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PUBLIC PARTICIPATION IN BROWNFIELD REMEDATION SYSTEMS: PUTTING THE COMMUNITY BACK ON THE (ZONING) MAP

Patrick J. Skelley II*

INTRODUCTION

In recent years, many states have enacted voluntary remediation, or "brownfields," statutes to expedite hazardous waste cleanups, and restore dormant and underutilized lands to productive use. Voluntary remediation statutes have become increasingly popular due to the unintended effects of certain federal environmental statutes, particularly the Comprehensive Environmental Response, Compensation, and Liability Act¹ ("CERCLA" or "Superfund"). In response to the public-health hazards posed by properties contaminated with toxic wastes, Congress enacted CERCLA in 1980, intending to force "polluters" to pay for remediating hazardous waste sites. Although Superfund was designed to be the most expedient method of cleaning such sites, the "polluter pays" principle has in fact hindered remediation efforts due to protracted and costly litigation over who actually must fund the removal of contamination.² One reason for this morass of lawsuits is CERCLA's broad definition of "potentially responsible party"³ which encompasses almost every entity having a re-

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. See Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 *ECOLOGY L.Q.* 705, 726-32 (1994).

3. Under CERCLA, a potentially responsible party includes (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by con-

lationship to a Superfund site.⁴

In addition to slowing cleanup efforts for many sites, the far-reaching CERCLA liability provisions have put a chill on the sale and development of now-dormant industrial and commercial properties,⁵ known as "brownfields."⁶ Owners will often take their properties off of the market rather than risk the discovery of toxic wastes on their land.⁷ Moreover, potential developers of such properties avoid brownfields so as not to become "owners" or "operators" of a CERCLA site.⁸ As a result of this skittishness towards brownfields, developers (and the corresponding economic benefits they bring) have been continually migrating out of urban centers towards relatively pristine suburban and exurban lands commonly termed "greenfields."⁹ Continuing greenfield development not only

tract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. § 9607.

4. See Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 *BUFF. L. REV.* 285, 286 (1995).

5. See *id.*

6. See Stacie A. Craddock, Comment, *A Call for Public Participation in State Voluntary Remediation Programs: Strategies for Promoting Public Involvement Opportunities in Virginia*, 30 *U. RICH. L. REV.* 499, 503 n.17 (1996). See generally Joel B. Eisen, *Brownfields of Dreams: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 96 *U. ILL. L. REV.* 883 (1996). "A 'brownfield' is best defined as 'abandoned or underutilized urban land and/or infrastructure where expansion or redevelopment is complicated, in part, because of known or potential environmental contamination.'" *Id.* at 890 (quoting NAT'L ENVTL. POL'Y INST., *HOW CLEAN IS CLEAN?: WHITE PAPER ON BROWNFIELDS* 38 (1995)).

7. See Craddock, *supra* note 6, at 505.

8. See Solo, *supra* note 4, at 286-87.

9. See *id.* at 287.

introduces potentially polluting activities into otherwise clean areas,¹⁰ but guides job growth away from city centers.¹¹ In addition, it can cause incidental environmental degradation from increased commuter traffic, due to a lack of mass transit options for greenfield employees.¹²

In an attempt to stem the tide of greenfield despoliation and revitalize urban areas, an increasing number of states are implementing so-called voluntary remediation statutes.¹³ These statutes may very well be the key to urban renewal and environmental restoration. The central aim of these legislative schemes is to encourage individuals to voluntarily remove contamination from brownfields by eliminating many of the Superfund-related obstacles that have previously plagued such properties.¹⁴ Nevertheless, such statutory schemes often fail to provide any meaningful community input into the remediation process, and this Note proposes the use of the local zoning and planning power as a means of effectively including communities in brownfield cleanups.

Voluntary remediation statutes typically have three main components to encourage brownfield development. First, such brownfields legislation usually contains provisions creating a range of cleanup standards; by contrast, CERCLA mandates a "one-size-fits-all" cleanup standard requiring that the property be made suitable for residential use no matter the actual use of the property.¹⁵ Each cleanup standard mandates that remediated property not be harmful to human health.¹⁶ By allowing for varying degrees of remediation to meet this baseline requirement, as opposed to mandating cleanup to pre-pollution levels regardless of actual risk, developers

10. *See id.* at 304.

11. *See id.* at 303.

12. *See id.* at 304-05.

13. *See* Craddock, *supra* note 6, at 499 n.3.

14. *See id.* at 499-500. These obstacles include exorbitant costs, the degree and method of cleanup that CERCLA requires, and the extensive liability "net" that CERCLA casts. This combination of factors discourages cleanups. Brownfield statutes try to ameliorate these problems by providing for more flexible standards in the means and extent of remediation.

15. *See* Eisen, *supra* note 6, at 910; *see also* McWilliams, *supra* note 2, at 738-40.

16. *See, e.g.*, VA. CODE ANN. § 10.1-1429.1(A)(1) (Michie 1996).

of brownfields receive greater flexibility, and decreased costs, in putting brownfields back on the market.¹⁷ Second, brownfields statutes invariably offer some degree of liability protection for brownfields owners once the applicable cleanup standard is met,¹⁸ thus removing one of the greatest disincentives to purchasing, selling, or developing contaminated property. The varying types of liability releases lend a degree of predictability to the remediation process, allowing developers to proceed with cleanup efforts without fear of being subjected to CERCLA liability at a later date.¹⁹ Finally, voluntary remediation legislation often contains provisions allowing for public participation in the remediation process, ostensibly allowing some degree of community input and self-determination as to the remediation efforts and future use of the brownfield in question.²⁰

Public participation is probably the most contentious issue surrounding brownfields legislation²¹ because a fundamental tension underlies the concept of voluntary remediation: Does streamlining the hazardous waste remediation process take place at the expense of public health and welfare?²² Developers may often perceive increased public participation as a time-consuming, costly imposition on speedy remediation.²³ Conversely, unless they are given a voice, communities surrounding brownfields may feel that they are the targets of environmental injustice,²⁴ especially where the state has approved relaxed cleanup standards for brownfields located in

17. See McWilliams, *supra* note 2, at 738-41.

18. See, e.g., Steven F. Fairlie, *The New Greenfields Legislation: A Practitioner's Guide to Recycling Old Industrial Sites*, 5 DICK. J. ENVTL. L. & POL'Y 77, 79 (1996) (discussing liability limitation provisions of Pennsylvania's voluntary remediation statute).

19. See McWilliams, *supra* note 2, at 742-48.

20. See R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. LAW 101, 160 (1995).

21. See McWilliams, *supra* note 2, at 773-74.

22. See *id.* at 738.

23. See Sweeney, *supra* note 20, at 160.

24. See, e.g., BUNYON BRYANT & PAUL MOHAI, RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (1992). See also Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1 (1995) (questioning the import of putative evidence of environmental racism).

predominantly minority or low-income areas.²⁵

Voluntary remediation statutes themselves reflect this tension, as public participation provisions range from California's mandate to take community concerns into consideration,²⁶ to Ohio's total exclusion of the public (and virtually the state as well) from the remediation process.²⁷ Given the states' varying approaches to public participation,²⁸ two fundamental questions must be resolved. First, if the community is indeed shut out of the decision-making process, is there any means by which it can effectively block an undesirable project. Second, if the public is to be included in the remediation of brownfields, what is the most effective method to do so?

In answering these questions, the author turns to an area of law that both legislators and commentators appear to have overlooked: the local zoning and planning power. Part I of this Note analyzes voluntary remediation statutes, and how comprehensive planning and zoning issues arise in the implementation of such statutes. Part II discusses the public's role in zoning actions, and the communities' ability to use the municipal zoning power as it currently exists as a potential means of participating in brownfields remediation. Such participation includes, for example, taking part in the decision-making process in local government hearings and legislative proceedings for actions affecting re-use of brownfields. Part III proposes the creation of "Brownfields Zoning Designations", as a means by which the zoning power, and consequently the public, can be more fully, and effectively, integrated into brownfield redevelopment and decision-making efforts.

25. See McWilliams, *supra* note 2, at 767.

26. See CAL. HEALTH & SAFETY CODE § 25398.6(i)-(j) (West 1996).

27. Under Ohio's system, verification of a developer's compliance with an applicable cleanup standard may be left solely to a "certified professional." See OHIO REV. CODE ANN. § 3746.11(A) (Banks-Baldwin 1996). If the certified professional determines that the applicable cleanup standard has been met, he or she has the authority to issue a "no-further-action letter" as a liability release. See *id.* The developer need only contact the state if he or she wishes to receive a "covenant not to sue" from the state. See *id.* § 3746.12. See also 415 ILL. COMP. STAT. ANN. 5/58.7(h) (West 1996) (leaving community participation to developer's discretion).

28. For a comprehensive listing of state public participation requirements, see Eisen, *supra* note 6, at 976 n.394.

I. ZONING AND PLANNING ISSUES IN CURRENT VOLUNTARY
REMEDATION LEGISLATION

The redevelopment of brownfields inherently entails land-use issues. First, from a comprehensive planning perspective, putting abandoned or underutilized property back into productive use invariably affects the nature of the surrounding community. It alters traffic patterns and density, increases noise, and changes the balance of uses in a particular area, e.g., creating more industrial and commercial sites in a community that had been previously predominantly residential.²⁹

Second, a participant in a voluntary remediation program may envision a use of the property that is in conflict with current zoning ordinances.³⁰ To proceed with the planned redevelopment, therefore, the developer must seek a zoning amendment³¹ or variance³² for the property.

29. See McWilliams, *supra* note 2, at 723, 758.

30. See Solo, *supra* note 4, at 309.

31. See DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 6.2, at 164-72 (2d ed. 1986). These authors have found that

[a]mendments are made by ordinance by the legislative body of the local government. Proper subjects for amendment may be either procedural or substantive provisions of the ordinance. Substantive amendments include: (1) rezonings, or zoning map amendments, that is, a change of the zone that applies to a parcel of land; (2) zoning text amendments, that is, a change in use permitted within a given zone. The amendment can be initiated by either the legislative body, a government official or a property owner.

Id. at 164; see also CHARLES M. HAAR & MICHAEL ALLEN WOLF, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND* 313-43 (4th ed. 1989) (discussing zoning amendments).

32. See HAGMAN & JUERGENSMEYER, *supra* note 31, § 6.5, at 172-82. They believe that

[variances] are intended to alleviate a situation in which for no public reason, zoning for an area more stringently burdens one parcel of land than others Variances are generally of two kinds: bulk or area variances which include those granted for height and minor departures from the ordinance, and use variances, which usually involve more substantial changes. The typical enabling act does not separately authorize two different kinds of variances, though some stat-

Third, zoning may be used as an "institutional control."³³ Institutional controls require restrictions on the future use of a particular site in order to reduce potential exposure to contamination; these restrictions are often instrumental in allowing a developer to meet applicable cleanup standards.³⁴ In addition, years after a site has been remediated, a local governmental entity must prevent any change in the use of that property if that change would endanger the public without further remediation.³⁵

Fourth, the cleanup standard applicable to a particular site is often a function of the use permitted on the property.³⁶ A site slated for residential development will generally entail greater and more numerous exposure pathways than will an industrial site.³⁷ Hence, a more stringent cleanup standard is necessary for the former than the latter, to reduce the public's potential exposure to hazardous contaminants.³⁸

Finally, redeveloping property may affect land-use-based environmental controls, such as stormwater discharge reduction³⁹ or

utes, ordinances and courts do not allow use variances, particularly for large sized parcels A variance is proper only if there is: 1) no adverse effect on [the] public, 2) no adverse effect on neighbors, and 3) the property has unique characteristics which make it eligible for a variance.

Id. at 172-74 (citations omitted); see also HAAR & WOLF, *supra* note 31, at 343-62 (discussing variances and special exceptions to zoning ordinances).

33. See generally Susan C. Borinsky, *The Use of Institutional Controls in Superfund and Similar State Laws*, 7 FORDHAM ENVTL. L.J. 1, 1 (1995) (noting that "institutional controls include use restrictions and requirements of notices in deeds or leases, notices in property transfer documents, building permits, easements, well-drilling prohibitions, and zoning ordinances").

34. See *id.* at 1-2.

35. See *id.* at 7.

36. See Sweeney, *supra* note 20, at 159-60.

37. See Krista J. Ayers, Comment, *The Potential For Future Use Analysis in Superfund Remediation Programs*, 44 EMORY L.J. 1503, 1513-15 (1995).

38. See *id.*

39. For example, Virginia's Chesapeake Bay Preservation Act, VA. CODE ANN. §§ 10.1-2100-1-2116 (Michie 1995), utilizes a land-use based system to control pollution runoff into the Chesapeake Bay. See also

transportation conformity.⁴⁰ If the reuse of a brownfield involves creating impermeable surfaces, or results in employees commuting from outlying areas, these redevelopment efforts may result in a violation of state and/or federal law.

While brownfields redevelopment implicates land-use, land-use in turn implicates community input. Whenever a change is contemplated for a master plan,⁴¹ or for the zoning of a particular parcel, notice to, and public comment by, the affected community is mandated.⁴² Since the seminal *Euclid* decision of 1926,⁴³ municipalities have been afforded great deference in making land-use decisions for the health, safety, and general welfare of the public.⁴⁴ The zoning function is perhaps one of local governments' most significant powers, and is one of the primary vehicles for community self-determination, allowing a municipality to control the type and extent of development within its borders.⁴⁵

Chesapeake Bay Critical Areas Program, MD. CODE ANN., NAT. RES. §§ 8-1801-1816 (1995). See generally Joel B. Eisen, *Toward A Sustainable Urbanism: Lessons From Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U.J. URB. & CONTEMP. L. 1 (1995).

40. See Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994). The Clean Air Act mandates that states control traffic patterns and vehicle use in order to reduce airborne pollution. *Id.* § 7511a. See generally D. Brennen Keene, *Transportation Conformity and Land-Use Planning: Understanding the Inconsistencies*, 30 U. RICH. L. REV. 1135 (1996) (discussing the relation between land-use and transportation conformity).

41. "The plan serves as an overall set of goals, objectives, and policies to guide land-use decisionmaking by the local legislative body." HAGMAN & JUERGENSMEYER, *supra* note 31, § 2.9, at 24. See generally Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955).

42. See, e.g., *Cross v. Billett*, 221 P.2d 923 (Colo. 1950) (noting ordinance's requirement of public notice and hearing for zoning actions) (cited in HAAR & WOLF, *supra* note 31, at 1071).

43. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

44. See *id.* at 387 (noting that zoning ordinances "must find their justification in some aspect of the police power, asserted for the general welfare").

45. See HAAR & WOLF, *supra* note 31, at 599-700 (discussing regulation of the "[t]empo and [s]equence of [g]rowth."). There are, of course, limits to the power municipalities have in maintaining their "character." Efforts to prevent the influx of new residents may raise "exclusionary zoning" concerns. See *id.* at 371-504 (discussing various

The intersection of land-use and brownfields legislation, therefore, affords some degree of public participation even if a particular state's voluntary remediation program fails to provide for any meaningful community input.

For a number of reasons, a community may seek inclusion in the decision-making process for a particular brownfield. First, nearby residents of a contaminated site may be wary of new industrial activity in the area, and may want reassurance that the proposed development will not yet again expose the public to hazardous wastes.⁴⁶ This issue is most likely to surface where the community is concerned about a cleanup standard that allows more contamination to remain on the site than the rigid CERCLA standard would permit.⁴⁷ Besides reassurance, neighborhood residents may want to call attention to certain attributes of the property in question that may affect the remediation process.⁴⁸ For example, if children frequently use the property as a shortcut to or from school, the risk of exposure to various contaminants may increase, dictating either a more stringent cleanup standard⁴⁹ or the use of some type of institutional control such as warning signs and fencing.⁵⁰ Local residents may also want to provide information to "fine tune" a development plan, requesting, for instance, that trees be planted on one side of the project to act as sound buffers, or that parking lot entrances be placed to reduce

exclusionary effects of zoning); see also Patrick J. Skelley II, Note, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning*, 16 VA. ENVTL. L.J. 273 (1996) (discussing methods by which rural localities can zone to prevent displacement of low-income residents by uncontrolled development). For a detailed account of the historic *Mount Laurel* exclusionary zoning cases, see CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE SPACE AND AUDACIOUS JUDGES* (1996).

46. See McWilliams, *supra* note 2, at 708-10.

47. See *supra* notes 15-17 and accompanying text (discussing voluntary remediation statutes' cleanup standards).

48. See Craddock, *supra* note 6, at 509.

49. See *supra* notes 36-38 and accompanying text (discussing future use analysis in setting cleanup standards).

50. See *supra* notes 33-35 and accompanying text (discussing institutional controls).

traffic flow on residential streets frequented by children.⁵¹ Above all, the public will simply want to be informed about remediation activities in their locality.⁵²

Failure to include the neighborhood at an early stage in the planning and remediation process is likely to cause resentment and misapprehension among the local population, which could ultimately result in the failure of an otherwise meritorious redevelopment effort.⁵³ Indeed, environmental justice advocates will inevitably take a dim view of reinstating industrial and commercial activities in predominantly low-income and minority neighborhoods, especially where the cleanup will not reach CERCLA's "pristine" standards.⁵⁴ In such a situation there will undoubtedly be a feeling of "being dumped on twice"; first, when the original pollution occurred, and second, when new potentially hazardous activities are encouraged on land that is not "fully" remediated. By shutting the door on the public, participants in voluntary remediation programs will almost assuredly be facing widespread community outcry.⁵⁵

If a state's voluntary remediation statute fails to provide for adequate public participation, the local zoning process may provide the only avenue for the community's involvement in a particular project. Aside from being a source of information, the zoning decision-making process may serve as a vehicle by which the public can force either the state environmental agency, the developer, or both, to consider neighborhood concerns. Moreover, if the parties to the voluntary remediation fail to consider pertinent community desires,⁵⁶ neighborhood activists may very well utilize the local zoning function to delay, if not eliminate, redevelopment efforts. This opportunity, however, will only arise in certain circumstances.

51. See generally PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* (1993) (advocating "walkable" streets to favor pedestrian traffic over vehicular traffic).

52. See McWilliams, *supra* note 2, at 774.

53. See Eisen, *supra* note 6, at 1031 (arguing that "without statutory amendments to address [public participation concerns], even meritorious projects will be stymied by local resistance"); McWilliams, *supra* note 2, at 708-10.

54. See McWilliams, *supra* note 2, at 764.

55. See *id.* at 708-10.

56. See *id.* at 775.

II. COMMUNITY USE OF THE ZONING POWER TO CONTROL BROWNFIELDS REDEVELOPMENT

A. *Capitalizing on Departures From the Zoning Ordinance*

The most obvious chance for a community to determine the fate of a voluntary remediation proposal occurs when the current use classification of a site conflicts with the developer's more intensive proposed use of the parcel.⁵⁷ In such a situation, the developer must seek a rezoning⁵⁸ or use variance⁵⁹ for the property from the appropriate local governmental entity. To make the requisite change, a municipality must hold a hearing on the matter, thus providing an opportunity for the community to influence the ultimate decision.⁶⁰ At such a proceeding, community members can voice their opinions concerning the proposed use. If the developer inadequately responds to the public's concerns, local residents (particularly where environmental justice issues are raised) may exert enough pressure to either persuade the local government to refuse the developer's request, or force the developer to abandon the project for fear of negative media fallout.⁶¹

The downfall of relying upon rezoning or variance hearings as a forum for public input is that community resistance will likely focus most upon proposed industrial, and to a lesser extent, commercial, uses.⁶² Most contaminated brownfield sites, however, are likely to be abandoned commercial or industrial sites, and hence will already be zoned for such activities.⁶³ In addition, if the property is, for example, an industrial zone and in a jurisdiction that recognizes cumulative zoning, a proposed less intensive use such as commercial or residential will already be permitted.⁶⁴

57. See *supra* notes 30-32 and accompanying text.

58. See *supra* note 31 (discussing zoning amendments).

59. See *supra* note 32 (discussing zoning variances).

60. See *supra* notes 41-42 and accompanying text (discussing notice and hearing requirements for zoning changes).

61. See McWilliams, *supra* note 2, at 708-10. See generally BRYANT & MOHAI, *supra* note 24.

62. See Craddock, *supra* note 6, at 509.

63. See Sweeney, *supra* note 20, at 109.

64. See HAGMAN & JUERGENSMEYER, *supra* note 31, § 3.3, at 46 ("[In cumulative zoning] only the "highest" zone is exclusive, and that [is]

In either case, no zoning change will be necessary to redevelop the site; and, consequently, the public will not be able to challenge the projects that it may find most objectionable.

Local residents, however, may still be able to use another aspect of the general zoning power to control brownfields redevelopment in their community: the elimination of non-conforming uses ("NCUs").⁶⁵ In many "mixed-use" neighborhoods where development proceeded unchecked prior to the enactment of a comprehensive zoning scheme, industrial and commercial activities often existed amidst residences at the time the zoning scheme was first put in place. For example, a junkyard or a gas station might be located in the middle of residential dwellings. When a system of zoning laws was eventually enacted, these more intensive uses often conflicted with the zoning classifications. Despite this conflict, such uses were permitted to remain as NCUs to avoid unreasonable abridgment of individuals' property rights. Nevertheless, since such uses no longer fit with the character of the area envisioned by the local zoning entity, a number of techniques were, and are still, used to prevent the continuing existence of NCUs.⁶⁶

One such technique is the termination of NCUs upon abandonment of the use.⁶⁷ Abandonment occurs when the property

the residential zone. Residential uses [are] permitted in commercial zones and all uses [are] permitted in industrial zones."). In exclusive industrial zones, however, uses other than industrial are *not* permitted, hence a plan to develop commercial or residential properties in such a zone *would* conflict with the existing zoning. *See id.* at 80-81 (discussing exclusive commercial and industrial zones). *But see* *Katobimar Realty Co. v. Webster*, 118 A.2d 824 (1955) (invalidating exclusion of commercial uses from exclusive industrial zones on ground that no sufficient distinction existed between such uses).

65. *See* HAAR & WOLF, *supra* note 31, at 290-312 (discussing NCUs, "[p]reexisting [u]ses [t]hat [w]on't [f]ade [a]way").

66. *See generally* HAGMAN & JUERGENSMEYER, *supra* note 31, at 117-29 (discussing termination of NCUs). Other techniques of NCU termination and control include prohibiting expansion or alteration of the NCU, preventing a destroyed NCU from being rebuilt, amortization of the NCU, and immediate termination of the NCU based on nuisance principles. *See id.*

67. *See id.* at 120-21 (discussing abandonment of NCUs).

owner no longer uses the property in a non-conforming manner, e.g., the gas station in a residential district goes out of business and ceases operations. In many cases, after a reasonable time elapses, the NCU is lost, and the property can no longer be used in a non-conforming manner.⁶⁸ Thus, for example, the owner of the defunct gas station will be barred from making the gas station operable again. In the context of brownfields redevelopment, community residents can assert that when a developer proposes to reuse a particular site in a manner that no longer accords with current zoning ordinances, such a use would constitute an improper reinstatement of a prior NCU, and thus should not be permitted. Such an approach could, of course, force a developer either to radically change her plans for the property, or else dissuade a potential remediator from taking further action. In addition, the termination of the NCU in effect results in a "downzoning"⁶⁹ of the subject property, since the more intensive use—previously permitted as a NCU—is now barred. This power would essentially give the community a veto over the property in question: Once the NCU is terminated, the local zoning entity must first approve any future plans for reinstatement of the NCU (or a more intensive use).⁷⁰

If, in derogation of the public's wishes, the municipality approves a rezoning to a more intensive use or refuses to acknowledge the termination of an NCU for a brownfield targeted for an objectionable project, the public is still not without recourse. However, it has an even more significant burden. Once the zoning entity's action has become final, the community can appeal the decision.⁷¹

68. *See id.*

69. Community residents could, of course, call for downzoning a parcel upon learning of a proposed remediation. Nevertheless, if such a rezoning is undertaken as a purely reactive measure, a local government may be hesitant to acquiesce to the public's demand for fear of interfering with a developer's "vested" rights and being sued for committing "reverse spot zoning." *See id.* at 136-41 (discussing spot zoning).

70. *See supra* notes 30-32 and accompanying text. Providing the community with input into the process at this late stage would be particularly applicable in enforcing a land-use-based institutional control.

71. *See, e.g.,* VA. CODE ANN. § 15.1-496.1 (Michie 1996) (providing mechanism for appeal).

B. *Overcoming Standing and the Standard of Review in Zoning Appeals*

The first hurdle that a community must clear in appealing a zoning decision is the issue of standing to sue. In most jurisdictions, only "aggrieved" parties have the legal right to bring suit.⁷² The only persons typically fitting this description are the owner of the property at issue, and owners of contiguous parcels.⁷³ Where a community-at-large opposes the redevelopment of a particular parcel, therefore, it may be difficult to find a proper party to challenge the board's actions.

This problem may be further exacerbated if the subject property is in a cluster of commercial or industrial sites, because the owners of contiguous commercial or industrial properties may either not want to interfere with redevelopment that could increase their own economic well-being, or may fear similar community backlash to their own activities. Nevertheless, the brownfield projects that are most likely to generate significant opposition are those in which residences border the brownfield.⁷⁴ Individuals living in such residences, therefore, will almost undoubtedly have standing.

A further obstacle exists in non-home-rule jurisdictions.⁷⁵ In such states, a municipal corporation has only those powers expressly granted to it by the state.⁷⁶ A developer, therefore, may

72. See, e.g., *id.*; see also Craddock, *supra* note 6, at 528-29 (noting that only "aggrieved" persons have standing).

73. See *Cupp v. Board of Supervisors and Fairfax County*, 318 S.E.2d 407, 411-12 (Va. 1984) (stating that "aggrieved" parties in zoning disputes must have a "personal stake" in the outcome of a case, but that the owner of affected property always has a "personal stake").

74. See *supra* notes 46-52 and accompanying text.

75. In home rule jurisdictions, localities may enact and enforce local laws such as zoning ordinances. Therefore, any such ordinances are a legitimate exercise of municipal authority. See HAGMAN & JUERGENSMEYER, *supra* note 31, § 3.8, at 53-54. In non-home-rule jurisdictions, however, Dillon's Rule severely limits the exercise of local government power and may prevent the implementation of any innovative land-use measures. See W. Todd Benson & Philip O. Garland, *Legal Issues Affecting Local Governments in Implementing the Chesapeake Bay Preservation Act*, 24 U. RICH. L. REV. 1, 5 n.26 (1989) (citations omitted).

76. For example, one decision stated

attack a locality's attempt to zone in regard to brownfields on the basis that such an exercise of power was not contemplated by the state, and is thus *ultra vires* and improper. The best advice for a locality, though, would be to proceed with its zoning measures, couching its actions as being within the contemplation of its general police power.

Assuming, *arguendo*, that a proper plaintiff can be found, the community must, on appeal, overcome the high degree of deference afforded to zoning decisions. Under the Euclidean system of zoning, a court will uphold a local government's decision so long as the reasoning underlying the decision is "fairly debatable."⁷⁷ Any indicia of reasonableness will render the municipality's decision unassailable, thus leaving the community without relief.

C. *Effective Community Use of Zoning*

Despite this multitude of obstacles, a community may nevertheless mount a multi-pronged attack on the zoning decision. In the situation when the local government rezones a brownfield to a more intensive use, the plaintiffs can first argue that the decision is arbitrary and capricious,⁷⁸ and contend that allowing the voluntary remediation to continue constitutes a threat to public

[n]othing is better settled than that a municipal corporation does not possess and cannot exercise any other than the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt as to the existence of power is resolved by the courts against its existence in the corporation, and therefore denied.

Kline v. City of Harrisburg, 68 A.2d 182, 184-85 (Pa. 1949) (striking down "interim" zoning ordinance as *ultra vires* and invalid).

77. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

78. See Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 - 6.14:25 (Michie 1996) (setting out standards of review for administrative actions).

health, safety and welfare. The community can also charge that the rezoning is not in accordance with a so-called "comprehensive plan."⁷⁹ If it can be established that the proposed use of the property conflicts with the existing master plan⁸⁰ and the general character of the neighborhood, the municipality's decision could be reversed. Similarly, depending on the jurisdiction, rezoning may only be proper if there has been a change in physical circumstances of the area surrounding the brownfield, or there was a mistake in the original zoning.⁸¹ Plaintiffs, therefore, could argue that neither a change nor a mistake existed to warrant the rezoning. Finally, the community could try to have the zoning decision classified as a "quasi-judicial," rather than a legislative proceeding, since the zoning change affected only a single parcel of property.⁸² As quasi-judicial, the decision would receive a lesser degree of deference than a legislative action, thus making it easier to overturn.⁸³

79. "[C]onsistency refers to the relationship between a comprehensive plan and its implementing measures. Not only does this mean that the plan and regulations promulgated under it must be consistent, it also means, in a growing number of jurisdictions, that any development orders and permits must be consistent with the local plan." HAGMAN & JUERGENSMEYER, *supra* note 31, § 2.13, at 32. The courts' interpretation of "comprehensiveness" has been far from consistent. See HAAR & WOLF, *supra* note 31, at 555-66 (noting the courts' disparate treatment of consistency). For the seminal discussion of zoning in accordance with a comprehensive plan, see Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

80. See *supra* note 41 and accompanying text (defining "master plan").

81. See HAGMAN & JUERGENSMEYER, *supra* note 31, § 6.4, at 169-72 (discussing the "change-or-mistake" rule).

82. "[The] determination whether the permissible use of a specific piece of property should be changed [is] an exercise of judicial authority, subject to a [more stringent] test." *Id.* at 170 (citing *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973) (holding that quasi-judicial nature of rezoning shifts burden to person seeking a rezoning to show why change is necessary). See also *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468-69 (7th Cir. 1988) (discussing differences between legislative and adjudicative actions).

83. See HAGMAN & JUERGENSMEYER, *supra* note 31, at 170.

If, on the other hand, the municipality refuses to terminate the NCU for the property, the public could simply use reformulations of the arguments stated above. For example, it could challenge the failure to prevent the proposed project on the ground that allowing the industrial or commercial classification to remain constitutes a threat to the public, and hence is an arbitrary or capricious exercise of power.⁸⁴

Next, community residents could assert that, given the community's general character, the proposed use is not in accordance with a comprehensive plan. Finally, the public could again argue that the local government's inaction was quasi-judicial in nature, thus precluding deferential review of the decision.⁸⁵

In reality, a community would not likely be particularly successful in challenging a municipality's decisions by taking the courses of action just described. As it stands now, however, the community may have few other options if it wishes to engage in any meaningful dialogue concerning the fate of a certain brownfield. In addition, by utilizing such an approach, if a community finds a proposed voluntary remediation to be objectionable, it may be successful in killing a project altogether, by making the particular site less attractive than other properties available to the developer as a result of the time, expense, and negative public relations surrounding the challenged project.⁸⁶

84. See *supra* note 78 (citing statutory standards of review for administrative actions).

85. See *supra* note 82-83. At a different level, the community could conceivably contend that allowing redevelopment of a brownfield runs afoul of some land-use-based environmental law, such as stormwater runoff control, or the transportation conformity provisions of the Clean Air Act. See *supra* notes 39-40. The burden in bringing such a suit, however, is probably even more onerous than that involved in challenging a zoning decision, particularly where the standing issue is concerned. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (requiring plaintiffs to show "specific concrete facts" of alleged harm).

86. Use of the local zoning power to open up the brownfields remediation process to the public is somewhat analogous to citizens' use of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1995), to force various governmental and private entities to "stop and think" about the impacts of their proposed actions; this provides time to garner further public opposition to, and input into, the proposed

Considering the potential ability to effectively preclude the remediation and subsequent remediation of a brownfield, one lingering question remains: Is the community better or worse off if the property remains undeveloped? The site that was the subject of the dispute still remains unused, unprofitable, and worse yet, contaminated.⁸⁷ The public has perhaps fended off a potentially detrimental project, but has also prevented the possibility of new jobs, tax revenues, and public improvements.⁸⁸ While the zoning power can be used to give the public the ability to *veto*, it is perhaps more advantageous to all parties involved in voluntary remediation efforts to give the public a *voice*.

III. ZONING AS THE PUBLIC PARTICIPATION MECHANISM FOR VOLUNTARY REMEDIATION LEGISLATION

Abandoned, contaminated properties are invariably a detriment to their communities due to aesthetic blight, lost employment opportunities, and above all, health risks. Any hope of comprehensive urban economic redevelopment and revitalization, therefore, hinges on eliminating pollution from brownfields, and returning such sites to productive use as expeditiously as possible. Nevertheless, even the most well-intentioned projects run the risk of being vehemently opposed, and quite possibly destroyed, by the public. This may be particularly true if individuals perceive (or more likely misperceive) that state agencies are engaged in "backroom" deals with developers, thus allowing industries to "repollute" affected communities.⁸⁹ Public

project. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 842 (1994). In addition, failure to include the public in the remediation process may constitute arbitrary or capricious action under the "hard-look" doctrine advanced in the *Overton Park* decision. See *id.* at 91-95 (discussing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). But see *id.* at 95-98 (discussing cases advocating "soft-glance" deferential review of agency action).

87. See McWilliams, *supra* note 2, at 709-10.

88. See *id.*

89. See Eisen, *supra* note 6, at 1021 ("A board such as Ohio's Property Revitalization Board appears to be a potential 'regulatory backroom' for cutting deals that shifts risk to the excluded community, because it does not require any representation from affected

participation at the earliest stages of remediation planning is thus instrumental in fostering the speedy, effective cleanup of brownfields.⁹⁰ However, many voluntary remediation statutes lack any provisions to include public input concerning a developer's plans for a particular site.⁹¹

A. *Creating a Joint Effort for Brownfields Redevelopment*

One remedy for inadequate public participation procedures could be simply to rewrite brownfields statutes at the state level to provide for increased community involvement. This approach, however, is problematic for several reasons. First, legislative change is time consuming and costly, and considerable debate would likely ensue over exactly how to provide for public participation.⁹² Moreover, since many state legislatures have recently passed voluntary remediation statutes they will probably not be amenable to making substantial amendments to recently enacted laws. Considering that the voices in opposition to increased public participation still exist, gridlock would be the likely result of such legislative efforts.⁹³ In addition, in the current era of streamlined government services, requiring state agencies to shoulder the burden of conducting meetings between communities and developers, or having to sort out a flood of written public comments, would tax already overstressed state resources.⁹⁴ Fi-

communities.”)

90. See McWilliams, *supra* note 2, at 711.

91. See *supra* note 27.

92. The vastly different approaches to public participation taken by the states indicate that still no consensus exists as to how to provide for community involvement in brownfields remediation. See Eisen, *supra* note 6, at 972-76.

93. See, e.g., Sweeney, *supra* note 20, at 160 (noting that public notice requirements may be a “deterrent” to undertaking voluntary cleanups unless projects are given proper “spin”); see also Eisen, *supra* note 6, at 1020-21 (discussing “capture” of state regulatory bodies by industrial interests).

94. See, e.g., Jim Keary & Laura M. Litvan, *Casinos in PG Rake in Millions*, WASH. TIMES, Aug. 2, 1992, at A1 (noting that in 1992 the Maryland Department of Environmental Resources had its staff cut by 40 percent and received no budget increase); Lynn Sprentall, *DNR Finds Developer Violated Dunes Act*, TRIB. BUS. WKLY., June 10, 1992, at 1 (noting

nally, even with the input of various communities, state environmental agencies are simply not designed to take into account all of the local and regional effects of approving a brownfields remediation proposal.

Rather than place the fate of communities in the hands of state government alone, a more practical solution might be to create a joint effort between state agencies and local governments. Several state environmental laws already utilize some type of state-local partnership;⁹⁵ and, given the overlap between brownfields legislation and land-use law explicated above,⁹⁶ such a system might be particularly expedient in the brownfields context. Even if the state fails to make any significant strides in the way of increasing public participation, localities can most likely make such provisions on their own initiative.⁹⁷ The question now stands as to how to integrate land-use and zoning law with voluntary remediation legislation.

B. *Putting the Community and Remediators "in the zone"*

As we have already seen, the only time the local zoning power is invoked is when a more intensive classification for a particular site is contemplated,⁹⁸ or a non-conforming use is at issue. To en-

major staff and budget cuts at the Michigan Department of Natural Resources); Rex Springston, *DEQ Deputy Stresses Openness; New No. 2 Runs Daily Operations*, RICH. TIMES-DISPATCH, Feb. 19, 1996, at B1 (noting report's finding of low morale and staff cuts in Virginia's Department of Environmental Quality).

95. See, e.g., Chesapeake Bay Preservation Act, VA. CODE ANN. §§ 10.1-2100-1-2116 (Michie 1996). See also Patrick J. Skelley II, Note, *Finding the Pearl in the Oyster: Strategies for a More Effective Implementation of Virginia's Chesapeake Bay Preservation Act*, 31 U. RICH. L. REV. (forthcoming 1997) (discussing means of strengthening state and local partnership to improve Chesapeake Bay water quality).

96. See *supra* notes 29-40 and accompanying text.

97. In several states with "negotiated compensation" statutes for waste disposal facility siting, see Eisen, *supra* note 6, at 991-97 (discussing negotiated compensation statutes), communities are precluded from enacting local laws to block such projects. See *id.* at 993. Such provisions have not, however, found their way into voluntary remediation statutes.

98. See *supra* notes 30-32.

sure that a zoning change, and hence community input accompanies every remediation effort, municipalities could create a new set of zoning classifications applicable to each brownfield.

Local zoning entities or planning commissions could identify potential brownfields based on inactivity and prior use. All properties that could be the subject of future remediation activities would retain their original height, bulk, and use classifications.⁹⁹ Such properties however, could be given the additional designation of "Brownfield-Inactive." When a developer seeks to remediate a contaminated site, he or she will be precluded from taking any action toward the property until the zoning is changed to "Brownfield-Active."¹⁰⁰ Enacting such a land-use scheme will have numerous beneficial effects in terms of public participation.

First, notice of a pending project often may be sufficient to quell an angry community response, or at least diminish residents' ire.¹⁰¹ With sufficient notice, neighborhood residents will have some advance warning of remediation and redevelopment activities, as opposed to being taken by surprise one day when bulldozers and other equipment suddenly appear on the lot next door.¹⁰² If nearby residents are blindsided by the unannounced reuse of contaminated property, community opposition and truculence concerning the project is almost inevitable.¹⁰³ Most states require that municipalities provide notice of pending rezoning to owners of lands abutting the subject property, and that such notice is circulated in some type of printed medium, usually a local newspaper.¹⁰⁴ An affected community, therefore, will be alerted to a potential remediation project, notwithstanding any lack of a public notice provision in a particular state's brownfields statute.

Besides notice, a zoning hearing for each targeted site¹⁰⁵ pro-

99. See HAAR & WOLF, *supra* note 31, at 220-55 (discussing bulk, height, and use ordinances).

100. See *supra* notes 30-32 and accompanying text.

101. See McWilliams, *supra* note 2, at 782-83.

102. See *id.* at 708-10.

103. See *id.*

104. See, e.g., VA. CODE ANN. § 15.1-431 (Michie 1989).

105. See, e.g., *id.*

vides an open forum conducive to a full and free exchange of information between the potential developer and the affected community. Such a forum gives residents of an affected area a sense of community participation. Furthermore, as a result of the dialogue between community and contractor, the public can learn the property's intended use, and what impacts the remediation and redevelopment of the site will have on the surrounding neighborhood and region. Neighborhood residents should also be able to find out what contaminants are on the property, how such pollution will be removed or contained, and to what extent the site will be cleaned.

Conversely, the developer can glean particular concerns of the community, and attempt to assuage the public's fears.¹⁰⁶ For example, the developer could ascertain how neighborhood residents comport with the site. Information regarding whether individuals walk across any portion of the property would be vital to a developer in terms of instituting any type of institutional controls¹⁰⁷ on the site, as well as determining an applicable cleanup standard.¹⁰⁸ In addition, if the public informs a developer of a particularly heavy traffic flow on any street bordering the site, such knowledge may greatly aid the siting of ingress, egress, parking facilities, and loading areas for the proposed development.¹⁰⁹ The developer may also gather information to mitigate non-toxic pollution such as noise, odors, vibrations, and glare, to prevent possible nuisance suits¹¹⁰ in the future. More importantly, perhaps, depending at what stage the zoning hearing takes place, public input may provide the developer with information concerning the past uses of a particular parcel, thus aiding a developer's "Phase I" site investigation.¹¹¹ Finally, the de-

106. See McWilliams, *supra* note 2, at 773.

107. See *supra* notes 33-35 and accompanying text.

108. See *supra* notes 36-38 and accompanying text.

109. See *supra* note 51 and accompanying text.

110. See HAAR & WOLF, *supra* note 31, at 91-151 (discussing nuisance).

111. See James W. Creenan & John Q. Lewis, Comment, *Pennsylvania's Land Recycling Program: Solving the Brownfields Problem With Remediation Standards and Limited Liability*, 34 DUQ. L. REV. 661, 687-90 (1996).

veloper can use the zoning hearing to assure the public that the new use will not expose the surrounding community to further health risks, explaining that any new activity on the property must comply with current state and federal environmental laws probably not in effect when the original polluting activities were taking place.¹¹²

C. *The Local Role*

There is, of course, a third party involved in the rezoning proceedings: the local governmental entity that must determine whether the brownfield should be rezoned "active." By their nature, local zoning entities are quite able to resolve disputes between landowners concerning potentially discordant uses of property. These governmental bodies are presumably equipped to determine not only whether a property owner's use of land is appropriate in reference to neighboring uses, but whether such a use accords with regional needs and concerns, given a zoning entity's familiarity with master plans and other comprehensive planning techniques. Under the *Euclid* standard, zoning is to be carried out to best promote the public health, safety, and general welfare.¹¹³ This standard is readily applicable—with one limitation discussed below—to zoning actions involving brownfields.

By presiding over the dialogue between the public and the participant in the voluntary remediation program, a municipal government should be able to evaluate the merit of the public's various concerns, and to determine whether the developer will adequately accommodate community residents' reasonable re-

112. This is not to say that every new industry will be 100% risk free. See Eisen, *supra* note 6, at 1025 ("[D]evelopers are not guaranteeing that they will not cause pollution in the future."). Nevertheless, any proposed use of the site will have to comply with any number of state or federal environmental laws such as the Clean Air Act, §§ 42 U.S.C. 7401-7671q (1994) (limiting airborne pollution), the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994) (limiting waterborne pollution), and the Resource Conservation and Recovery Act, §§ 42 U.S.C. 6901-6992k (1994) (preventing the storage or disposal of hazardous wastes upon an unauthorized site).

113. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

quests.¹¹⁴ Besides the effect on the brownfield's immediate neighbors, a municipal zoning entity can assess the impact on the surrounding region and consistency with the master plan.¹¹⁵ Viewed in this light, a local government's analysis and determination of a brownfield rezoning request is not terribly different than the garden-variety zoning cases it sees on a regular basis, as it exercises its police powers to control brownfields redevelopment within its borders. There is, however, one aspect of voluntary remediation that is probably beyond the authority of local governments: cleanup standards.

D. Which Watchdog Watches What?

One of the most appealing features of voluntary remediation statutes is the elimination of CERCLA's draconian "one-size-fits-all" cleanup standards. In place of a uniform standard, maximum contaminant levels are often set according to "Risk Based Corrective Actions" (RBCA) that consider the type of the contaminant, the medium in which the contaminant exists, and the attendant health risks.¹¹⁶ Many systems, for example, employ a three-tiered RBCA system to govern cleanups.¹¹⁷ The first tier incorporates a "background" standard.¹¹⁸ In the second tier are "statewide health standards" which set risk-based uniform stan-

114. One wonders, however, if municipalities could simply deny a rezoning based on a community's unreasonable requests. *See, e.g., Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) ("[N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic . . . government, operations which are permeated by pressure from special interests.") (citation omitted).

115. *See, e.g., VA. CODE ANN. § 15.1-489* (Michie 1989) (explaining the purposes of zoning ordinances).

116. *See Eisen, supra note 6*, at 947-1038; Robert W. Wells, Jr., *Without "Rebecca," Cost-Effective Environmental Cleanup Is An Oxymoron At Florida's Petroleum Contamination Sites*, FLA. B.J., Feb., 1996, at 53.

117. *See Eisen, supra note 6*, at 946-48 (discussing "tiered" cleanup standards).

118. *See id.* at 903. This standard is reminiscent of the CERCLA mandate to remediate all sites to residential standards *regardless* of the proposed use for the site.

dards for various contaminants. The third tier, which is both the most attractive cleanup standard available to developers, and the most troubling, is the "site-specific" standard.¹¹⁹ Site-specific cleanups, as their name implies, are not governed by any preexisting standard as to maximum allowable contaminant levels; rather, they employ a RBCA analysis for each individual site. The site-specific RBCA decision-making process, in short, entails tailoring a cleanup standard to the particular characteristics of a site by evaluating, *inter alia*, the proposed use of the site,¹²⁰ the corresponding exposure and migration pathways of contaminants,¹²¹ and the type of pollution¹²² and its attendant health risks.¹²³ In establishing a site specific RBCA cleanup standard, one must additionally evaluate a range of scientific data including, for example, toxicity studies¹²⁴ and geographic surveys¹²⁵ for the subject site. After compiling and assessing this not-insignificant amount of information, an acceptable cleanup standard for the subject property is consequently set by the entity charged with such a duty.¹²⁶

State environmental agencies are currently primarily responsible for evaluating proposed RBCA cleanup standards and either approving or rejecting those proposals.¹²⁷ Given the state's resources, in terms of experts who are trained to assess scientific data related to hazardous waste, it is probably best to leave cleanup standards in the state's domain. Local governments, on the other hand, are perhaps best equipped to assess the impact of the development of a brownfield itself within its borders. It is unlikely, however, that municipalities will be capable of making an informed decision as to the prudence of a site-specific

119. *See, e.g.*, 35 PA. CONS. STAT. § 6026.304 (1996).

120. *See, e.g., id.* § 6026.304(f)(1).

121. *See, e.g., id.* § 6026.304(1)(1)(iv).

122. *See, e.g., id.* § 6026.304(1)(1)(ii).

123. *See, e.g., id.* § 6026.304(1)(2).

124. *See, e.g., id.* § 6026.304(j)(2).

125. *See, e.g., id.* § 6026.304(d)-(e).

126. Under Pennsylvania's system, the participant in the voluntary remediation program sets the site-specific standard in accordance with strictures of § 6026.304, and submits for state approval various reports and evaluations. *See id.* § 6026.304(1).

127. *See, e.g., id.* § 6026.304.

cleanup standard proposed by a participant in a voluntary remediation program.¹²⁸

As we have seen, cleanup standards are likely to be the most hotly contested issue surrounding a proposed brownfield remediation.¹²⁹ At a brownfields rezoning hearing, therefore, a local zoning board could be faced with two equally unattractive scenarios. In the first conceivable situation, the municipality would be faced with "dueling experts," in which the developer presents testimony asserting that the proposed cleanup standard is more than adequate to protect human health and the environment, while the community offers conflicting evidence in an attempt to show that more extensive remediation is necessary to shield the public from further harm. In the second, and more likely, scenario, the developer will again proffer evidence in support of its proposed cleanup standard, while neighborhood residents, who cannot afford to hire an expert, will simply vociferously contend that they deserve a more stringent CERCLA-type standard.

In either case, the zoning entity, lacking any expertise as to RBCA-proposal evaluation, will be faced with an unenviable dilemma. It can approve the developer's proposal, which could ultimately result in public harm if the cleanup standard is inadequate. Alternatively, it can deny the developer's rezoning request, and kill a redevelopment effort that could have been both over-protective of the community's welfare and a tremendous economic boon to the area.¹³⁰ To avoid these potentially disastrous

128. See Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 78-85 (discussing local government's inability to effectively enforce environmental controls). But see HAAR & WOLF, *supra* note 31, at 743-61 (discussing the role of local governments in implementing environmental controls).

129. See *supra* notes 46-52 and accompanying text.

130. Whether redevelopment of a particular brownfield will actually result in the economic betterment of the surrounding community is certainly subject to debate. See McWilliams, *supra* note 2, at 723-24. If, in fact, the proposed use will employ persons from outlying areas who commute to the site, local residents will not only fail to reap the economic gains from the redevelopment, but may be exposed to further health risks as a result of the increased traffic. See *id.* at 758. The issue

outcomes, the decision concerning approval or disapproval of an applicable cleanup standard for a site should be left to the state agencies,¹³¹ leaving the question as to the propriety of the redevelopment itself to the local governmental body.¹³² As part of its

of whether brownfields redevelopment will actually result in economic benefits for local residents brings to mind certain Enterprise Zone legislation that requires businesses to hire a certain percentage of local residents in order to qualify for Enterprise Zone benefits. See Michael Allan Wolf, *Potential Legal Pitfalls Facing State and Local Enterprise Zones*, 8 URB. L. & POL'Y 77, 84-85 (1986) (discussing Enterprise Zone hiring preferences). See also Patrick J. Skelley II, Comment, *Enterprise Zones in the Courts: Legal Challenges to State Economic Development Legislation*, 30 U. RICH. L. REV. 877, 891-93 (1996) (discussing cases involving job creation in Enterprise Zones). Indeed, given the high number of brownfields in economically distressed areas, there may be a significant overlap of voluntary remediation systems and Enterprise Zone (or Federal Empowerment Zone and Enterprise Community) designations.

131. Admittedly, leaving cleanup standards to the state perhaps hampers public participation into the one element of voluntary remediation that is most important to community residents. Nevertheless, the argument can still be made that public participation concerning cleanup standards can at least take place via state rulemaking procedures for setting maximum contaminant levels. The rebuttal to this claim, however, is (1) that such decision-making processes are too far removed from local concerns to raise any particular opposition from any one community; (2) notice of such procedures may be easily overlooked; (3) the time and expense involved in traveling to the state capital to participate in public meetings may be too burdensome for many urban dwellers; and (4) site-specific cleanup standards, which are probably the most contentious, may be set without any involvement at all.

In any event, the solutions offered in this Note are perhaps second-best measures, designed to include the public in a decision-making procedure from which they may have been wholly excluded otherwise. In addition, while community residents may not have a direct say in setting cleanup procedures, they can voice their concerns at the zoning hearings, and by so doing, perhaps prevent an otherwise improvident remediation.

132. Given the extent of the public's involvement in the local zoning process, and the degree to which brownfields impact upon surrounding properties, one should not rule out the possibility that the entire voluntary remediation scheme could be handled from a local governmental perspective, utilizing only minimal state input. While further exploration of such a system is certainly warranted, it is beyond the scope of this Note.

decision-making process, however, the municipality should still require that the developer provide documentation of compliance with the cleanup standard in order to fulfill its mandate to zone for the benefit of the public weal.¹³³

E. *Timing is Everything*

To fully integrate the state and local components of brownfields remediation, the state approval of the proposed cleanup standard should take place as early as possible. While many state statutes require documentation of a planned remedia-

133. There is also the problem of assuring continued compliance after the rezoning takes place. Naturally, one could charge the local zoning entity with the task of preventing inconsistent future uses of brownfields; however, this method is not without its pitfalls, given the possibility that future zoning entities will either misunderstand the brownfield zoning scheme, or capriciously rezone properties subject to the brownfields zoning classification. *See Borinsky, supra* note 33, at 7 (discussing problems of enforcing institutional controls). One means of supplementing the local government role is community activism, whereby community groups can keep tabs on remediated brownfields, and can alert municipal officials as to the nature of the property if a change in the use is contemplated at a later date. Nevertheless, this assumes that neighborhood residents have the time and resources to keep track of all "active" brownfields in the area, and to contest objectionable proposed alterations to those sites if a local government is derelict in its duties. One possible scheme that could be used in addition to, or even in lieu of, the "Brownfield" zoning classification is a "brownfield easement". When a potential developer seeks rezoning of a particular parcel, she could be given the opportunity to voluntarily place an equitable servitude on the property, akin to a conservation easement. *See HAGMAN & JUERGENSMEYER, supra* note 31, § 15.9 at 498-99, § 19.10 at 587. The brownfield easement is attractive for several reasons. First, such a restriction would allow the developer to retain all interests in the site, but would prevent any use inconsistent with the restriction, i.e., a more intensive use, or a renovation that would disturb previously encapsulated toxic soil. In addition, even if the zoning is changed, the easement will remain unaffected by this change. *See id.* at 587. Finally, local residents and neighborhood groups can be given the power to sue without any concerns as to standing, provided that they are either mentioned in the servitude, or are part of a neighborhood organization considered to be acting on behalf of property owners surrounding the restricted property. *See id.* at 578-79.

tion and proposed cleanup standard at the outset of the state approval process, others do not. Considering the fact that a cleanup could very well be stopped cold if a developer's planned use for a site does not comport with sound planning and zoning practices, states should require submission of, and approve or deny, a proposed cleanup plan at the beginning, not the end, of the review period. This not only facilitates speedy remediation, but adds an element of legitimacy to the state's approval process that may be lacking if state agencies merely rubberstamp remediation plans at a late stage of the actual cleanup.¹³⁴

A state's early approval of a cleanup standard has the additional effect of allowing rezoning to occur as early in the process as possible.¹³⁵ Early zoning is advantageous for a number of reasons. First, the developer's proposed use might not be suitable for the location, and it would be patently unfair for her to sacrifice the time and expense of navigating through a state's approval process, only to be halted by a local government just before undertaking the remediation. Furthermore, permitting a developer to expend significant resources on a project, allowing him to claim a violation of his vested rights,¹³⁶ and hence facilitating an end run around the rezoning procedures if the project is not approved by the local government would be equally unfair. Most importantly, fostering a meaningful dialogue between developers and affected communities from the outset will prove to be advantageous to all parties by greatly reducing the chance of a showdown at the late stages of a brownfields cleanup.¹³⁷

134. See Eisen, *supra* note 6, at 1002 ("The legitimacy of a voluntary cleanup program depends to a great extent on whether the program provides the community [with] a voice").

135. See McWilliams, *supra* note 2, at 783.

136. See *id.* at 774; *supra* note 69.

137. There is, of course, the very real and persistent problem of neighborhood concerns being trumped by powerful local political influences. See HAAR & WOLF, *supra* note 31, at 74-76. The author of course does not mean to suggest that local governments are inherently corrupt, but that municipalities are in the unenviable position of being caught between community desires and the almost irresistible pressures of local development concerns. See Eisen, *supra* note 6, at 1020 (noting factors influencing state regulators).

By taking into account public concerns early on, a developer can avoid costly challenges to his or her project that could have been warded off merely by making some minor and insubstantial changes to the project from the outset. Conversely, by having early access to information concerning a remediation effort, a community can make informed decisions about a project, reducing the chance of scotching a cleanup on account of fear and misperception concerning an otherwise highly beneficial project. In any case, both the public and participants in voluntary remediation programs have much to gain, and little to lose, by being partners in brownfields redevelopment.

CONCLUSION

The problems created by hazardous waste contamination perhaps stem from a lack of foresight on the part of industrial and commercial interests of years past. Failing to consider the long-term effects of one's actions often results in unpleasant, if not disastrous, consequences. There is probably no better evidence of this than the harm caused by both the existence of unremediated brownfields, and the laws that, until now, have prevented their renaissance. With this state of affairs in mind, an admonishment is perhaps in order.

Burgeoning voluntary remediation programs may very well be the key to making brownfields "green" again; however, failing to make the community a partner in the process will almost certainly result in consequences that will once again cause us in hindsight to question the propriety of our actions. While permitting a developer to proceed without community input may be more cost-effective in the short run, nuisance suits, toxic tort claims, and the roadblocks that a community may erect to redevelopment attempts, may all exact a large price.

Similarly, a community's foregone job opportunities, tax revenues, infrastructure improvements, and the continued exposure to environmental toxins, will factor into the long-term costs of preventing a brownfield's remediation from proceeding as a result of misapprehension and misunderstanding. The only way, therefore, to prevent our short-term triumphs from becoming our long-term travesties, is to bring voluntary remediation program participants and the public together as coworkers in the

task of putting brownfields back on the market. By utilizing the already-existing zoning infrastructure to bring the community into the remediation process, such a task may be made a great deal easier.

