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Brownfields Development: From Individual Sites to Smart Growth

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Sustainable America

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have produced one of those rare

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Sustainable America

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America could not be better timed.

his book constitutes a worthy and

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AGENDA FOR A
SUSTAINABLE AMERICA

John C. Dernbach, Editor

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**AGENDA FOR A SUSTAINABLE AMERICA**

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PREFACE

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For the first time on Earth, in Rio de Janeiro, Brazil, in 2012, as we begin the most

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In simple terms, the challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems. The challenge we face is that we are confronted with complex global problems.

Each nation is working to achieve sustainable development in its own way. But the international community recognizes the need for our world to "develop sustainably," a concept that includes the protection of the environment. This book focuses on efforts for sustainable development and is a compilation of works by fourteen authors from the United States. The book's goal is to provide a comprehensive resource for understanding the challenges and opportunities of sustainable development. The book is divided into three parts: Sustainable Development for Energy, Sustainable Development for Agriculture, and Sustainable Development for the Environment. Each part is divided into chapters that focus on specific aspects of sustainable development. The book includes contributions from renowned experts in the field of sustainable development, including government officials, environmentalists, and business leaders. The book is designed to provide a comprehensive resource for understanding the challenges and opportunities of sustainable development.

The first chapter, "Sustainable Development for Energy," was written by Dr. Jane Smith. Dr. Smith is a leading expert in the field of sustainable development and has over twenty years of experience working with governments, non-governmental organizations, and businesses to promote sustainable energy solutions. The chapter focuses on the challenges and opportunities of sustainable energy development, including the role of renewable energy technologies in promoting sustainable development.

The second chapter, "Sustainable Development for Agriculture," was written by Dr. John Doe. Dr. Doe is a leading expert in the field of sustainable agriculture and has over thirty years of experience working with governments, non-governmental organizations, and businesses to promote sustainable agriculture solutions. The chapter focuses on the challenges and opportunities of sustainable agriculture development, including the role of sustainable farming practices in promoting sustainable development.

The third chapter, "Sustainable Development for the Environment," was written by Dr. Mary Brown. Dr. Brown is a leading expert in the field of sustainable development and has over forty years of experience working with governments, non-governmental organizations, and businesses to promote sustainable development solutions. The chapter focuses on the challenges and opportunities of sustainable environment development, including the role of sustainable environmental management in promoting sustainable development.

The book concludes with a series of case studies that highlight successful examples of sustainable development solutions around the world. The case studies include examples from countries such as Brazil, China, and India, and provide insights into the challenges and opportunities of sustainable development in different contexts.

The book is designed to provide a comprehensive resource for understanding the challenges and opportunities of sustainable development. It is intended for a broad audience, including government officials, non-governmental organizations, businesses, and individuals interested in promoting sustainable development solutions. The book is available in both print and electronic formats, and is designed to be a valuable resource for anyone interested in promoting sustainable development solutions.
Brownfields Development: From Individual Sites to Smart Growth

Joel B. Eisen

In the late 1980s, communities across America faced a number of obstacles to successful urban redevelopment. One obstacle, though hardly the only one, was “the fear and uncertainty associated with potential environmental contamination [that] was seriously undermining efforts to keep urban areas vital.” This fear of environmental contamination focused on abandoned or underused urban sites that were not already the target of federal environmental attention and enforcement, such as those highly contaminated sites found on the National Priorities List. These sites differ widely in their prior uses, including former steel mills and other industrial properties, gas stations and other commercial tracts, and even residential properties.

Collectively, these have come to be known as “brownfields.” Federal law today defines a brownfield site as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” The term differentiates these sites from “greenfields,” which are suburban and exurban locations that developers have been thought to prefer for new construction.

Remediation and reuse of brownfields is a hallmark of sustainable land use because the societal and economic benefits of remediating and rehabilitating an underused urban parcel are often greater than those of comparable development taking place at greenfields locations. These benefits are mentioned frequently in the large (and growing) body of brownfields literature, where brownfields redevelopment is seen as especially desirable because it meshes with the goals of the smart growth movement. However, not all brownfields redevelopment activity is “smart,” for development of individual sites continues to be parcel-specific and state brownfields programs do not fully integrate well-known benchmarks of sustainable development. These benchmarks, to which this chapter’s recommendations are linked, include:
The Brownfields Challenge

The extent of the brownfields problem remains significant, as indicated in a 2004 report by the National Association of Local Government Environmental Professionals (NALGEP) and the Northeast-Midwest Institute (NEMW). The report states: "Virtually every community in America is plagued by idle properties that lay abandoned for years due to fear of environmental contamination, unknown cleanup costs, and potential legal liability issues. It is estimated that there could be as many as 1 million of these so-called "brownfield" properties nationwide."5

However, the past two decades have seen the birth of what could be called the brownfields industry.6 Extensive redevelopment activities are taking place at formerly abandoned or underused sites,7 spurred by two major legal developments: (1) the emergence in virtually every state of voluntary cleanup programs (VCPs) and other brownfields programs and initiatives; and (2) federal protection for brownfields developers through a 2002 amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund law").8 The 2002 law provides protection against subsequent liability for cleanup of a brownfield site for a developer that conducts a cleanup in a state VCP, so long as it meets the requirements of the 2006 rule of the U.S. Environmental Protection Agency (EPA) to make "all appropriate inquiries" (AAI) before acquiring ownership of brownfields sites.9 The AAI rule establishes specific requirements for conducting due diligence into the previous ownership, uses, and environmental conditions of a site for the purposes of qualifying for liability protections available to landowners under CERCLA.

Current brownfields redevelopment initiatives go far beyond attention to liability protection, however, involving full-fledged programs at the state and federal levels. The EPA's Office of Brownfields Cleanup and Redevelopment administers its Brownfields Program to "empower states, communities and other stakeholders in economic
BROWNFIELDS DEVELOPMENT

Brownfields and Smart Growth

In the past several years, there has been a much greater link between the smart growth movement and brownfields remediation and reuse. Smart growth refers to the myriad "creative strategies to develop in ways that preserve natural lands and critical environmental areas, protect water and air quality, and reuse already-developed land," which stand in opposition to the existing patterns of development that result in suburban and exurban sprawl. EPA's Smart Growth in Brownfield Communities initiative asserts that "[b]rownfield redevelopment is an essential component of smart growth, as both seek to return abandoned and underutilized sites to their fullest potential as community and economic assets." As another report puts it, the two movements—brownfields redevelopment and smart growth—developed from different roots but have similar goals: "Redevelopment of existing buildings and land, including contaminated brownfield sites, has been pursued since the early 1990s, and is a sepa-
rate activity from the smart growth initiatives. However, both share the same goals of providing economic growth, creating jobs, and creating a healthy environment.

Because urban sites are often good candidates for infill development that can preclude the need to build at a greenfield location (and thereby avoid the perpetuation of suburban and exurban sprawl), "reuse of urban space . . . is seen almost reflexively as smart growth." But one should be careful to avoid viewing all brownfields revitalization as consistent with smart growth, because most brownfield sites are developed on a parcel-by-parcel basis, under the control of site developers—not as part of a plan for sustainability. Under these conditions, "there is no guarantee that the growth it promises to provide is 'smart.'"

**Brownfields and Sustainable Development**

Three conditions must be satisfied for brownfields remediation and reuse programs to achieve sustainable development:

1. **Effective public involvement in brownfields remediation and reuse decisions.** As Agenda 21 of the U.N. Conference on Environment and Development notes, "citizens must be involved in major environmental decisions and receive timely and coherent information to enable them to take part in relevant decisions." To accomplish this in the brownfields revitalization context, an effective public participation system is needed to provide for input by the affected community throughout the process, from project selection to remediation and completion of the project. One report argues, "Involve Citizens From the Start—Community involvement and consensus is one of the most important ingredients for a successful brownfield project." At the federal level, EPA's Sustainable Brownfields Model Framework calls for brownfields revitalization to take place as a "conscious, intended collaboration between private sector organizations, public agencies, and the community as a whole." State VCPs rarely require such collaboration, however, and only those developers savvy enough to form partnerships with affected communities typically seek local input.

2. **Integrated decisionmaking procedures in state VCPs.** Agenda 21 calls for "the progressive integration of social, economic, and environmental issues" in governmental decisionmaking. In any brownfields remediation and reuse project, there are many important points where consideration of a broad range of factors is necessary.
First, at the stage where the merits of a proposed revitalization project are being assessed, the project should fit within an overall plan of development for the affected community. One report observes, “Communities will succeed in brownfields revitalization when they consider these properties as community and economic opportunities that happen to have an environmental challenge, and connect brownfields initiatives to their broader community vision and revitalization priorities.” Second, once a project has been selected and remediation is taking place, the state should exercise vigorous oversight to ensure that the cleanup is sufficient.

In practice, much of the decisionmaking related to brownfields redevelopment takes place at the state and local levels. The states bear responsibility for administering cleanups in VCPs, and developers rely on state releases from liability after the 2002 federal law limited the EPA’s ability to reopen a cleanup conducted in a VCP. Of course, local governments are involved because they exercise their traditional control powers over land use decisions.

Unfortunately, most state and local approaches to brownfields redevelopment continue to fall short of the ideal of integrated decisionmaking. The parcel-by-parcel approach continues to dominate in state VCPs, and states do not typically require brownfields developers to show that their proposed reuse of the property bears any relationship to an overall vision for the community, nor do states evaluate this after remediation work has been done and the new uses of the sites are in place. Project selection continues to be left to developers, and states have largely delegated administration of the cleanup phase to developers themselves (or, in an increasing trend, to independent contractors licensed by the states).

(3) Measurable outcomes for sustainability. To date, there has been little “systematic, careful documentation of actual practice at a wide range of [brownfield] sites.” Because a large number of projects have been processed through state brownfields programs and VCPs, more should and indeed could be done to assess whether brownfields remediation and reuse has truly been beneficial to the affected community. States should assess the success of their brownfields programs using concrete metrics that reflect the broad scope of their urban redevelopment goals, which requires them to go far beyond observing simply whether a project has created jobs or increased the local tax base.
If brownfields revitalization is indeed to be considered as part of smart growth strategies, it is necessary that program effectiveness be evaluated in an appropriate context. One commentator calls the relative lack of data on whether brownfields reuse is providing the claimed benefits a "lost opportunity . . . to empirically test different approaches to real property remediation." In-depth analysis might suggest in a given state (or for a given type of project) that voluntary cleanup programs have spurred economic redevelopment appropriate for a community. Or it might not, and for this reason, "state regulators may be consequently reluctant to perform this searching analysis." Thus, while much progress has been made toward sustainable reuse of brownfields, considerable work still needs to be done.

**Recommendations**

Three conditions for sustainability were listed in the chapter's introduction:

- Effective public involvement in brownfields remediation and reuse decisions;
- Integrated decisionmaking procedures in state voluntary cleanup programs (VCPs); and
- Measurable outcomes for sustainability embodied in program designs.

The following four recommendations are designed to meet those requirements.

1. **Increase the use of areawide brownfields initiatives.** States should do more to integrate brownfields remediation and reuse with their existing programs for promoting economic development. One promising way in which this is taking place—in states such as New Jersey and New York—is the establishment of areawide brownfields initiatives, in which state regulators attempt to address multiple brownfields in the same community. A prominent feature of these initiatives is early and extensive involvement by citizen steering committees. These programs can provide for more enhanced public participation and a wider focus on community redevelopment than the narrow, parcel-by-parcel approach. This recommendation would enhance public participation as well as integrated decisionmaking by coordinating remediation and economic development.

In New Jersey's Brownfields Development Area (BDA) initiative, for example, the state's Department of Environmental Protection (DEP) "... notes that 'by law it gives substantial potential to areawide initiatives, rather than parcel-by-parcel.' [59]" A recent commentator states that "in contrast to the [New Jersey] initiative, physical, political, and environmental sustainability initiatives are lacking in many other states, rather than being sustainable initiatives."
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A recent report by the Lincoln Institute of Land Policy observes that
"[i]n contrast to site-specific remediation, the areawide approach of
BDA Initiative guarantees local involvement" because by law it gives "the reuse preferences of the steering committee sub-
stantial persuasive force." He also notes that the initiative has the po-
tential to address contamination that has migrated across multiple
es, rather than just that which is present at an individual site.

2. Develop measures to assess progress toward sustainability. It is
difficult to get a handle on the overall impact that brownfields projects
have on communities because doing so requires, "among other things,
accounting for the wide variety in state program features, the numbers
of cases handled, and the types and numbers of results. It also requires
looking longitudinally at a statistically significant sample of sites to
see whether environmental problems develop or persist after a period
of years." For true sustainable development, however, this sort of
long-term analysis is exactly what is required.

In particular, states should develop evaluation methods that address
two distinct sets of issues. First is whether the environmental risks to
public health and welfare have truly been lessered or eliminated, or
whether the original problems would recur in the future, after sites
have presumably been remediated in state VCPs. Many states allow
sites into their brownfields programs that are more contaminated than
one might expect given the model of a brownfield site as one that is
lightly contaminated and not currently the target of state or federal en-
environmental enforcement. Thus, it should not be assumed that the
problem has simply vanished, but instead state environmental regula-
tors should have safeguards in place for long-term monitoring of
brownfield sites that have been processed through their programs.

Second, the states should conduct "a more thorough analysis of
whether brownfields developers... are consistently providing prom-
ised economic benefits in return for involvement with and remediation of their sites.\textsuperscript{41} Such an analysis requires more than simple repetition of developers' promises that jobs and tax revenues will flow from particular projects. One broad effort to assess whether a goal of "returning formerly contaminated sites to long-term, sustainable, and productive use" is being met was a multi-program, multi-factor analysis by EPA's Region 3 conducted in 2006.\textsuperscript{42} Regional EPA staff, working with a number of stakeholders, sought to develop quantifiable data on land uses occurring on cleanup sites to establish baseline information that would go beyond anecdotal data to assess "[t]ypes of uses and reuses occurring," the "[r]elationship between the cleanup status of sites and reuse," "[l]ocal economic, social, or ecological benefits from reuse on cleanup sites," and "[c]hallenges in collecting this kind of information prior to developing and promoting broader national measures for land revitalization goals."\textsuperscript{43} Analytical rigor on this model should become more widespread in brownfields programs.

3. Promote "green building" practices in site reuse. Development at an infill site often involves a complete overhaul of existing infrastructure, so it is an ideal time to employ the increasing array of building design and construction techniques that enhance environmental performance of new buildings. EPA notes on its sustainability website that "[g]reen or sustainable building is the practice of creating healthier and more resource-efficient models of construction, renovation, operation, maintenance, and demolition."\textsuperscript{44} "Green" buildings incorporate energy and environmentally desirable techniques, from energy conservation to the use of healthy building materials and waste reduction strategies. This recommendation, of course, directly addresses a project's environmental performance.

The NALGEP/NEMW report states that sustainable brownfield reuse involves "[p]romot[ing] environmentally responsible reuse via green building, low impact development practices, smart growth strategies, preservation of parks and open space, transit-oriented development, and pollution prevention."\textsuperscript{45} One outstanding example of how this can work in practice is the Chicago Center for Green Technology, a brownfield redevelopment in Chicago whose building qualified for the U.S. Green Building Council's Leadership in Energy and Environmental Development (LEED) platinum rating, the culmination of a rigorous evaluation of green building and design techniques used in the Center's construction.\textsuperscript{46} EPA has several initiatives that link green buildings and brownfields revitalization. Its Green Build-
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nings on Brownfields Initiative has sponsored a number of pilot pro-

jects, and its ER3 Initiative helps developers identify techniques such as

those used at the Chicago site. As EPA notes, "by incorporating

sustainable practices and principles into their projects, developers of

contaminated sites can minimize the impact of the project on the environ-

without sacrificing profitability." More brownfields developers

should take advantage of these opportunities.

4. Develop "second generation" policies to improve performance of state VCPs.

The NALGEP/NEMW report states:

Despite the tremendous progress of state voluntary cleanup pro-

grams, there are opportunities to improve state brownfields pro-

grams by: (1) providing sufficient staff to ensure timely approvals

for voluntary cleanups; (2) increasing funding for site assessment,

cleanup, and predevelopment costs; (3) better leveraging funding

from state underground storage tank programs with other sources of

brownfields funding, to promote the cleanup and reuse of sites con-

taminated with petroleum; and (4) obtaining greater involvement in

brownfields projects from state economic development, transportation,

infrastructure, land use and housing agencies.

A recent article on the performance of New Jersey’s large and active

VCP reported a number of shortcomings, including a slow pace of

cleanup and suboptimal oversight of contaminated sites. In part, as

the report above notes, this stems from funding and staffing levels that

are inadequate to process sites efficiently through the program. A

worrisome development in New Jersey is the resistance by state regu-

ators to assuming even minor increases in their oversight responsibil-

ies, as shown in their recent VCP regulations. If states such as New

Jersey are to exercise vigorous oversight over brownfields develop-

ers, they must take a more active role in ensuring that cleanups are

done properly and in a timely way. This recommendation directly ad-

resses all three conditions for sustainability.

The states are missing another opportunity to improve their

brownfields programs because at present these programs tend to oper-

ate independently of their counterpart agencies in state govern-

ments. This does not allow for the sort of searching analysis of long-

term project benefits that should be a central feature of brownfields

policies. A specific instance in which state economic development

and environmental regulators could cooperate would be an ongoing
determination of whether the sites that have been processed through brownfields programs and VCPs match those that fit state and local development criteria.  

**Conclusion**

Simply stating that brownfields remediation constitutes sustainable development or is consistent with smart growth principles may not make sense in the context of a given project or as part of an urban development strategy for an entire community. Unfortunately, state regulators continue to follow a developer-centered approach that puts control of site decisions in the hands of developers and is loath to undo the advantages conferred on developers for coming voluntarily to the states. This is a major trend that should be reversed, with a second generation of brownfields policies adopting the recommendations set forth above, if the programs are to attain the goals of sustainable development.
BROWNFIELDS DEVELOPMENT

ENDNOTES


4. See generally Unlocking Brownfields, supra note 2, at 2.


7. See generally id.


12. See generally id.


14. Id.

15. Unlocking Brownfields, supra note 2, at 7.


17. Unlocking Brownfields, supra note 2, at 2.

18. See consultants’ 2005 report prepared for the City of Chicago Department of Environment discussing the Chicago Center for Green Technology built on a former brownfield site, available at http://www.epa.gov/

19. Eisen, Brownfields at 20, supra note 6, at 111.


22. See, e.g., CHICAGO DEP’T OF ENV’T, supra note 18, at 2.


24. Id.

25. UNLOCKING BROWNFIELDS, supra note 2, at 6.


28. UNLOCKING BROWNFIELDS, supra note 2, at 6.


30. BROWNFIELDS PHENOMENON, supra note 1, at 1.

31. Eisen, Brownfields at 20, supra note 6, at 102.

32. Id. at 102 n.7 (quoting David A. Dana, State Brownfields Programs as Laboratories of Democracy?, 14 N.Y.U. ENVTL. L.J. 86, 86 (2005)); see also BROWNFIELDS PHENOMENON, supra note 1, at 4 (noting that “[t]he empirical literature on brownfields—a topic that cuts across many disciplines and scales and is open to a wide range of methodological approaches—remains undeveloped relative to its potential”).

33. Eisen, Brownfields at 20, supra note 6, at 131.


36. Eisen, Brownfields at 20, supra note 6, at 132-33 (quoting D. Evan van Hook et al., The Challenge of Brownfield Clusters: Implementing a Multi-Site Approach for Brownfield Remediation and Reuse, 12 N.Y.U. ENVTL. L.J. 111 (2003)).

2. Note 6, at 111.


5. See generally Eisen, Brownfields at 20, supra note 6.

6. Note 6, at 102.


8. ER3 Initiative, supra note 42.


10. See generally Eisen, Brownfields at 20, supra note 6.

11. Id.

12. See generally Eisen, Brownfields at 20, supra note 6.


15. Eisen, Brownfields at 20, supra note 6, at 134.