CITIZENS HOUSING AND PLANNING COUNCIL

THE URBAN PROSPECT

Housing, Planning and Economic Development in New York

May / June 2002 Volume 8, Number 2

BROWNFIELDS BURNOUT

At one time a leader in environmental legislation, New York State now lags far behind the rest of the nation in brownfields remediation programs. As a result, thousands of acres of property sit idle while development drifts across state lines. In the five boroughs of New York City there are estimated to be as many as 5,000 brownfields sites, many of them located in waterfront neighborhoods. The absence of codified reuse programs has had a direct impact on the vitality of these neighborhoods, and on the entire city's ability to remain competitive with neighboring New Jersey and Connecticut -- both of which have codified reuse programs and incentives.

In January of this year, Governor Pataki and Mayor Bloomberg both cited brownfields revitalization as priorities of their administrations. Bloomberg's assertion resonates in statements made by the commissioners of the city's housing and planning agencies, and echoes the sentiments of business, environmental and community leaders who have lobbied for nearly a decade to bring attention to the issue.

Nevertheless, yet another session may come to a close without the New York State legislature reaching a consensus on brownfields. The main problem appears to be a lack of political momentum behind any one of the many brownfields legislative proposals that have been made. The city, while actively supporting brownfields reuse and legislation in concept, has yet to advocate directly for any specific legislative package or priorities.

Obstacles to Reuse

Brownfields, in a simplified version of a lengthy federal definition, are abandoned or underutilized properties where redevelopment is complicated by real or perceived environmental contamination. The contamination, if any, is not so severe as to pose immediate health or safety hazards to humans (in which case the site would be subject to Superfund enforcement), but will require some degree of investigation, cleanup, and/or capping in order for the land to be reused. Some residential and commercial properties may be brownfields, as well as properties suspected to have been contaminated by migration of hazardous substances from off-site. For the most part, however, brownfields are properties previously used for agricultural or industrial activities.

In the late 1990s, the US Government Accounting Office estimated that there were 450,000 brownfield sites within the United States. New York City's estimate of 5,000 sites is based on a tally of vacant industrially-zoned lots, a formula which surely includes sites idle for reasons other than contamination while overlooking residentially- and commercially-zoned sites that may be brownfields. A more accurate estimate would necessarily be based on a site-by-site survey of vacant property.

Brownfields redevelopment was initially problematic because the first generation of federal environmental regulations were intended to address disasters on the scale of the infamous Love Canal, and not sites with lower levels of contamination. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provisions, passed in 1980, stated that any party or institution with a financial interest or managerial involvement with a site could be forced to assume full responsibility for all investigation and cleanup costs, regardless of that party's responsibility for the contamination. Lenders had no explicit liability defenses, and relied upon a loosely defined "secured creditor" exemption in CERCLA that the courts supported as pertaining to lenders. CERCLA was originally designed to deter activities that could prove harmful to the environment, while punishing those who had already engaged in such activities and providing a mechanism to ensure that contamination is cleaned up. An unintended consequence of CERCLA regulations and liability standards was that they deterred brownfield redevelopment and remediation.

Liability in and of itself may not be a deal breaker, but developers and lenders' inability to anticipate the financial implications of liability had a chilling effect on brownfields transactions. The type or extent of investigation or remediation that would be required on a particular site could not be predicted, and delays in the remediation agreement negotiation process were common. The Environmental Protection Agency

(EPA) had control over selecting the cleanup process, and, even after remediation was completed, developers had little assurance that the agency would not reopen an agreement and require additional cleanup. In practice, it was rare for federal agencies to hold a lender liable for borrowers' activities or to reopen a cleanup agreement, but the additional layer of perceived risk further deterred investment in brownfields projects.

Sprawl and Urban Decline

The disincentives to brownfields reuse first began to draw widespread attention as the nation grew increasingly uneasy about suburban sprawl. Owners, lenders, and developers regularly mothballed urban sites because of the costs and risks involved with brownfields transactions, opting instead to develop pristine "greenfields." Generally located on the outskirts of suburban areas, greenfields could be developed cheaper and faster than brownfield sites -- but at the expense of open space, and by further encouraging auto-dependency.

The flipside to sprawl, meanwhile, was that within urban areas, commercial and residential development slowed and middle- to upper-income population declined. Urban areas could not compete with the suburbs. Developers were drawn by lower land and construction costs, and residents by the newer, more modern, residential and commercial properties.

Older, built-out cities are likely to have land shortages as well as clusters of brownfields sites, and feel the need for remediation programs particularly acutely. Brownfields reuse programs reduce the cost of brownfields projects so as to be more competitive with greenfields projects, while also releasing a quantity of land into tight urban land markets. This is especially relevant in New York City: vacancy rates are low, rents are high, and land is scarce. Housing construction within the five boroughs has slowed steadily since the post- World War II housing boom, the result being that the average New York City housing unit is more expensive than newer, higher-quality alternatives located at the metropolitan area's commuter fringe.

Zoning restrictions, obsolete or insufficient transportation infrastructure and unappealing neighborhood conditions all play a role in the underutilization of the city's land reserves, but cumbersome, redundant, and unpredictable environmental remediation processes also prevent or discourage seemingly valuable real estate from entering the market. Brownfields transactions do occur, but generally in prime Manhattan areas where the potential payoff outweighs the costs and risks involved with taking on a remediation project. In outer borough locations, sites are less likely to be developed.

The Legislative Response

To rectify the gaps in federal environmental law pertaining to brownfields, a series of amendments to CERCLA has been made that deals with both Superfund and brownfields issues. The first amendment was passed in 1986, and the most recent was signed by President Bush in January of this year. Being that the usefulness of the federal amendments depends upon the existence of corresponding definitions and programs at the state level, by the early 1990s individual states began to respond by enacting local legislation specifically dealing with brownfields. Currently, all 50 states have some type of brownfields reuse program, which may be voluntary for parties willing to undertake redevelopment of a site, or mandatory for parties responsible for contamination.

The most recent amendments, the 2001 Small Business Liability Relief and Brownfields Revitalization Act, demonstrate the extent to which environmental remediation priorities have evolved since CERCLA's inception in 1980. Whereas traditional environmental policy emphasized environmental restoration, regardless of cost, the newest generation of environmental laws explicitly prioritizes the economic and social benefits of returning land to active use. Most state programs have responded in kind by involving local planning and economic development agencies in reuse programs, in addition to state environmental authorities.

The building blocks of most state programs include funding streams and financial incentives, use-based numeric cleanup standards, explicit liability relief for an array of parties, and assurances that no further enforcement actions will be made against developers by state or federal authorities once a cleanup has been conducted. Some states provide bonuses for projects resulting in housing or job creation, or that utilize land in economically depressed areas.

As the nation moves forward with environmental remediation programs, New York State law continues to lack fundamental language and provisions. Title 13 of New York's

Environmental Conservation Law (ECL), which deals with remediation issues, predates CERCLA by one year and has never been amended to recognize brownfields. At the time Title 13 was drafted, lawmakers intended New York's provisions to supplement what they presumed would be a broader, stricter, federal law then in the making. In essence, both CERCLA and New York State environmental laws were drafted with the expectation that the other would take up the slack – the result being that both contained inadequacies that neither addressed. The federal law has been altered over the past two decades in order to adapt to changing environmental remediation needs and priorities, and other states have enacted programs to respond to the inadequacies of federal law. New York State continues to rely on outdated provisions ill-equipped to solve brownfields problems.

Specifically, the ECL makes no mention of the term "brownfields," does not define liable parties or a process for determining liability, provides no exemptions or defenses from liability, and, for the limited number of terms that are defined, uses language inconsistent with CERCLA. The "owner" of a site, or "any person responsible for the disposal of hazardous wastes" can be liable for contamination, but little guidance is provided to illustrate which parties can be considered owners or persons responsible. Another significant problem with ECL language is that it recognizes only the "hazardous wastes" class of contaminants as eligible for remediation programs. In contrast, CERCLA considers hazardous wastes as a subgroup of a larger category of contaminants classified as "hazardous substances." As a result, sites polluted with an array of common contaminants are excluded from participating in New York State programs.

In the absence of brownfields legislation, New York State's two Department of Environmental Conservation (DEC)-administered programs -- the Brownfields Program for municipally owned land, and the Voluntary Cleanup Program for privately owned property -- are the only available recourse for developers interested in reusing a brownfield site. Eligibility for each of the two programs is limited to sites that meet particular ownership or contamination criteria, and cleanup requirements are based on Superfund standards.

For eligible sites, there are no liability defenses for innocent owners, and CERCLA's "secured creditor" defense remains New York State lenders' main protection against liability. There are no numeric cleanup standards in place, and cleanups are negotiated between developers and the DEC on a case-by-case basis. Flexibility in negotiating a cleanup agreement can often work to a developer's advantage, but without specific numeric standards developers and lenders are unable to anticipate remediation costs, or delays due to the negotiation process, all of which complicates project planning.

A 1998 study conducted by the New York City Public Advocate's Office found that negotiations with the DEC lasted from three to as many as twenty three months for New York City projects, and it was not uncommon for negotiations to take more than a year.

Parties willing to assume full liability for a site must accept that they will not be able to predict the financial implications of liability, and that there will likely be considerable delays as investigation and remediation agreements are negotiated and approved with the DEC. Once remediation is completed, the developer is given little assurance that neither the DEC nor EPA will reopen a cleanup agreement to require further remediation actions.

The consequence for New York is that thousands of acres of brownfields sit idle, and private investors opt for competing sites across the Hudson. Meanwhile, New York City developers lament high land costs and the dearth of sites available for construction.

New York's Efforts

New York's failure to pass brownfields legislation is not the result of a lack of political awareness of the issue: the state's first legislative proposals were made in 1993, and there have been a series of bills circulating in Albany ever since. There is clearly an awareness among developers, environmentalists, community groups, and politicians that major program reforms are needed to stimulate brownfields redevelopment. Despite the consensus, no single legislative effort has gathered the political momentum needed to propel it through both houses of the state legislature. As the nation moves towards a second and third generation of brownfields policies, focusing on the more subtle social and economic aspects of remediation goals, New York State continues to debate the basic technical components of brownfields legislative packages.

Currently, approximately 13 different bills related to brownfields remediation, reuse, and financing are percolating in the state legislature. Of the recent proposals concerning brownfields, two legislative bills and a budget bill submitted by the Governor offered the most comprehensive program packages, with each differing somewhat in its treatment of the key brownfields program components. The legislative efforts include a bill sponsored by Assemblyman Richard Brodsky of Westchester known as "The Brodsky Bill," (A9265), and a bill cosponsored by Senator Carl Marcellino of Long Island and Assemblyman Vito Lopez of Brooklyn known as "The Coalition Bill" (A7498/ S7499).

The Coalition Bill is the result of a collaborative effort initiated in 1998 to break the brownfields deadlock. Using a grant from the EPA, the New York City Partnership convened The Pocantico Roundtable for Consensus on Brownfields. A multidisciplinary committee, the Pocantico Roundtable was committed to drafting a comprehensive leg-

islative proposal for New York State. When the effort concluded in 2000, former Pocantico members formed The Brownfields Coalition to provide support for the Pocantico proposals, which are embodied in Marcellino and Lopez's Coalition Bill. More than 100 diverse organizations joined the Brownfields Coalition.

All three bills stalled in 2001. The Governor's budget bill was denied by the legislature, and was not included in his 2002-2003 budget. The bill had folded brownfields program reform into a Superfund reauthorization proposal, and inspired opposition from several fronts. Most significant for New York City was that the bill explicitly excluded the metropolitan area from receiving real property tax abatements in exchange for brownfields reuse, while population limits effectively excluded the city from other financial incentives. The New York City exclusions surely contributed to the failure of the bill, as did conflicts over proposed increases in industry fees. The enacted 2001-2002 and 2002-2003 budgets did, however, include funding for the DEC brownfields programs as they currently exist, but none of the programmatic reforms or definitional changes necessary to encourage reuse were included.

The Brodsky and Coalition bills are now considered to be New York's last best hope for brownfields reform. The Brodsky Bill was passed by the Assembly but died in the Senate in 2001, and is currently in the Assembly's Ways and Means Committee. The Coalition bill is in the environmental committees of both the Senate and Assembly.

Both bills would amend New York ECL definitions to include terms currently absent from state law but central to federal law -- particularly with regard to the hazardous waste/ substance distinction. Both would expand voluntary cleanup program eligibility, and provide liability relief to lenders and fiduciaries. The Coalition Bill provides liability releases to the largest number of parties, while the Brodsky Bill more strictly regards any present owner as liable for remediation costs. Both establish deadlines for DEC review and approval of applications and workplans, in order to improve predictability in project planning.

Both bills would provide some type of incentives or preferences to projects located in distressed areas or undertaken by community based organizations, with the Brodsky Bill more actively targeting distressed and urban areas. The Coalition Bill does not address program financing, while the Brodsky Bill authorizes the use of state Clean Water Clean Air Bond Act funds. The Coalition bill explicitly allows three-tiered, use-based cleanup standards, while the Brodsky Bill states more ambiguously that pristine cleanups will be the "goal" when feasible. This implies that in practice, as is the case with current Superfund guidelines, use-based standards would also be allowed under Brodsky Bill provisions.

Conflicts about "use-based" and "pre-release" cleanup standards have traditionally been an obstacle in brownfields legislation, but are no longer the major hangup. With the exception of some influential groups such as The Sierra Club, environmental and community interests that once tended to advocate for pre-release standards no longer oppose use-based standards in all instances. This is reflective of the fact that use-based does not necessarily imply "weaker" or "relaxed," even in comparison to original Superfund standards. State Superfund standards require pristine cleanups only in a limited number of circumstances -- such as when contamination is the result of illegal dumping. In the event that contamination was not due to illegal activities, pristine cleanup standards are the "goal" and not mandated, and cleanups are determined on a case-by-case basis. Use-based numeric standards may be as stringent as Superfund standards when applied to brownfields.

What's Best for NYC?

The New York City Environmental Justice Alliance, New York Lawyers for the Public Interest, the Environmental Defense Fund, a multitude of local neighborhood development corporations, and a variety of private interests signed on to the Brownfields Coalition in 2000. The Environmental Committee of the Bar Association of the State of New York, the New York State Builders Association, the New York State Environmental Business Association, Natural Resources Defense Council, and New York League of Conservation Voters, among others, have waged campaigns endorsing broad policy objectives, in some instances, or specific legislative language in others. The New York City Partnership, which led Pocantico and Brownfields Coalition efforts, currently endorses both the Brodsky Bill and the Coalition Bill.

The basic idea expressed by New York City development and environmental interests seems to be that at this point, any legislation that addresses brownfields directly in state law would be an improvement. Either the Brodsky or Coalition bill, which include the most basic components necessary to stimulate brownfields redevelopment, would represent an important and useful step.

Many observers contend that what has been lacking to date is a coherent response to the brownfields issue on the part of the city. That the Bloomberg administration has recognized brownfields as vital to the city's economic growth is a significant improvement over the inaction of the previous administration. There is apparently an interagency effort underway to focus the city's brownfields legislative strategy, but it is unclear how much political pressure the administration will apply. The message to Albany should stress that brownfield redevelopment, clearly important to New York City's economy, can bolster economic growth statewide.

-- *Martha Galvez*

Publication of the Urban Prospect is made possible in part through a grant from the Community Preservation Corporation