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# BROWNFIELDS IN MARYLAND

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*"Brownfields" describe unused or abandoned urban properties that are either polluted or perceived to be polluted as a result of past commercial or industrial use and are not attractive to the current real estate market. The result is contaminated properties that are neither developed nor cleaned up. Real estate market forces and current environmental regulatory programs are not providing the impetus necessary to clean up the sites.*

*Brownfields are receiving a great deal of attention because these idle urban properties are blamed for job losses, foregone economic development potential and new commercial and industrial development in undeveloped suburban and rural areas ("greenfields"). Redeveloping brownfields and siting new commercial and industrial activities in urban areas is one of the many pieces necessary to solve the growth management puzzle that is essential to achieving restoration of Chesapeake Bay. As the population in the Chesapeake Bay watershed moves toward 15 million, we must change the way we are growing and stem the sprawl patterns of development that are directly impacting the economic environmental and cultural health of the Chesapeake Bay. Brownfields are not solely an environmental or economic issue, however. Promoting their redevelopment will require addressing issues ranging from crime to transportation.*

*What causes a piece of property to sit idle while others attract much coveted commercial or industrial uses? Fear of legal liability for pollution is only one of many causes but nevertheless one that can be addressed. The keys to removing environmental barriers are to provide as much "certainty" about the site to a prospective developer as possible, to reexamine laws and regulations and their practical application, to streamline the process by which environmental contamination is addressed and to provide incentives for redeveloping brownfields properties while still protecting public health and the environment.*

## INTRODUCTION

Brownfields are a community, economic development, environmental, health, land use, tax base and urban redevelopment issue. Complex and sometimes overlapping environmental regulations are frequently blamed as a critical reason why many properties in industrial areas continue to be unused, polluted sites are not cleaned up and suburban areas with undeveloped land are chosen as locations for new or relocating businesses. As a result, over twenty states and the federal Environmental Protection Agency have implemented programs designed to encourage the re-use of these properties. Because of the many factors that can cause developers and prospective purchasers to shy away from a particular piece of property, there is no easy solution to promoting the redevelopment of brownfields. A sound public policy must take into account the economic, environmental, legal, planning and technical issues that are driving development of greenfields while leaving parcels of property in already developed areas untouched.

Brownfields redevelopment is one area where environmental and economic development goals can go hand in hand. As experience in other states has shown, however, it can also be an opportunity to relax environmental controls while not necessarily achieving economic development goals. While overreaching environmental regulation can slow an economy, strong environmental programs have been shown to contribute positively to a

region's economy by providing a higher quality of life. A carefully crafted balance between changing the regulatory process, streamlining that process, and insuring that adequate environmental and public health protection measures still exist, must be struck to accomplish economic development goals.

In Maryland, both the City of Baltimore and the State have identified brownfields as a priority due to the emphasis placed by current administrations on economic development initiatives. All of these efforts must, however, be discussed in light of the economy. The fact is that Maryland's economy has been growing slowly and Baltimore City's not at all. Any expected results of a brownfields overhaul must be tempered by the realities of the local economy. The question is how to revise current regulatory programs in a way that promotes economic development and protection of the public health and environment.

## **DEFINING BROWNFIELDS**

Brownfields are properties that were used for commercial or industrial purposes and are now unused. These properties are often in urban areas and may or may not be contaminated as a result of past use. The nature of brownfields contamination is usually pollution of soil and/or the underlying groundwater by hazardous waste, oil or a combination of the two.

### *Brownfields in Baltimore*

Baltimore City estimates that there are 600 acres available in sites ten acres or more in size. Of those 600 acres, 310 are abandoned or idle properties suspected to be contaminated. The City further estimates that if all occupied and vacant sites were tested, thousands of acres would be shown to be contaminated.

### *Brownfields in Maryland*

Throughout Maryland, there are also brownfields sites in areas that have an industrial history including Hagerstown, Cumberland, Federalsburg, Frederick and Salisbury. Although statewide there are approximately 180 sites where hazardous waste contamination is being cleaned up, the State estimates that there are eight to twelve hundred additional sites potentially contaminated with hazardous waste.

The lack of specific numbers of brownfields sites is symptomatic of the problem. The risks of getting involved with a potentially contaminated site are so great that often the perceived contamination is not even verified. The scope of the brownfields problem, therefore, remains unquantifiable.

## **THE EFFECTS OF BROWNFIELDS**

### *Contaminated Sites*

The most obvious manifestation of brownfields are properties that are contaminated and not cleaned up. There are public health risks and threats to groundwater aquifers

associated with these sites. Along with abandoned sites, of course, come another cadre of social problems including urban blight.

### *Impact on Growth*

Throughout the Chesapeake Bay watershed the trend around our metropolitan areas has been to spread out. As suburbanization increases, we use more and more of our rural agricultural, forested and other lands. These living patterns are increasingly important to the Chesapeake Bay. Developing unused pieces of property for new industrial, commercial or business use (as well as residential use) means that we not only are spreading out but we are attracting more people to outlying areas by providing jobs there. With more people, of course, comes an increased need for roads, schools and other amenities which in turn bring more people. Reversing this general trend is difficult at best. One small piece of the answer to the growth problem is to redevelop previously used sites including brownfields, bringing needed jobs to urban areas and revitalizing urban centers, a key to smart growth.

## **WHAT IS NEEDED TO ACHIEVE THE REDEVELOPMENT OF BROWNFIELDS**

### *"Ready to Go"*

The ultimate goal for redeveloping a brownfield is providing a site that is cleaned up and "ready to go." A developer looks for a site on which construction can start on a set date. Many developers use the phrase "the buyer needs to kick the tires." Buyers want to see the property and know that they can walk right on and begin their work without contingencies based on testing for contamination or completing an environmental remediation. *Size of Site*

The size of the site is also a critical factor in determining whether a site will be reused. For example, warehousing is a business naturally suited to Maryland because of its proximity to over 30% of the U.S. population in a day's drive. These types of facilities require larger tracts of land, usually ten acres. Developers of these types of facilities also have very specific requirements related to access to major transportation routes and other infrastructure. The number of sites that are at least 10 acres in size and "ready to go" are few and far between in an urban area like Baltimore City. Whereas in suburban Harford County in 1995, for example, several companies have announced plans to locate new warehousing and regional distribution centers there.

### *Other factors*

The size of a site is just one of many factors, other than pollution, that inhibit the redevelopment of an urban property. Change from a manufacturing to a service economy, crime in the community, aging infrastructures, changes in the local community, poor access to transportation, the education level of the employment base, availability of executive style housing, cost of labor (labor usually runs 50 to 80% of a company's costs), and the costs of development of urban versus suburban or rural properties are just a few factors that affect business location decisions. To redevelop brownfields, all of these issues must be addressed.

The environmental regulatory structure, however, is one component of the brownfields problem that can be improved, not only as an incentive to encourage redevelopment but also to encourage voluntary cleanups of property.

## **ENVIRONMENTAL BARRIERS TO THE REDEVELOPMENT OF BROWNFIELDS**

### *Legal Liability*

Fear of legal liability for contamination deters property owners and potential buyers from investigating contamination, cleaning up or buying a site. The general environmental regulatory scheme is a maze of federal and state rules that are under attack for slowing down real estate markets for commercial and industrial properties in recent years.

In particular, "Superfund" liability that makes a potential buyer of contaminated property liable for the contamination, even though the buyer did not cause the contamination is under intense debate. The Superfund law, or the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), was passed in 1980 with the intent to ensure that the polluter paid for the cleanup of the site. Under CERCLA, the legally responsible person includes present and past owners and operators of the property regardless of whether they caused the contamination and any person who transported or generated the substance that caused the contamination. Therefore any person who may purchase contaminated property may become a liable party (subject to an exemption for "innocent purchasers"). A system that was designed to ensure that there is a responsible party to cleanup at all times has resulted in few cleanups and large volumes of litigation. Although Superfund reform continues to be debated in Congress, it is important to note that the vast majority of brownfields, in cities like Baltimore for example, are not Superfund caliber sites on the "national priorities list," a list of the worst sites, but rather fall under State control. The debate over liability at the federal level is instructive because Maryland has a similar liability scheme.

Maryland has its own "Superfund" equivalent which was originally designed to address sites that were a serious threat but not serious enough to warrant federal Superfund designation. The liability provisions are the same as the federal law. In addition to this law, Maryland also regulates hazardous waste under the Resource Conservation Recovery Act ("RCRA") "cradle to grave" scheme which holds the generator, transporter or disposer liable. Currently, in Maryland, there are approximately 200 to 400 sites not actively being addressed under the State superfund program or RCRA. It is these sites which need to be addressed either through brownfields redevelopment or a voluntary clean up program. Current State resources do not enable a sufficient number of enforcement actions to be taken to prompt clean up of the majority of sites.

### *Improvements*

A mechanism to protect potential purchasers willing to conduct a cleanup from liability for past contamination caused by another party will encourage more redevelopment activity on contaminated sites. Mechanisms that may provide this level of comfort for

potential purchasers include potential purchaser agreements and covenants not to sue provided to the potential purchaser. The disadvantage of providing such releases is that, in some cases, there may be no other legally responsible party to clean up the site leaving the State in a position where it is unable to meet its mandate to protect public health and the environment. To address this scenario, such releases can be conditioned on a completed clean up by the potential purchaser or other party who stands to benefit economically from the remediation. Another potential answer is the creation of a fund to cover these scenarios combined with a provision that if there is an imminent threat to public health or the environment, such a release cannot be granted. From a financial point of view, however, such funds carry their own risks for taxpayers.

#### *Lender Liability*

Although Maryland has enacted provisions that afford more protection to lenders than at the federal level, there is still a fear of lender liability in the banking community which must be addressed.

A significant factor in whether a piece of property will be developed is whether a potential buyer or developer can get a loan on the property. Increasingly, lenders such as banks have become reticent to make a loan on property that may be contaminated because some courts have held the bank to be liable for the cost of environmental clean up. The only public policy rationale for not exempting banks entirely from liability is that there have been instances where a bank, to protect its interest in the property, has assumed the day to day operation of a site including oversight of the clean up and that bank has negligently conducted the clean up. In such a scenario, where a bank becomes the de facto operator of a site, it is necessary to employ the same type of restrictions on the operator of the site, in this case the lender, as would be applied to any other operator.

#### *Improvements*

Although Maryland's policy has never been to seek enforcement from a lender unless there were egregious circumstances in which the lender was negligently operating the site on a day to day basis, this policy could be broadened and clarified by amending the current State statute to afford the lender as much protection as is feasible without eliminating the State's authority in the those extremely rare cases of unusual circumstances.

#### *Lack of Certainty*

There is an inherent lack of certainty for anyone interested in cleaning up a site, whether that person be a polluter, potential buyer, or government regulator. There are always technical uncertainties, questions about the duration of the cleanup and questions about when clean is clean because environmental remediation is not an exact science. The following four issues directly contribute to this inherent lack of certainty.

#### *Cleanup Standards*

Under current Maryland law, the levels to which contamination must be removed are decided on a case by case basis depending upon a number of factors at a site including surrounding land use, geology, and pathways for the pollution to migrate. The length of

time required to determine clean up standards can vary depending on such factors as the number of State staff available to review remediation plans, whether the State agrees with the proposed clean up plan, the complexity of the plan and site characteristics.

### *Improvements*

Definitive clean-up standards would provide more certainty than the standards based on a site by site analysis. The disadvantage of a generic, one size fits all, standard for a particular pollutant is that it does not take into account the multitude of variables at a particular site that will affect the cleanup nor does it address the fact that the level of cleanup at which public health and the environment will be protected may differ depending on site characteristics. To address this, some states have enacted a generic standard for specific types of land use. For example, different generic standards have been established for residential, commercial and industrial properties. This approach provides some flexibility and some certainty. Levels of generic standards, however, if widely used could result in numerous properties that have been through the cleanup process yet have varying levels of contamination and land use restrictions based on those contamination levels.

Another approach is to use a "background" level standard. A background level is a cleanup standard set at a level equivalent to the level of contamination on site when the party conducting the cleanup arrived. Such a standard may not guarantee protection of public health or the environment if the level of "historical" contamination at a site is high.

Providing a choice between a site based analysis or generic standards gives the developer a choice between the most efficient cleanup based on the characteristics at that particular site or the expediency of a generic standard. If different generic standards based on categories of land use are used, safeguards to ensure additional cleanup activity should land use change to a higher use are necessary. Using background levels as a cleanup standard, unless limited in some way, can open the door to very high contaminant levels as the cleanup standard.

### *State Program Administration*

Since developers are looking to "kick the tires," lengthy approval processes for cleanup plans can wreak havoc for pending real estate transactions. One mechanism that may go a long way toward providing certainty is to establish an administrative process with definitive steps and time periods for the submission and review of remediation plans. The constraint on the State to do this in the past has been the constant pressure on and fluctuation of staff resources. A more definitive process, therefore, must account for payment of administrative costs to ensure the State has the ability to run such a process.

### *Reopeners*

Another issue that relates to certainty is whether the State will issue the property owner a determination that there are no further requirements for cleanup of a site. These determinations often contain "reopeners" that allow the State to require additional remediation should new facts come to light. It is difficult to know whether all contamination has been removed. For example, a pocket of contamination may be

trapped between layers of clay or another geologic feature making it latent until some change occurs. To protect public health, the State will retain its right to require additional cleanup under circumstances where new facts come to light. This reopener, however, is an uncertainty for the potential buyer. Absent a fund to pay for cleanups required as a result of newly discovered information, the State, if it is to fulfill its mandate to protect the public health and the environment, must retain these limited rights.

#### *Improvements*

To provide a release of liability for potential purchasers and more limited reopener provisions, there must be a mechanism to enable the State to pay for remediation of a site where no remaining responsible party is available. One such mechanism is the creation of a fund. A fund does not provide all the answers because its effectiveness is entirely dependent on the level of funding. Moreover, liability for a remediation can be astronomically expensive resulting in the depletion of even a substantial fund by one or two particularly difficult sites.

#### *Cost of Remediation*

A relatively simple remediation of pollution on a half acre of property can easily cost over \$100,000 with some remediations going into the millions of dollars. Cost depends on the complexity of the geology, the threat to ground water, whether public sewer or water sources are nearby, the threat to human health and environmental resources and luck. The uncertainty of and duration of these expenses is a big factor in discouraging the re-development of a site that may have some contamination present. While remediation technology is constantly changing, the high costs associated with environmental cleanups may always be a deterrent in real estate transactions.

## **PUBLIC PARTICIPATION**

The State's current public participation policy on the type of sites at issue is strong. Where there is public interest in a site, meetings with the public are conducted. However, this policy is predicated on current staff practice and there are few mechanisms to ensure continuation of this policy in the event of a staff change.

#### *Improvements*

Public participation requirements that differ according to the severity of contamination on site and the surrounding land use of the site may be helpful both to assure communities that may have a brownfield site as well as provide some certainty to potential developers. Such guidelines should provide a more consistent process yet still accord MDE some discretion so that valuable resources are not wasted on mandatory public participation processes at sites where there is no public interest.

## **FINANCIAL INCENTIVES**

Financial incentives should be made available to sites that meet prioritized criteria. To achieve growth and urban redevelopment goals, highest priority must be given to unused,

contaminated industrial sites in urban areas that provide the greatest potential for redevelopment. Incentives focused on brownfields in existence as of a certain date will also focus scarce resources on the existing problem. Using financial incentives created now to help address pollution that will be caused in the future undermines attempts to get idle properties back into circulation by spreading the resources around and provides a safety net for companies now operating if they cause contamination.

Financial incentives can most easily be provided through existing funds and programs. Authority for current State financial assistance programs should be clarified to allow for the use of funds for brownfields development. Expansion or clarification of existing funds is also more politically viable than creation of new financial assistance programs.

The Abell Foundation recently suggested that Baltimore City create a bond issue to fund the creation of a prototype industrial park redevelopment of a brownfields site. Loan guarantees, tax breaks and tax deductions for clean up expenses by prospective purchasers who conduct cleanups are also being considered.

Financial incentives available to fund cleanup work must be carefully analyzed for public policy implications. For example, should a party who caused pollution qualify for tax breaks related to cleanup expenses? To do so amounts to a tax break for expenses related to pollution violations. But should a prospective purchaser willing to cleanup a site and get it back in commission qualify for those same tax breaks? In one sense, that developer is a "good guy" in that he or she is willing to assume the risks. That developer, of course, also stands to make a profit. In cases where a party enters into these transactions for potential economic gain, which would presumably be every transaction, a loan fund may be more palatable. Another potential solution is the creation of a quasi-public development corporation authorized to buy and sell contaminated property that have key urban development ramifications.

Any financial assistance mechanisms must provide the necessary incentives to overcome risks and avoid subsidizing facilities that do not upgrade pollution controls as a cost of doing business to be effective. On the other hand, there are many sites that are polluted although the operators of those sites were in compliance with all laws. We simply know more now than we did 20 years ago. The latter category of sites should be eligible for incentives and loans. The ultimate question with regard to financial incentives is whether they will be sufficient to overcome the obstacles to redevelopment.

## **CURRENT INITIATIVES**

### *Baltimore City*

Baltimore City has been designated by EPA as one of fifty brownfields demonstration sites throughout the country (Richmond and Cape Charles, Virginia are other demonstration sites within the Chesapeake Bay watershed.) Baltimore's designation earned it an award of over \$200,000 to develop a strategic plan encompassing financial, legal and technical issues to encourage redevelopment. The City appointed the Baltimore Industrial Redevelopment Council composed of volunteers from the academic, business,

community, development, economic development, environmental and urban interest sectors to carry out this work.

### *Maryland*

Maryland appointed a diverse Task Force representing the lending, real estate, environmental, local government and legal communities to recommend components of a voluntary cleanup program for both brownfields and other contaminated sites. The Task Force submitted a comprehensive report to the Secretaries of the Departments of Environment and Economic and Business Development in November 1995.

Also, several legislative proposals addressing the brownfields issue are anticipated to be introduced during the 1996 session of the Maryland General Assembly.

A number of other states have also been active in brownfields efforts. With the exception of Minnesota, however, most of these efforts are so recent, it is difficult to discern whether the programs have increased the development of brownfields.

Encouraging the redevelopment of brownfields will require efforts such as these combined with private sector, local government and other initiatives to promote the redevelopment of brownfields.

## **ALLIANCE POINT OF VIEW**

Our point of view is changes in the regulatory system can be made to encourage redevelopment and more voluntary clean ups but such changes should not be used as an excuse for relaxed environmental standards that have no realistic connection or expectation of enhanced economic development. These are complex issues which require thorough analysis. Such an analysis has been conducted by the diverse parties of the State Task Force which reached consensus on a number of these issues. The consensus recommendations of the Task Force are fully supported by the Alliance.

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### **OTHER MARYLAND RESOURCES:**

*The Abell Report*, Volume 8, Number 2. The Abell Foundation, (410) 547-1300.

*The Alliance for the Chesapeake Bay*, The Alliance tracks the brownfields issue as part of its public policy efforts and participates in the Baltimore Brownfields Industrial Redevelopment Council and the State Task Force on Voluntary Clean Ups. For more information, call (410) 377-6270.

*Baltimore Industrial Redevelopment Council*, For more information, call Evans Paull at (410) 396-4367.

*Maryland Voluntary Cleanup Task Force*, For more information, call Robert DeMarco at (410) 631-3000.

*Overview of Macro-Economic Barriers, Micro-Economic Barriers and Brownfields Redevelopment Incentives*, The Jacob France Center (410) 837-4727.

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**The Alliance for the Chesapeake Bay is a multi-state coalition of environmentalists, business representatives, government officials, scientists, farmers, sport enthusiasts and others who work to protect the Chesapeake Bay through education, hands-on restoration projects and public policy research and analysis.**

**The Alliance, a non-profit, non- advocacy organization, is headquartered in Baltimore and has offices in Harrisburg, PA and Richmond, VA. For more information about the Alliance, please call (410) 377-6270.**

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