrial facility has only small amounts of contamination.

Access to Capital

Financial institutions are reluctant to make loans associated with potentially contaminated properties for three reasons. First, lenders fear that unexpected cleanup liability could bankrupt borrowers and thus jeopardize the loan. Second, these properties make undesirable collateral. In the event of a borrower’s failure to pay back a loan, the bank could end up taking title to contaminated property. Third, the law is unclear as to the circumstances under which lenders who engage in workouts with borrowers to help them avoid default can themselves be sued as operators of a hazardous waste site. All this can have a chilling effect on the availability of capital for redevelopment. Though some would argue that the perceived financial risk to banks is less than the actual risk of brownfields loans, it remains difficult to find private redevelopment financial unless the bank can be satisfied that the property is clean.

Private Sector Financing

In spite of the major obstacles to private sector financing, opportunities exist. The following are key sources of private-sector support in the United States:

Responsible parties

Prior to redevelopment, many sites are cleaned up by the party responsible for the environmental contamination.
Purchasers

Often a property can be cleaned up by the new property owner when a responsible party could not be identified or held accountable, or where the party was financially insolvent.

Commercial Banks

Many banks are reluctant to loan money on brownfield projects until remedial work at the site has been certified as complete, either with a No Further Action letter or a Covenant-not-to-Sue. However, banks are increasingly exploring the role of lending on contaminated property, and many will do so.

Foundations

Private foundations may be sources of money for cleanup and redevelopment.

Public Sector Incentives

The public sector can 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. 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 can meet several goals including:

- Reducing the lender’s risk, making capital more available by providing incentives or legal clarification for lending institutions 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 subsiding the interest charged on brownfield loans, 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, that can help improve the project’s cash flow.

 Obtaining financing and funding is often the most important element to creating a successful brownfield redevelopment project and it is, at times, the most difficult. However, there are public incentives and private financing options that may come together to create successful cleanup and redevelop brownfield properties.
Encouraging Clean up of Contaminated Property

In spite of all the obstacles to cleaning up contaminated property across the United States, Congress, state Legislatures and regulatory agencies have recently adopted several legal and policy schemes to encourage cleanup of brownfields including:

- The limitation of liability for prospective purchasers, lenders and trustees dealing with contaminated property in connection with brownfields redevelopment;
- The use of incentives – such as tax breaks – for the economic redevelopment of brownfields sites;
- The development of standardized cleanup levels;
- The encouragement of flexible use of financial resources in cleanup activities;
- A broader scope of risk assessment strategies that reflect the future likely use of redeveloped brownfields sites.