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AREA-WIDE BROWNFIELDS PLANNING, REMEDICATION AND DEVELOPMENT

*D. Evan van Hook**

INTRODUCTION

No environmental issue has received more attention from federal, state and local authorities in recent years than developments concerning brownfields. The candidates for the 2000 presidential election have already signaled that brownfields will rank high in the campaign's environmental debate.¹ In New York alone, several legislative proposals for encouraging brownfields development are under consideration.²

Although there is lively debate over the proper definition of brownfields, a commonly accepted one is "abandoned, idled or underutilized industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination"³ that can add cost, time or uncertainty to a

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1. See Peggy Roberson, *Gov. Bush Wants to be Known as a Brownfields Reformer*, 5 THE BROWNFIELDS REP., Apr. 6, 2000.

2. See discussion *infra* at Part V.

3. Christian Volz & Peter L. Gray, 1998 WILEY ENVTL. L. UPDATE 244 (1998) (citing Office of Solid Waste & Emergency Response, Environmental Protection Agency, Pub No. 92300-30, *The*

redevelopment project.⁴ The complications that impede development of these properties derive from basic features of current environmental liability regimes. Generally speaking, these regimes do not force brownfield owners to investigate or remediate their properties absent some triggering event that attracts the attention of a regulating agency. At the same time, these regimes can make brownfield purchasers strictly, and jointly and severally liable for remediating the property, even if they had no involvement with the contamination.⁵

Consequently, owners do not want to sell brownfields and risk attracting regulatory attention, and developers do not want to buy brownfields and risk substantial environmental liabilities. In addition, banks generally avoid lending on contaminated property that might be worth less than the cost of the remediation. All of this adds up to a recipe for stagnation, persistence of contamination, and urban decay. As developers turn away from brownfields and towards undeveloped "greenfields" distant from former industrialized areas, they take with them jobs and economic development, leaving brownfields-impacted areas further distressed.

Because properties are usually not industrialized in isolation, the negative impact of brownfields is often compounded by the close proximity of several abandoned, contaminated sites. These idle sites, which may attract noxious uses such as illegal dumping, decrease an impacted area's attractiveness for development, and further depress property values. Beset by these and other problems, such as infrastructure degradation and low employment, whole areas of formerly industrialized regions have stagnated, while greenfield development has increased, contributing to urban sprawl. Although the number of brownfields in the United States is unknown, some estimates place the total as high as half a million

Brownfields Economic Redevelopment Initiative; Application Guidelines for Demonstration Pilots I (1995).

4. See Glen M. Vogel, *An Examination of Two of New York State's Brownfields Remediation Initiatives: Title V of the 1996 Bond Act and the Voluntary Remediation Program*, 17 PACE ENVTL. L. REV. 83, 84 (1999).

5. See *id.* at 91.

sites.⁶ There may be thousands of brownfield properties in New York State,⁷ with as many as 3,500 to 4,000 acres of brownfields property in New York City.⁸ Similar numbers exist for the area in and around Buffalo.⁹

Since at least 1988, federal and state governments have developed specific brownfield reclamation programs.¹⁰ These programs generally direct incentives and penalties at individual brownfield property owners and developers in an effort to convince them to voluntarily investigate and remediate these properties. While effective in some cases, these “first tier” brownfields programs are limited by their focus on individual properties. This has made them unable to address environmental issues affecting multiple properties, such as contaminated aquifers or migrating contamination plumes. Equally important, these programs are unable to spark the area-wide economic and community development that ultimately represents the best hope for returning brownfields to productive use.

Recently, a second tier of brownfields programs has begun to emerge.¹¹ Rather than addressing individual properties, these second tier programs approach brownfields redevelopment on an area-wide basis. Property owners and developers create area-wide

6. See Bradford C. Mank, *Reforming State Brownfield Programs to Comply With Title VI*, 24 HARV. ENVTL. L. REV. 115, 120 (2000).

7. See Vogel, *supra* note 4, at 90 (citing Charles E. Sullivan, *The Department of Environmental Conservation's Voluntary Remedial Program*, 8 ENVTL. LAW IN N.Y. 17 (1997)).

8. See Ron Howell, *Building the Future Chapter 5: 21st Century Government Construction Ahead*, NEWSDAY, May 16, 1999, at HO2 (revealing that the New York City Housing Partnership estimates two percent of the city's 200,000 acres are vacant brownfield properties).

9. See ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS SHOWCASE COMMUNITY, NIAGARA REGION, NEW YORK, QUICK REFERENCE FACT SHEET, at http://www.epa.gov/swerosps/bf/html-doc/sc_Niagara/htm (estimating that the EPA has identified 3,000 brownfield sites in this region).

10. See Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 193-94 (1999).

11. See *id.* at 213-14; see also Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 617-18 (1998) (discussing the establishment of community-based boards to guide neighborhood remediation from a community-based perspective).

remediation and redevelopment plans. Affected communities and relevant agencies then maximize the efficacy and efficiency of required remediation.

The great hope for second tier programs is that they will rejuvenate areas affected by multiple brownfields by addressing the complex environmental, economic and developmental issues faced by these areas. Before this hope can be realized, second tier brownfields programs must resolve a number of thorny issues, such as how to integrate area-wide brownfields planning with historic land use planning processes and authorities; how to equip environmental agencies to handle the challenges of reviewing, approving and overseeing multi-site remediation programs; how to ensure fairness to landowners within the designated areas, and others. Moreover, because area-wide brownfields development necessarily involves larger, more complex interest groups than development of individual brownfields properties, area-wide processes must develop structures to account for this complexity.

This article briefly describes the problems caused by brownfields, the way in which statutory environmental liability schemes contributed to these problems, and how first tier programs aimed at individual brownfields were unable fully to address these problems. Following this, the elements of an ideal area-wide brownfields development program are described. Because no such program has yet been fully implemented, much of this description reflects purely personal preferences, although examples from existing area-wide programs are referenced wherever possible. In addition, this section references issues that must be addressed before the promise of area-wide brownfields programs can be realized.

The area-wide brownfields programs currently under consideration in New York are also described. This article ultimately concludes that, while a number of issues should be resolved before enacting an area-wide brownfields program in New York, it would be well worth the effort of legislators and other policymakers to resolve these issues, and enact an area-wide program that could generate real progress in giving our formerly industrialized areas new life.

I. PROBLEMS CAUSED BY BROWNFIELDS

The problems caused by brownfields have been thoroughly examined elsewhere, and need only brief reiteration here. Generally, brownfields are currently unused or underused, in part, because of "real or perceived contamination."¹² Many of these underutilized properties are near urban centers and contribute to urban blight.¹³ Because economic activity and property values are decreased on underutilized properties, brownfields negatively impact tax revenues, and unsightly brownfields may also decrease the value of surrounding properties.¹⁴

An associated problem has occurred with many companies choosing to develop pristine properties, or "greenfields," which are typically away from urban centers, instead of brownfields.¹⁵ Greenfield development carries industrial activity (with its threat of environmental contamination) to formerly unpolluted areas, and further draws economic activity and jobs away from urban centers. Moreover, while many brownfields areas have access to existing infrastructure and public transportation services, these are often not available in greenfield areas,¹⁶ requiring expenditures on sewage and other infrastructure projects, and increasing dependence on automobile transportation, with its attendant air pollution effects.

12. Vogel, *supra* note 4, at 84.

13. *See id.* at 85.

14. *See id.*

15. *See id.* at 84; *see also* Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1, 9 n.29 (2000) (citing Kibel, *supra* note 11, at 601 stating that liability associated with brownfields has made the development of brownfields economically unfeasible, further contributing to urban decay).

16. *See* Espinosa, *supra* note 15, at 10 n.31 (citing Todd S. Davis & Kevin D. Margolis, *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property* 11, 12 (1997)).

II. ROOT CAUSES OF THE BROWNFIELDS PROBLEM

A. The Environmental Liability Structure Discourages Developers from Purchasing Potentially Contaminated Property

Federal law and even some municipal laws make the current owner of contaminated property liable for the property's remediation.¹⁷ This liability is strict (there is no need to show that the property owner is at fault or contributed to the contamination), and it is joint and several (the property owner can be liable for the full cost of remediation, even if other parties actually caused the contamination).¹⁸ The cost of remediating a property can be very high, often far exceeding the value of the property itself. Because of the threat of this liability associated with potentially contaminated properties, many developers prefer to develop greenfields instead.

B. Current Environmental Laws Generally do not Require Property Owners to Investigate and Remediate Environmental Conditions on Their Land

There is generally no freestanding obligation for property owners to investigate environmental conditions on their land. Many properties are only investigated during their preparation for sale, which is required by law in some states.¹⁹ Even where not required, few developers would purchase properties without first conducting a thorough environmental investigation; and short of that, most banks will not lend money on a real estate transaction without first requiring an environmental investigation.²⁰ For a number of

17. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (discussing CERCLA, 42 U.S.C. § 9607(a)(1) imposing strict liability on the owner of a facility); see also *Espinosa*, *supra* note 15, at 10.

18. See *New York v. Shore Realty Corp.*, 759 F.2d at 1044.

19. See ENVIRONMENTAL LAW INSTITUTE, AN ANALYSIS OF STATE SPECIFIED PROGRAMS, 50 STATE STUDY, 1998 UPDATE, at 139-290, at <http://www.eli.org/bookstore.htm>. Connecticut, Florida, Hawaii, Michigan, and New Jersey currently require sellers to perform a site investigation prior to sale. *Id.*

20. See Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(20)(E) (1994).

reasons, once an owner is actually aware of contamination on the property, the obligation to address the contamination is often increased.²¹ Because environmental investigations could trigger liabilities that might be higher than the value of the property, many owners of potentially contaminated property find it less expensive to simply "warehouse"²² the property than try to sell or redevelop the property.

C. Changes in Property Use May Affect the Risk Posed by Contamination at the Property

Properties may pose no risk to human health or the environment in their current use (e.g., industrial), but could pose a risk if they are converted to another (e.g., for residential development or child care).²³ Current owners of potentially contaminated property believe that as long as they retain ownership they can control the use of the property, even if they simply warehouse the property. They fear that if they sell the property it may be converted to an inappropriate use, which could result in both remediation liability

Although federal law now provides some protection from banks themselves becoming liable to remediate mortgaged property, these protections do not exist under the law of some states, including New York. Moreover, banks intending to take a security interest in property generally want to assure themselves that environmental contamination on the property will not make their collateral worthless.

21. See, e.g., CERCLA § 103(a), 42 U.S.C. § 9603(a) (requiring notification to National Response Center as soon as person in charge of a facility obtains knowledge of a release of hazardous substances); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (holding that plaintiff's knowledge created an obligation that triggered the beginning of that statute of limitations for federal tort claims).

22. Warehousing occurs when economic activity on a property is discontinued or drastically reduced, though ownership is retained.

23. See Judith G. Tracey, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENVTL. L.J. 169, 182-83 (1991); Stephen L. Poe, *Sale of Reo Properties Under CERCLA: An Area of Continuing Environmental Risk for Lenders*, 29 AM. B.B.J. 43, 62 n.82 (1991). See also Kibel, *supra* note 11, at 604 (discussing the EPA's Activity and Use limitations); Paul C. Nightingale, *Employing Land Use Restrictions for Waste Site Cleanups in Massachusetts*, Boston Bus. J., Mar.-Apr. 1997, at 4, 5 (discussing Massachusetts' contingency plan for activity and use on contaminated properties).

and personal injury liability to individuals exposed to contaminants on the property.

III. "FIRST TIER" APPROACHES TO ADDRESSING THE BROWNFIELDS PROBLEM

Many states have passed legislative programs²⁴ to encourage redevelopment of brownfields.²⁵ While each of these programs has its own characteristics, common features are discussed below.

A. Risk-based Remediation Standards

Most brownfields programs include risk-based corrective action ("RBCA") standards. These standards take into consideration the future use of a property and property-specific conditions in developing remediation requirements. Thus, industrial property may not be subject to the same remediation requirements as residential property.

B. Institutional and Engineering Controls

Related to the concept of RBCA, most brownfields programs allow "institutional" controls (e.g. deed restrictions requiring the property to remain in industrial use)²⁶ and engineering controls (e.g., permanently "capping" contaminated soil with an asphalt cover rather than removing or treating the soil)²⁷ as acceptable remediation strategies.

24. The role of the federal government vis-à-vis state brownfields programs is complicated and developing, and beyond the scope of this article. In brief, while the federal government has developed only limited brownfields programs itself, it will enter into memoranda of agreement with states on an individual basis, pursuant to which the federal government agrees to cede, with certain reservations, its enforcement authority over properties handled under a state brownfields program.

25. See Wendy E. Wagner, *Learning From Brownfields*, 13 J. NAT. RESOURCES & ENVTL. L. 217, 217 (1998). See generally Larry Schnapf, *State by State Survey of Brownfields & Voluntary Cleanup Programs*, 28 ENV'T REP. (BNA) No. 46, 2488, at 2488-2502 (1998) (discussing the specific programs implemented by the states).

26. See Schnapf, *supra* note 25.

27. See *id.*

C. "No Further Action" Letters and Liability Releases

It is often difficult to predict when remediation will be deemed sufficient and, as a result, environmental liability can be hard to quantify at the outset. To alleviate this problem, some brownfields programs create mechanisms whereby the state may issue a "no further action"²⁸ letter stating that once the agreed-upon remediation has been completed, the state does not intend to require additional cleanup.²⁹ States also offer liability releases providing that, if the brownfields developer completes the agreed-upon remediation, the state will release the developer from further contamination-related liability for the site.³⁰ These mechanisms create a level of certainty that allows the developer to estimate potential profits from the property, and facilitates obtaining financing. Usually, this certainty is tempered by a variety of "reopeners," which limit or eliminate the protections if it is later determined that the remedy was not protective, or if new contamination is discovered or created.

D. Public Participation

Communities surrounding brownfields have a significant interest in their development. These communities are adversely affected by the presence of underutilized properties in their midst. Additionally, if the redevelopment plan for a brownfield contemplates leaving contamination in place along with institutional or engineering controls, these communities have a strong interest in ensuring that the plan is fully protective. Therefore, most brownfields programs provide mechanisms for public review of and comment on brownfields remediation and redevelopment plans.³¹

28. See Margi Lifsey, Comment, *Prospective Purchaser Agreements: EPA's New Outlook on Landowner Liability*, 30 ENVTL. L. 177, 198-99 (2000).

29. See Phyllis E. Bross, *The Greening of New Jersey's "Brownfields" - as Viewed by the Department of Environmental Protection*, 9 FORDHAM ENVTL. L.J. 541, 556 (1998).

30. See Patrick J. Skelley II, Note, *Public Participation in Brownfield Remediation Systems: Putting the Community Back on the Zoning Map*, 8 FORDHAM ENVTL. L.J. 389, 392 (1997).

31. See Mank *supra* note 6, at 132.

E. Direct Incentives

Because of the strong public interest in redevelopment of brownfields, most brownfields programs include direct incentives, including grants, technical assistance and tax incentives, to brownfields developers. Incentives explicitly targeted toward brownfields can often be augmented by incentives from other programs run by federal, state or local economic or urban development agencies.

IV. AREA-WIDE DEVELOPMENT: THE SECOND TIER OF BROWNFIELDS INITIATIVES

Tremendous gains have been made in some states under first tier brownfields programs. However, these programs are inadequate to address the unique remediation and redevelopment problems faced by areas afflicted with multiple brownfields. In these areas, it may be futile to remediate single properties that later could be affected by contamination plumes spreading from neighboring properties spreading through soil or groundwater. Even where it is technically feasible to remediate single properties, there may be significant economies of scale in coordinating remedy selection and public participation, mobilizing remediation equipment, and coordinating remediation waste disposal from multiple properties.³²

Coordinating plans for multiple properties can enhance redevelopment. Area-wide development can justify more substantial expenditures for public transportation, sewage treatment, schools, and other improvements. Coordinated planning can also increase overall utility by encouraging an appropriate mix of industrial, commercial, residential and public properties and proper siting thereof. Moreover, individual properties tend to fare better when they are developed as part of an area that is undergoing general revitalization.

In several quarters, area-wide brownfields programs are being considered. While no fully developed area-wide program is currently in operation, portions of such programs have been

32. See NATIONAL GOVERNOR'S ASSOCIATION, EXECUTIVE SUMMARY, REVITALIZING AMERICA'S BROWNFIELDS: ECONOMIC GROWTH THROUGH ENVIRONMENTAL PROTECTION, *available at* <http://www.nga.org/NaturalRes/BrownfieldExecSummary.htm> (last visited Nov. 10, 2000).

enacted in some jurisdictions, with Michigan and Florida providing the best current examples.³³ This section describes the features the author believes are the appropriate elements of an area-wide brownfields program, relying on actual examples where possible. An area-wide brownfields redevelopment program should: (1) Establish a process for defining and delineating areas affected by multiple brownfields; (2) Aggregate and organize all available incentives for addressing the brownfields within each designated area; (3) Solicit, develop and integrate input on a remediation and redevelopment plan for the delineated area from the owners of the brownfields within the area, persons interested in developing those brownfields, community members and relevant government officials; and (4) Provide ongoing, focused support, incentives and assistance for remediation and redevelopment of the brownfields area in accordance with the area-wide plans. Each of these elements, with their associated potential benefits and problems, are discussed below.

A. Establishing a Process for Defining and Delineating Areas Affected by Multiple Brownfields

The first element of an area-wide brownfields development program should be a process for defining the relevant brownfields area. This entails two steps: (1) The boundaries of the brownfields area should be defined. Because area-wide brownfields development should respond to and be integrated with the concerns and needs of the communities in which the brownfields are located, this process should be initiated by, and incorporate substantial input from, these communities; and (2) The designated brownfields

33. Area-wide planning can also take place without the benefit of a statutory framework, for example, by municipalities identifying specific areas that have historically housed major industry, often along the routes of waterways, and have developed programs specifically for these areas. Pittsburgh, Seattle and Baltimore are examples of cities that have taken area-wide brownfields planning action outside the context of their respective states' brownfields statutes. See generally Kellee Van Kuren, *Lifting the Clouds: Seattle Clears the Way for Redevelopment*, BROWNFIELDS NEWS, Jan. 1998; Kellee Van Kuren, *Baltimore Bull's Eye*, BROWNFIELDS NEWS, Nov. 1997; Kellee Van Kuren, *A Tale of Two Cites: Pennsylvania Gets Into the Brownfields Act*, BROWNFIELDS NEWS, Apr. 1997.

area would be approved or accepted by the state. Liability under state law is the principal environmental concern for most brownfields properties, and, where the federal government is involved, the state is an essential liaison between the federal government and local governments and communities. Moreover, the state is both a source of substantial brownfields development incentives, and a conduit for federal incentives. Therefore, states are invaluable partners in area-wide brownfields development, and this role should be formalized early in the area-wide development process. In the course of completing these steps, a steering committee representing affected interests and agencies should be constituted, which would champion development of the brownfields area.

1. Designating a Brownfields Area

An area-wide brownfields development program can address complex problems, some of which are environmental, and others that relate to other aspects of urban renewal. A brownfields area may not be strictly limited to potentially contaminated properties, however the area should not be so large or diverse that its central purpose--remediation and redevelopment of potentially contaminated properties--is dissipated. The goal of area-wide brownfields development should be to encompass the properties needed to revitalize the area, some of which may have no known contamination.³⁴

Substantial questions arise with respect to the best way to initiate the designation process. One option is to make brownfields area designation an additional function of existing local governments.³⁵ These governments can then move the process forward through traditional processes (e.g. public hearings or resolutions).³⁶ Historically, private individuals and community-based organizations have employed various means (e.g., petitions) to spur municipalities and counties into action on a variety of issues. Thus,

34. *See, e.g.*, FLA. STAT. ANN. § 376.79(4) (West 2000). Florida's statute defines "brownfields area" as "a contiguous area of one or more brownfields sites, some of which may or may not be contaminated, and which has been designated by a local government by resolution."

35. *See, e.g.*, FLA. STAT. ANN. § 376.80 (West 2000).

36. *See id.*

to the extent that brownfields area designation is left to these governmental bodies, traditional means for initiating action and incorporating public input would be available.

A potential shortcoming of leaving area-wide designation solely in the hands of existing local governments is that the jurisdiction of these governments extends only to defined political boundaries. Contamination, and economic interdependency, however, may not be limited to the same boundaries, and designating a brownfields development area that extends beyond a single jurisdiction may be difficult for a single local government to do. An alternative to local governmental designation is to provide for a brownfields area designation process wholly outside of, or only partially integrated with, local governmental structures. Florida's statute, for example, provides that an owner of a site within a potential brownfields area can request area designation by either a municipality or county.³⁷ New York's proposed legislation allows community based organizations to initiate the area designation process through partnerships with municipal governments.³⁸

However, establishing an extra-governmental process risks creating another layer of bureaucracy. While local governments have developed processes to ensure interested parties a right to be heard and to influence decisions, an extra-governmental process would have to develop similar processes, and ensure that they were fair.

Another issue relating to area-wide designation is the determination of how the boundaries of the area could be altered after area-wide development has commenced. Designating brownfield redevelopment areas can be an intensely politicized process, in which groups with divergent positions will and should participate. A successful area-wide brownfields development

37. FLA. STAT. ANN. § 376.80(2)(b) (West 2000). Upon requesting area designation, the site owner must show: (1) that he has agreed to redevelop the site; (2) that the redevelopment will result in economic productivity and creation of at least ten new permanent jobs; (3) that the proposed development is consistent with local land use regulations and the local comprehensive plan; (4) that notice and an opportunity to be heard has been given area residents; and (5) that he or she has the financial resources to complete the proposed redevelopment. The municipality or county then decides whether or not to seek designation.

38. See *infra* Part V.

process will allow these groups to reach a broadly acceptable agreement on the boundaries of brownfields development areas, and remediation and development plans. Several steps in this process, including the designation of the brownfields area, could result from political compromise.

Final resolutions of complex environmental problems, however, are impossible to determine in advance. Solving these problems often requires an "adaptive management process,"³⁹ whereby decisions under politically established agreements may be made on the basis of information obtained from implementation, without completely revisiting the political compromise that made the agreement possible. For example, in the context of designating brownfields redevelopment areas, it may become clear during the course of the project that additional properties should be included in or excluded from the area. The area-wide brownfields development program should be structured to allow for such modification without the need to entirely reconsider the validity of the initial designation.

Another complex issue in the designation process is whether owners of particular parcels should be allowed to opt out and not

39. A full discussion of the "adaptive management process" is beyond the scope of this article. In brief, it entails structuring agreements to solve complex problems around broad principles. The agreements explicitly acknowledge that the details of implementation are impossible to determine in advance, and that it is most effective to allow these details to be shaped by information obtained in the course of implementation. Aggressive pursuit of such information is actively encouraged. Rules are established for incorporating the information into the implementation process, involving such features as ranges of implementation measures that will be deemed acceptable before seeking further approval from the decision making body; the amount of effort with which the pre-approved process must be tried before alternative processes can be explored; and the types of data that will be deemed acceptable for indicating that a change in the pre-approved process is indicated. Adaptive management has been found particularly appropriate for large-scale, multi-party environmental issues. *See generally*, Warren T. Coleman, Note, *Legal Barriers to the Restoration of Aquatic Systems and the Utilization of Adaptive Management*, 23 VT. L. REV. 177 (1998); John M. Volkman & Willis E. McConnaha, *Through a Glass, Darkly: Columbia River Salmon, the Endangered Species Act, and Adaptive Management*, 23 ENVTL. L. 1249 (1993); Joy B. Zedler, *Adaptive Management of Coastal Ecosystems Designed to Support Endangered Species*, 24 ECOLOGY L.Q. 735 (1997).

have their parcels included in the designated area and, if permitted, how this may be achieved. A property owner may believe that the negative stigma of being included within a brownfields area outweighs the potential benefits. While individual property owners should not have a veto over an area-wide designation with broad benefits, involuntary inclusion in designated areas should be avoided if at all possible. For example, under the Florida statute, a property owner may request in writing to have his property removed from the proposed designation, which the local government must grant.⁴⁰

2. State Approval of the Brownfields Area Designation

While it is essential that the impetus for the brownfields area designation process emerges from and reflects local concerns, it is equally essential that designated areas obtain state approval. The environmental liabilities most likely to impact brownfields spring from state environmental laws.⁴¹ Since the area-wide brownfields development process will entail creating remediation and redevelopment plans, it is crucial that the state be involved in this process, to avoid the risk of developing plans the state would not approve. Also, the review, approval and oversight of multi-property remediation plans may require more and different resources than the state's environmental agency is used to mobilizing. State involvement in the designation and approval process would provide a good opportunity to inform the state of the impending project, and the need to allocate resources appropriately.

Ultimately, it is state releases from liability that will provide a significant incentive to redevelop brownfield areas. The state may also be the source of substantial direct and indirect redevelopment incentives, as well as be the conduit for other incentives from the federal government. In fact, state approval or registration may be necessary for the brownfields area to gain certain benefits, or to exercise certain powers, such as issuing bonds.⁴² In the unabashedly

40. FLA. STAT. ANN. § 376.80(1) (West 2000).

41. Generally, but subject to many exceptions, the federal government will not act to address environmental conditions at a site unless it meets a relatively high level of concern that generates a federal interest.

42. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 125.2662, 125.2667 (West 1997).

political context in which brownfields development takes place, state officials can and should have a sense of ownership in brownfields development areas, and a stake in their success.

In designing the state approval process, important decisions must be made regarding when the state becomes involved, and whether the process entails merely notification to the state, or requires state approval. Under Florida's area designation process, for example, after a municipal or county government resolution designating an area is adopted, the local government then notifies the Florida Department of Environmental Protection of the designation. Under Michigan's Brownfields Redevelopment Financing Act, local Brownfields Redevelopment Authorities⁴³ are initiated by local governmental resolution and registered with the state,⁴⁴ giving them the ability to contract, borrow money, invest funds and issue bonds.⁴⁵

3. Formation of a Steering Committee

Successful area-wide brownfields development will require input from a variety of parties, the identity of which may vary during the different stages of a project's development. However, a defined group should be constituted and given the task of shepherding the area through the development process. Because development of brownfields areas will potentially impact a variety of rights and interests, rules for membership in this group should be thought through carefully. Membership should include at least one representative of the major affected interests, including owners of brownfields, owners of other area properties and businesses, community representatives, representatives of state and local environmental, planning and land use agencies, and others.

To ensure fairness, additional members should be included upon a showing that they represent a significantly affected interest that is

43. See MICHIGAN DEP'T OF ENVTL. QUALITY, BROWNFIELDS REDEVELOPMENT FINANCING ACTS: THREE YEARS LATER (July 1999).

44. MICH. COMP. LAWS ANN. §§ 125.2653, 125.2654 (West 1997).

45. See *id.* §§ 125.2657, 125.2661, 125.654. Michigan has Brownfields Redevelopment Authorities administering 150 Brownfields Redevelopment Zones. A list of Michigan's Brownfields Redevelopment Financing Authorities is available at <http://www.deq.state.mi.us/ead/eosect/bralist.pdf> (last visited Dec. 1, 2000).

unrepresented by the present membership.⁴⁶ Membership should also be limited to individuals and organizations that are willing to "stay the course," and see the redevelopment through to completion. It should be made clear that those with more limited or short-term interest in the project will have ample opportunity to express their views in public meetings, public comment periods, and other by means.

A less tangible but important benefit of forming a steering committee early in the process is that it could provide a forum for affected parties to familiarize themselves with each other and develop trust. Area-wide brownfields development will require cooperation among interests that traditionally have had adverse views on timing and methods of remediating and redeveloping properties. Sustained interaction within a properly formulated and managed steering committee should foster the trust necessary to achieve optimum efficiency in the steering committee's operations.

*B. Aggregation of Financial and Technical Resources and
Incentives for Area-wide Planning, Remediation and
Redevelopment*

The second essential element of an area-wide approach should be the creation and aggregation of financial and technical resources and incentives for planning, remediation and development in the brownfields area. This should involve both the creation of specific financial and technical incentives targeted for the brownfields area, and aggregation of pre-existing incentives from other programs that are applicable to the brownfields area. Potential incentives can include designated grants and low interest loans for planning and development, subsidized training for workers in businesses opening in the brownfields area, research and technical assistance from agencies and academic institutions, and a host of others.

Many incentives and resources for brownfields development already exist in a variety of governmental programs on the federal, state and local level, and from private foundations. Organizations that are not centered around environmental issues, such as job

46. Cf., D. Evan van Hook, Note, *Conservation through Cooperation: The Collaborative Planning Process for Utility Conservation and Load Management*, 102 YALE L.J. 1235, 1250-57, 1260-61 (1993).

creation, corporate retention and urban development organizations, may also offer incentives that can be targeted to development within a brownfields area. Sometimes the brownfields area designation process will determine the availability of these incentives if the brownfields area overlaps with economic development areas designated by the state or federal government. For example, in Baltimore, the Baltimore Development Corporation, an independent nonprofit organization, teamed with Cornell University's Work and Environment Initiative to develop a plan for redeveloping a 1,300-acre industrial peninsula in South Baltimore.⁴⁷ Since the area is in a federal Empowerment Zone, it qualified for a \$100 million grant, \$3 million of which was targeted for brownfields development.⁴⁸

The scope of area-wide brownfields projects may also justify publicly funded measures, such as infrastructure improvement, that initially may not be apparent to developers looking only for incentives from environmental agencies. The City of Baltimore committed \$10 million to non-environmental infrastructure improvements, such as road reconstruction, transportation studies and sewage plant improvements, to encourage brownfields development in the Fairfield Peninsula Area.⁴⁹

While many incentives exist and more may be created, it is often an overwhelming effort to seek out these benefits and understand how they can be accessed and applied. One tremendous practical benefit of an area-wide approach would be that it could allocate resources towards identifying and interpreting all incentives potentially applicable to properties within the redevelopment area, thereby greatly enhancing the efficiency with which these incentives can be utilized. Brownfields area steering committees should be encouraged to think creatively both within and outside the environmental context to identify all potential remediation and development incentives. The end goal of this step in the process

47. See *Baltimore Bull's Eye*, *supra* note 33. The area is being developed as the Fairfield Ecological Industrial Park.

48. See *id.* \$2.5 million of the \$3 million was used to establish a revolving loan fund for site remediation and preparation. The remaining \$500,000 was designated for matching site assessment grants. Funding for the city's mayoral Brownfields Industrial Redevelopment Council, which addresses brownfields issues in the city generally, is partially underwritten by an EPA Pilot Program grant.

49. See *id.*

should be creating a clear, understandable package of incentives available to sites within the brownfields area. This will provide a baseline from which owners and developers can assess the viability of different development options, and could be used to market the area and solicit additional development interest.

Michigan's brownfields program provides an example of how an area-wide approach can create new incentives and bring together existing resources to promote development in the area. Central to Michigan's area-wide approach is the use of Brownfields Authorities to administer tax increment financing specifically directed toward development in the brownfields zone. These authorities have the power to capture a portion of the incremental tax revenue generated by the improvement of brownfields properties⁵⁰ and reinvest recaptured taxes through revolving loan funds specifically for properties within the zone.⁵¹ Brownfields Authorities also act as magnets and clearing-houses for existing redevelopment funding available for brownfields properties.⁵²

Examples of state incentives available in Florida for sites within brownfields areas include low-interest loans to purchase outstanding liens on sites, loan guarantees,⁵³ job bonus refunds⁵⁴ and tax credits for cleanups of sites within designated areas.⁵⁵

50. MICH. COMP. LAWS ANN. § 125.2663 (West 1997).

51. MICH. COMP. LAWS ANN. §§ 125.2658, 125.2663 (West 1997). Brownfields Redevelopment Authorities can also use captured taxes to reimburse expenses and pay loan obligations.

52. Examples of these include site assessment grants and site reclamation grants, awarded by the state to communities, and Michigan's Single Business Tax Credit, administered through the Authority, which provides a credit of up to \$1 million for eligible response activity costs.

53. See FLA. STAT. ANN. § 376.86 (West 2000).

54. See *id.* § 376.84. See also, FLORIDA DEP'T OF ENVTL. PROTECTION, BROWNFIELDS IN FLORIDA: DESIGNATION PROCESS AND INCENTIVES FOR REDEVELOPMENT AND SUSTAINABLE REUSE, available at <http://www.dep.state.fl.us/dwm/programs/brownfields/geninfo/factsheet.pdf> (last visited Nov. 10, 2000) [hereinafter BROWNFIELDS IN FLORIDA]. The Brownfields Loan Trust Fund, loan guarantees and job bonus refunds are administered by Florida's Office of Tourism, Trade and Economic Development ("OTTED").

55. See BROWNFIELDS IN FLORIDA, *supra* note 54. See also FLA. STAT. ANN. § 376.84 (West 2000) (listing 15 types of financial incentives available for brownfields redevelopment).

Proposed legislation in Florida seeks to expand the range of incentives by adding brownfields area sites to the lists of projects eligible to receive targeted funding under the State's other economic development programs.⁵⁶

C. Development of Area-wide Remediation and Redevelopment Plans

The third element of an area-wide brownfields development program should be a process for developing area-wide remediation and redevelopment plans. One of the great promises of area-wide brownfields development is that it will provide an opportunity to integrate decisions about (1) how to remediate properties; (2) what redevelopment options make the most sense from an economic perspective; and (3) what redevelopment options make the most sense from a community development perspective. For example, decisions may be made to locate industrial uses in areas that would be most difficult to remediate, while ensuring that space for other uses is available elsewhere. Moreover, by planning comprehensively for the brownfields area, it may be possible to allocate incentives to encourage uses or levels of remediation in a manner consistent with the overall development plan.

Comprehensively addressing contamination in the area may itself create incentives for additional development. Central to the idea of an area-wide approach is the recognition that contaminated properties are frequently clustered, rather than isolated. Site-specific brownfields statutes typically make the developer responsible in some measure for assessing off-site contamination. At the same time, migration of contamination from other areas can threaten a project's viability. Thus, addressing a property on a site-specific basis, without adequate information on area-wide contamination either originating from or migrating to the property, adds a level of risk unacceptable to many developers. Area-wide planning, to the extent it identifies and assesses ubiquitous contamination in the area, helps developers to better assess the potential impact to and from their site.

This area-wide process should present unique and challenging, but potentially very rewarding opportunities. A primary feature of

56. See S. 1406, 102nd Leg. Reg. Sess. (Fla. 2000), available at <http://www.leg.state.fl.us> (last visited Nov. 10, 2000).

the process should be a means to incorporate the viewpoints of all affected parties, and those of individuals with particular expertise in remediation and redevelopment issues. To a certain extent, the incorporation of affected interest viewpoints will flow naturally from the shift from development of individual properties to the development of brownfields areas. Under tier-one, single property brownfields programs, individual property owners or developers typically generate remediation and redevelopment plans in isolation. These plans are usually shared with regulating agencies at required points in their development, and the public is generally provided with an opportunity to review and comment on the plans once they are complete. The process is substantially driven, however, by the intentions of one property owner for one property.

The area-wide approach would follow a different paradigm. From its inception, area-wide brownfields redevelopment would be a community-driven process. Its design would enable communities to identify areas where the confluence of multiple brownfields and other problems impeded development, and formulate comprehensive plans for addressing those impediments. Plans would be initially formulated and later developed by steering committees representing affected interests, rather than being created in isolation with affected interests entitled only to comment after plans were finalized.

Some important aspects of this part of the process should be noted. First, the process should recognize the value of expertise. While all affected interests should review, question and comment on plans as they are developed, the process should recognize that certain aspects of area-wide planning require training and expertise in remediation techniques, land use planning, and other related areas, that not everyone shares. The planning process will not be successful unless such expertise can be mobilized effectively.

Second, the process should recognize the limits of expertise. Although brownfields development has been occurring since at least 1988,⁵⁷ it is still in its infancy in terms of truly integrating the various skills necessary to remediate and redevelop contaminated property. Too often, brownfields are approached solely from a technical remediation perspective, or from a real estate transactional perspective. While due accord should be paid to expertise when it is required, steering committees should not be

57. See Eisen, *supra* note 10, at 193.

afraid to break new ground and look for new ways to achieve the best results from environmental, real estate development and community development perspectives.

Third, despite the fact that community views will naturally be more thoroughly represented in the area-wide planning process, this will not eliminate the need for formal public comment procedures. Not every potentially affected community member will have the time or resources to participate directly in the planning process, and these parties should not be deprived of their traditional rights to voice their concerns at scheduled times.

Fourth, remediation plans cannot be developed in the abstract, without real-world data. In the planning stage, important issues will have to be addressed concerning access to properties for testing. Additionally, as discussed further below, incentives that have been aggregated for the brownfields redevelopment area will need to be mobilized at the outset, perhaps at the stage of area designation, but certainly at the stage of plan development, when resources for conducting environmental and development analyses will be required.

Fifth, the remediation and redevelopment plans should fully incorporate the concept of adaptive management, discussed above.⁵⁸ These plans should incorporate procedures under which, within specified bounds, modifications to them can be implemented quickly as dictated by experience in the field. The plans should also specify the circumstances under which, if planned remediation or redevelopment in the field proves to be impossible, objectives can be entirely reconsidered, or additional public comment may be solicited.

Sixth, fears that the area-wide process represents an attack on private property rights in brownfields areas must be addressed. Area-wide plans would be voluntary in nature. Substantial incentives would be aggregated to encourage property development according to the plans. A property owner's or developer's decision to avail himself or herself of these incentives by developing the properties in accordance with the comprehensive plan would be voluntary, and would likely be made on the basis of whether it would still be more profitable to develop in a different manner.

58. See *supra* note 39 and accompanying text.

Development of area-wide remediation and redevelopment plans should create tremendous incentives for development according to the plan, in ways that at first might not be apparent. One fear brownfields owners have of initiating plans for investigating, remediating and redeveloping a brownfields property is that the uncertainties of community or environmental agency opposition will greatly increase the cost and time required for redevelopment. A comprehensive remediation and redevelopment plan, which has been developed with, and approved by, affected communities and agencies, would go a long way toward eliminating these concerns.

D. Provision of Ongoing, Focused Support, Incentives and Assistance for Remediation and Redevelopment of the Brownfields Area in Accordance with the Area-wide Plans

The final element of an area-wide brownfields development program should be continued, supportive and focused assistance with remediation and development in accordance with the area-wide plans. This assistance could come in a variety of forms, from dedicated state environmental agency resources for review and oversight of remediation measures and expedited permit approvals, to special consideration for infrastructure projects, such as public transportation, schools, grants, tax incentives, worker training low-cost loans, and various other programs.

The sometimes-onerous task of applying for and gaining approval of incentives offered by governmental bodies and foundations should be streamlined to maximize the area-wide resources available. Incentives should be aggressively pursued and funded, in order to minimize the costs of evaluating environmental conditions, remediating properties and initiating new property uses that are consistent with the area-wide development plan.

Finally, incentives should include funding for the members of the steering committee. Membership on these committees will be a largely thankless task, and consequently, should not be unpaid. To a large extent, the success of a brownfields redevelopment area will depend on the creativity, determination, and effort of the steering committees. Options should be explored for funding membership for representatives of interests with relatively few resources.

Again, a few issues should be noted respecting the implementation phase of the program. First, adaptive management will be a very important aspect of this phase. If the plans have been

drafted appropriately, and an appropriate level of trust has developed among the parties, participants should expect and not be troubled by a host of minor modifications in response to circumstances encountered during remediation and redevelopment. The plans should incorporate procedures for implementing these modifications without having to revisit first order consensus agreements.

Second, it should be noted that development according to the plan should remain voluntary. Strong efforts should be made to make property owners aware of the area-wide plan, and of the incentives available for redevelopment according to it. The hope would be that the incentives offered for development pursuant to the plan, the reduction in uncertainty afforded by community and environmental agency approval of the area-wide plan, and the chance that property values generally would rise after the plan was implemented would make property owners and developers voluntarily see that their best interests lay in participation. Significant due process concerns could be raised, however, by any attempt to compel property owners to participate, and this should be avoided.

V. AREA-WIDE INITIATIVES IN NEW YORK'S PROPOSED BROWNFIELDS LEGISLATION

Two bills containing area-wide brownfields redevelopment provisions are currently under consideration in New York State.⁵⁹

59. Brownfields legislation in New York has been controversial during recent legislative sessions, in part, because this legislation has been proposed as a component of proposals that also address other contentious areas of environmental law, such as the scope of the state's environmental enforcement authority. Legislative proposals on brownfields have emerged or been modified frequently, and it is impossible to determine which, if any, of these proposals will be enacted into law. For purposes of practicality, this article's analyses of area-wide brownfield development measures proposed for New York are based on a draft of the Governor's proposed bill dated June 15, 1999, Legislative Bill Drafting Commission 12132-04-9 [hereinafter Governor's Bill] (on file with the author), and a November 16, 1999 draft of the Brownfields Coalition's proposed bill [hereinafter Coalition Bill] (on file with the author). These drafts should be viewed as exemplars of the types of area-wide proposals that are under consideration in the state, rather than as the

One bill, proposed by Governor George E. Pataki, is based primarily on the recommendations of the Superfund Working Group established by the Governor in 1998.⁶⁰ The second bill was proposed by the Brownfields Coalition, a group of diverse organizations that have come together to support enactment of the program that emerged from the Pocantico Roundtable for Consensus on Brownfields.⁶¹ In addition to extensive proposals for codifying and revamping the site-specific provisions of the state's brownfields program, both bills propose adding provisions addressing area-wide brownfields planning and development.⁶² They embody processes that include state assistance with pre-planning, followed by state-approved local area designation and formulation of an area plan that in turn provides access to financial incentives.⁶³

A primary focus of both bills is planning, both before and after area designation. Both proposals facilitate the organization of community input at an earlier stage in the planning process than is common with a site-by-site approach.⁶⁴ Partnerships between municipalities, community-based organizations, not-for-profit corporations with community ties, residents and private sector businesses are encouraged.⁶⁵ Both proposals require a showing of

author's predictions of the precise content of legislation likely to be enacted.

60. See Governor's Bill, *supra* note 59.

61. See Coalition Bill, *supra* note 59.

62. See Governor's Bill, *supra* note 59, at 54 (proposing the addition of new § 970-r to General Municipal Law); Coalition Bill, *supra* note 59, at 1-2 (proposing the addition of new Article 18-d (§§ 973-a-j) to General Municipal Law).

63. See generally Governor's Bill, *supra* note 59; Coalition Bill, *supra* note 59.

64. See Coalition Bill, *supra* note 59, at 1-4; Governor's Bill, *supra* note 59, at 54-55.

65. See, e.g., Coalition Bill, *supra* note 59, at 1-2, proposed Statement of Legislative Findings and Declaration:

It is the public policy of the state to facilitate partnerships between local governments, private sector employers, businesses and employees, area residents, community based organizations and financial institutions to recognize and act cooperatively and in partnerships to address the existing brownfields conditions so as to promote the physical, economic, and social revitalization of the communities in which these brownfields concentrations exist.

Id.

strong local support as one of the criteria that must be considered in pre-planning grant applications.⁶⁶

Both proposals provide for state assistance in the pre-planning studies designed to gather information on an area prior to an application for designation as a brownfields area.⁶⁷ In the Governor's bill, the Secretary of State, in consultation with the New York State Department of Environmental Conservation ("ENCON"), oversees area-wide brownfields development.⁶⁸ The Secretary is authorized to provide financial and technical assistance to municipalities and not-for-profit corporations in cooperation with municipalities for pre-planning studies, after which, an area may be designated as a brownfields redevelopment area.⁶⁹ The Governor's bill defines a brownfields redevelopment area as an area characterized by clustered properties, suspected widespread contamination and recognition of the inefficacy of developing the area on a site-by-site basis.⁷⁰ The Coalition bill contains provisions for assistance in pre-planning studies, after which municipalities and not-for profits would apply to the Commissioner of Economic Development for designation of a "land re-use opportunity area" or "LROA."⁷¹

Once designation of an area has been approved by the State, the focus shifts to development of an area plan, to be submitted to the State for approval.⁷² Both bills provide targeted planning grants for designated areas.⁷³ The focus of planning is then broadened to include a range of non-environmental development issues, such as identifying infrastructure needs and defining anticipated end uses of area sites.⁷⁴ In the Coalition bill, the plan must include proposals

66. *See id.* at 1-4 to 1-5; *see also* Governor's Bill, *supra* note 59, at 56-57.

67. *See* Coalition Bill, *supra* note 59, at 1-4 to 1-5; Governor's Bill, *supra* note 59, at 55.

68. *See* Governor's Bill, *supra* note 59, at 55-57.

69. *See id.* at 55.

70. *See id.* at 54.

71. Coalition Bill, *supra* note 59, at 1-7 to 1-9.

72. *See* Governor's Bill, *supra* note 59, at 55-56; Coalition Bill, *supra* note 59, at 1-9 to 1-10.

73. *See* Governor's Bill, *supra* note 59, at 55-56; Coalition Bill, *supra* note 59, at 1-7.

74. *See* Governor's Bill, *supra* note 59, at 55; Coalition Bill, *supra* note 59, at 1-7.

for infrastructure improvement, procedures to expedite the issuance of any local permits or licenses necessary for development, job development and promotion strategies, and a demonstration of involvement with municipal agencies, business entities, not-for-profits and community based organizations.⁷⁵ The Governor's bill contains a similar set of criteria for area plan evaluation by the Secretary of State, in consultation with ENCON.⁷⁶ Both bills also provide site assessment grants for sites within designated areas.⁷⁷

The primary financial benefits of area designation are qualification for targeted brownfields area planning grants, and enhanced access to financial incentives.⁷⁸ The grants are designed to facilitate development of an area-wide plan that is then submitted for state approval.⁷⁹ While both bills focus on pre-planning, planning and site assessment grants to brownfields areas, the Coalition bill authorizes the Commissioner of Economic Development to arrange for the direction of available funds from other state infrastructure improvement programs to support LROA plans, and creates a Brownfields Site Assessment, Acquisition and Remediation Assistance Program under the State Urban Development Area Action Act⁸⁰ to administer a comprehensive set of financial incentives for LROAs.⁸¹

Beyond the planning stage, the Governor's bill continues to address remediation issues, mostly on a site-specific basis. The Coalition bill proposes revisions to the groundwater remediation provisions in the Environmental Conservation Law, addressing ubiquitous groundwater contamination.⁸² While not specifically tied to the LROA program, the ability to address ubiquitous groundwater contamination affecting a multi-site area would have

75. Coalition Bill, *supra* note 59, at 1-9 to 1-10.

76. Governor's Bill, *supra* note 59, at 56-57.

77. *Id.* at 56; Coalition bill, *supra* note 59, at 2-5 to 2-6.

78. Governor's Bill, *supra* note 59, at 55-56; Coalition Bill, *supra* note 59, at 1-3 to 1-10.

79. *See* Governor's Bill, *supra* note 59, at 55-56; Coalition Bill, *supra* note 59, at 1-3 to 1-9.

80. *See* Coalition Bill, *supra* note 59; N.Y. GEN. MUN. LAW, Art. 16, §§ 690 *et seq.* (McKinney 1999).

81. *See* Coalition Bill, *supra* note 59, at 2-1 (proposing addition of new section 16-i to New York's General Municipal Law's Urban Development Action Area Act).

82. *See* Coalition Bill, *supra* note 59, at 6-20 to 6-23.

positive implications for LROAs. The proposal calls for the development of a statewide groundwater characterization and assessment study to identify ubiquitously contaminated groundwater areas.⁸³ In such areas, modifications are made to liability provisions to encourage redevelopment.⁸⁴

CONCLUSION

In theory, an area-wide approach could provide substantial environmental and developmental benefits to areas affected by numerous brownfields. The public processes of identifying and designating brownfields redevelopment areas, and of developing remediation and redevelopment plans for these areas, would bring the views of a wider set of affected interests into the decisionmaking process earlier, and in a more effective way, than is the case with first tier, single property brownfields programs. The early and comprehensive involvement of these parties would result in a concomitant reduction in uncertainty for developers over plan approval and community acceptance.

The economies of scale inherent in addressing multiple brownfields sites should reduce the costs of identifying and interpreting incentives, collecting and processing technical information, agency review of remediation plans and permits, and mobilizing remediation and redevelopment equipment and personnel, and the scope of area-wide projects should more readily justify public investments in infrastructure. Additionally, comprehensive planning for brownfields areas promises the potential for siting preferred uses to minimize remediation costs and maximize economic and community development potential.

83. *See id.* at 6-7. "Ubiquitously contaminated groundwater" is defined as

groundwater that is contaminated and is (i) not currently used for and not moving into groundwater now used or anticipated to be used for drinking water, (ii) characterized by a range of contaminants from multiple sources, or contaminated from naturally occurring conditions which make it unsuitable as a potable supply (e.g., high sulfides, metals or chlorides) and (iii) so widespread that site-by-site remediation actions would be inefficient or ineffective using currently available technologies.

Id.

84. *See id.* at 6-22 to 6-23.

From an environmental perspective, area-wide programs promise more comprehensive approaches to multi-site problems, such as ubiquitously contaminated groundwater, or contamination plumes affecting more than one property. Moreover, any program that gets developers in to remediate and reuse brownfields represents an improvement over the current environmental situation, in which neighborhoods surrounding brownfields remain exposed to contamination while the properties languish. To the extent that an area-wide approach triggers development that otherwise would not have occurred, this development will improve overall environmental health.

A number of problems must be addressed, however, before an area-wide approach can be implemented in New York or elsewhere. A statutory brownfields program may put into place a structure and process whereby affected groups, many of whom may have traditionally viewed one another in an adversarial light, will work together. These structures and processes will not function effectively unless participants, including property owners, environmental enforcement agencies, community representatives and others, are able to gain one another's trust, and feel confident that everyone has the best interests of the brownfields area at heart.

The precise way in which area-wide brownfields redevelopment procedures will fit into existing environmental, land use and economic development structures is a complex problem that will require extensive consideration, as will the issue of ensuring that area-wide planning does not erode the individual rights of property owners within the area. An area-wide approach to brownfields could add new roles for local governments in situations where a brownfields area extends over more than one governmental unit's jurisdiction. Government officials may need to learn new methods of cooperation and address problems in new ways. Moreover, many time-honored and effective measures for planning and public participation are embodied in historical local land use and environmental procedures, and these procedures should not be tampered with unless absolutely necessary, and then, only after thorough consideration.

Both the Governor's Bill and the Coalition Bill address a wide variety of issues, including environmental liability, remediation standards, and the inclusion of additional sites under ENCON's jurisdiction, many of which have been the topic of lively debate. In

this context, it is easy to lose sight of the importance and innovative aspects of the Bills' provisions for area-wide brownfields development. Perhaps because of the need to address such a host of other issues, the programs proposed in the Bills do not include all of the features one might want to see in a full-fledged area-wide brownfields development program, and it is unlikely that the Bills' drafters had the opportunity to fully consider all of the issues, potential problems and implications of their programs.

Either during evaluation of the currently proposed bills or in future legislation, New York should seriously consider comprehensive area-wide brownfields development legislation. This would provide an opportunity for the state, which lacks even a statutory first tier, single property brownfields program, to leap immediately to the second tier, and lead the nation in exploring and capturing the benefits promised by area-wide brownfields development.