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## Public Participation in Brownfield Redevelopment: A Framework for Community Empowerment in Zoning Practices

Jenny J. Tang

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# Public Participation in Brownfield Redevelopment: A Framework for Community Empowerment in Zoning Practices

Jenny J. Tang<sup>†</sup>

*This article discusses the importance of brownfield redevelopment in the context of the environmental justice movement. It emphasizes that the goals of environmental justice advocates and attorneys should include promoting the interests of the community in order to achieve environmental and procedural equity. This article argues that the only way to adequately promote these goals is to allow for maximum public participation, which would include community empowerment practices and an eye towards the problems inherent in public participation. Because brownfield remediation provisions and programs rarely provide for adequate public participation, zoning practices can be employed as a vehicle for community participation. Traditional land use law addresses environmental justice issues, and it also provides the community with other avenues for involvement in brownfield redevelopment. This article offers a moderate framework for fostering adequate public participation that can be applied to zoning practices by environmental justice advocates.*

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<sup>†</sup> J.D., 2012, University of Tennessee College of Law. Special thanks to Professors Dean Rivkin and Gregory Stein for their guidance.

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## I. INTRODUCTION

The present critical economic moment has instigated change in how municipal agencies are planning future urban schema. Many critics have asserted that urban revitalization will buttress employment and improve standards of living for urban communities and cities at large.<sup>1</sup> Thus, urban revitalization through renovation, development, and cleanup has become a priority for many cities that experienced economic downturn. Many of these projects include redevelopment of abandoned commercial and industrial properties called brownfields, defined by the EPA as “property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”<sup>2</sup> This article will focus on land use

1. See e.g., Bruce Katz, *City Centered: To Double Exports and Create Jobs, the U.S. has to Invest More in its Metro Areas*, TIME, Nov. 1, 2010, at 62.

2. Oni N. Harton, *Indiana’s Brownfields Initiatives: A Vehicle for Pursuing Environmental Justice or Just Blowing Smoke?*, 41 IND. L. REV. 215, 217 (2008). See *Brownfields and Land*

methods for remedying the environmental inequities likely to result from brownfield redevelopment while utilizing public participation.

The view of urban revitalization has replaced the outdated idea of urban renewal in light of the environmental justice movement.<sup>3</sup> The Environmental Protection Agency (EPA) defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>4</sup> Renewal focuses simply on redevelopment of urban areas and does not take into account the potential negative effects on surrounding communities. Advocates for environmental justice prefer the urban revitalization model because it factors in potential environmental inequities affecting the minority and lower class citizens inhabiting the area that urban redevelopers can overlook. These urban revitalization projects “typically involve a mix of renovation, selective demolition, commercial development, and tax incentives in hopes of revitalizing urban neighborhoods *without displacing existing citizenry*.”<sup>5</sup>

Urban planning and redevelopment have long been cited as a key to stimulating employment, implementing smart growth, and restoring metropolitan aesthetics.<sup>6</sup> Historically, however, discrimination, classism, and general conflicts of interest by city officials have resulted in ignoring or overlooking the interests of minority and low-income communities within urban centers. Thus, rather than promote the concept of urban renewal,<sup>7</sup> environmental justice advocates promote *urban revitalization* projects, specifically those that include contaminated properties such as brownfields.

In response to urban sprawl and related environmental concerns such as pollution, loss of open space, and traffic, cities are appropriately pushing for the repopulation of cities, in which the majority of United States brownfields are located.<sup>8</sup> As many environmental justice

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*Revitalization*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/brownfields> (last visited Apr. 15, 2013), for more information on local brownfields.

3. See e.g., LeRoy C. Paddock, *Green Governance: Building Competencies Necessary for Effective Environmental Management*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10, 609 (2008), for discussion of the negative consequences of “urban renewal” plans.

4. See Jennifer Felten, *Brownfield Redevelopment 1995-2005: An Environmental Justice Success Story?*, 40 REAL PROP. PROB. & TR. J. 679, 681 (2006).

5. James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857, 859-60 (2006) (emphasis added).

6. E.g., Paddock, *supra* note 3.

7. See e.g., Michele Alexandre, “*Love Don’t Live here Anymore*”: *Economic Incentives for a More Equitable Model of Urban Development*, 35 B.C. ENVTL. AFF. L. REV. 1, 2-3 (2008), for further discussion of the negative consequences of “urban renewal.”

8. Kushner, *supra* note 5; Paddock, *supra* note 3, at 609.

advocates and urban planning scholars have iterated, redevelopment of brownfields can support the process of urban revitalization, thus serving to reverse the negative effects of urban sprawl.”<sup>9</sup> In addition to the economic benefits they provide, carefully engineered brownfield redevelopment plans can also address the goals and concerns of the environmental justice movement.

Unfortunately, “most state brownfields programs use traditional public-private partnerships that do not require community involvement as a substantive component of the redevelopment process,” which can allow developers to ignore community needs, leading to side effects such as gentrification or lack of affordable housing.<sup>10</sup> Public participation is essential for discovering when potential environmental justice issues result. When a community is not inclined toward self-interested social activism and therefore fails to participate in the implementation of a brownfield redevelopment program, environmental and social inequities can arise without remedy.

This article addresses the significance of brownfield redevelopment within the context of the environmental justice movement. The article first outlines the motives and goals for brownfield redevelopment and the environmental justice issues associated with those plans. The article then argues public participation can ameliorate environmental inequity and that the best vehicle for public participation is greater community involvement in local zoning procedures. Further, the article gives a brief nationwide overview of the modes of public participation currently provided by the states, such as public record, notice, and hearing requirements. The article then posits specific methods to address environmental justice goals and how municipalities can promote urban revitalization by way of brownfield redevelopment without incurring environmental injustices. After comparing prior approaches to fostering public participation, this article ultimately argues for a new “moderate” framework for public participation that applies the progressive environmental justice model for public participation specifically to the execution of legal tactics.

Finally, this article posits that public participation in land use planning and zoning is an effective avenue to address environmental justice concerns arising from brownfield redevelopment. In almost every state, decisions regarding land use planning and the adoption of land use laws to implement these plans are entirely a function of the local

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9. See e.g., Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 GA. J. INT'L & COMP. L. 589, 602 (2009).

10. *Id.* at 603.

government.<sup>11</sup> These municipalities have been afforded great deference in making land use decisions per the standard in the seminal 1926 case, *Euclid v. Ambler Realty Co.*,<sup>12</sup> which held that zoning should be carried out to promote the public health, safety, and general welfare.<sup>13</sup> Local governmental entities “are presumably equipped to determine not only whether a property owner’s use of land is appropriate in reference to neighboring uses, but [also] whether such a use accords with regional needs and concerns, given a zoning entity’s familiarity with master plans and other comprehensive planning techniques.”<sup>14</sup> As a result, local municipalities that collaborate with public participants are “best equipped to assess the impact of the development of a brownfield itself within its borders,”<sup>15</sup> including any negative effects on the surrounding community.

## II. THE NEXUS BETWEEN ENVIRONMENTAL JUSTICE AND BROWNFIELD REDEVELOPMENT

Because studies have reflected disparate proportions of minority, low-income communities near brownfields,<sup>16</sup> environmental justice advocates and like-minded attorneys argue that developers should prioritize these particular properties in the effort to generally boost economic stability and revitalize urban areas. For example, Professor Tony Arnold’s findings show that the areas in need of redevelopment are generally inhabited by low-income, minority communities.<sup>17</sup> Professor Arnold focused on land use regulatory patterns nationwide to determine that “[l]ow-income, minority communities have a greater share of...industrial and commercial zoning, than do high-income white communities”<sup>18</sup> where “commercial” zones include permitted manufacturing uses.<sup>19</sup> Many of the commercial and industrial properties in these zones have fallen into disuse and may even pose an

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11. See Suellen T. Keiner, *The Next Frontier: Land-Use Planning and Environmental Justice*, in CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING 101-2 (Patricia E. Salkin ed., 2005).

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

13. Patrick J. Skelley II, *Public Participation in Brownfield Remediation Systems: Putting the Community Back On The (Zoning) Map*, 8 FORDHAM ENVTL. L.J. 389, 411 (1997).

14. *Id.*

15. *Id.* at 413.

16. For further discussion of disparate impact of contaminated properties on minority, low-income communities, see ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 289-93 (Rechtschaffen, et al. eds., 2d ed. 2009).

17. Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 77 (1998).

18. *Id.*

19. *Id.* at 80.

environmental risk even when inoperative. When redeveloped, these properties can serve the same ends as a plan to boost the economy by way of urban economic development. Redeveloping decrepit, contaminating, unaesthetic sites in inner-city neighborhoods would directly and indirectly support education, employment, and the general quality of life in the area.

In response to these findings, in 1995 the EPA developed its brownfield program. Subsequently, “it has been working with states, communities, and developers to clean up contaminated properties, and in the process, facilitate economic growth.”<sup>20</sup> This is fortunate because failing to clean up brownfields can have a multitude of negative economic, social, health, and environmental impacts including: inner-city residents cannot benefit from jobs that redevelopment may provide; cities receive less property tax revenues, which limits funding for basic services such as education; brownfields are unaesthetic and can contaminate the properties and water supplies surrounding it; vacant sites may tempt further environmental abuse such as “midnight dumping”; urban investment may be discouraged by these properties, thus contributing to “a pervasive sense of poverty and hopelessness.”<sup>21</sup>

An abandoned brownfield site can have a broad negative impact on the community. It can be appealing for criminals or squatters who may be conducting illegal activities. Conversely, these abandoned sites can attract children, who have few play areas available to them, especially in rougher neighborhoods.<sup>22</sup> Additionally, the areas surrounding an underutilized site receive lesser funds for services such as road utilities and other public services. The brownfield site also reduces property values,<sup>23</sup> further lending to the community’s overall nature of disrepair—a site familiar in cities across the country.

Unfortunately, brownfield remediation programs— specifically state voluntary remediation programs— generally require less stringent standards for cleanup than other EPA programs.<sup>24</sup> Therefore, there should be great concern that significant amounts of contamination may be left behind after cleanup, which would be of particular concern if developers convert these sites into parks or schools.<sup>25</sup> On the other hand,

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20. Felten, *supra* note 4, at 681.

21. Joel B. Eisen, *Brownfields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16, at 295-298, 295.

22. See Felten, *supra* note 4, at 682-83.

23. *Id.*

24. Alma L. Lowry, *Environmental Justice Implication of Brownfields*, 4 TOL. J. GREAT LAKES’ L. SCI. & POL’Y 363, 371 (2002).

25. See Felten, *supra* note 4, at 682-83.

using the sites for industrial purposes may produce new contaminants<sup>26</sup> and exacerbate any remaining contamination. One critic grimly stated that “environmental justice advocates will inevitably take a dim view of reinstating industrial and commercial activities in predominately low-income and minority neighborhoods, especially where the cleanup will not reach” more stringent standards.<sup>27</sup> Still, if the community is willing to take on faith that developers will adequately clean up the site, whatever the proposed use, the issue of a highly contaminated site leaking remaining toxins is mitigated because brownfield redevelopment generally occurs in areas where less cleanup is necessary.<sup>28</sup>

### *A. Participating in State Brownfields Programs*

Full public participation in the brownfield remediation process is necessary to implement a redevelopment plan that addresses the surrounding community’s environmental justice concerns. About thirty-five states have enacted general voluntary cleanup programs, and another ten have programs focused on brownfields.<sup>29</sup> Unfortunately, these states generally require minimal public participation in these programs,<sup>30</sup> therefore, environmental justice concerns are often overlooked. One potential explanation for this limitation of public participation may be that “[b]y limiting public participation in a redevelopment project, states may be attempting to avoid possible delays in or deterrents to remediation of particular site.”<sup>31</sup> Nevertheless, there still exists some opportunity for public participation.

State programs vary in terms of degree of public participation,<sup>32</sup> however, public record and public notice requirements are the most common. Though these are informative for the community, “they [unfortunately] do not put in place any system for community planning or empowerment.”<sup>33</sup> As will be discussed in Part III, community

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26. See Lowry, *supra* note 24, at 372.

27. See Skelley, *supra* note 13, at 398.

28. See Felten, *supra* note 4, at 682-83. For a discussion of those properties classified with highly contaminated Superfund watch list sites, see ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16 at 286.

29. JENNIFER L. MACHLIN & TOMME R. YOUNG, MANAGING ENVIRONMENTAL RISK: REAL ESTATE AND BUSINESS TRANSACTIONS § 9:56 (2012), available at Westlaw Managing Envtl. Risk § 9:56.

30. David B. Hawley, *The Brownfields Property Reuse Act of 1997: North Carolina Creates an Additional Incentive to Reclaim Contaminated Properties*, 76 N.C. L. REV. 1015, 1043 (1998).

31. *Id.* at 1043-44.

32. For a general discussion of the key elements that define a typical state voluntary cleanup program, see Harton, *supra* note 2, at 232.

33. See Felten, *supra* note 4.



empowerment is critical to successful public participation and social action.

### 1. Public Record, Notice, and Hearing Requirements

Every state, except North Dakota and Maine, has public record or notice requirements within its voluntary cleanup programs.<sup>34</sup> These requirements may include “publication in the state registrar or in newspapers and the posting of signs on the property.”<sup>35</sup> Thirty-nine states require more public participation in the form of public comment periods.<sup>36</sup> These public comment periods allow citizens the opportunity to voice concerns or suggestions regarding proposed development plans.<sup>37</sup> “However, public comment under many of these programs only occurs after developers, municipalities, and bureaucrats have made the redevelopment plans, a point at which major change is unlikely because of the time and resources already invested in the project.”<sup>38</sup> Over half of the states’ supplement notice requirements with hearings or meetings, but, “[t]hese hearings can be limited to cases where there is a substantial public interest in the remediation, such as when the project involves a school.”<sup>39</sup> Overall, the short time frame allowed for the community to mobilize prevents communities from effectively acting against or supporting a proposed project.<sup>40</sup>

### 2. Availability of Cleanup Project Information

States are increasingly using technology to provide information related to cleanup projects. Websites with greater access to public records also allow information to be more accessible to the residents.<sup>41</sup> For example, Virginia’s Department of Environmental Quality website has included links to its Voluntary Remediation Program database, which publishes to the public “institutional control” information for each cleanup site including “restrictions on ground water use, residential use, and other site-specific controls.”<sup>42</sup>

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34. *Id.* at 685.

35. Melissa A. Orien & Ellie B. Word, *State Brownfields Law*, 27 CONSTR. LAW. 38 (2007).

36. *See* Felten, *supra* note 4, at 682.

37. *Id.* at 685.

38. *Id.*

39. *See* Orien & Word, *supra* note 35.

40. *See* Felten, *supra* note 4.

41. *See* Orien & Word, *supra* note 35.

42. *Id.*

*B. Environmental Justice Issues in Brownfield Redevelopment*

A brownfield redevelopment plan may be drawn up to promote only the commercial interests of the developer and without regard to the surrounding community's interests or the interest of environmental justice. Environmental justice advocates and attorneys should be concerned about whether a proposed brownfields reclamation plan will "provide tangible benefits, in terms of economic development or environmental quality"<sup>43</sup> for the community. Therefore, the standard of contaminant cleanup must be adequate, and the proposed use must not additionally exhibit a threat of fresh contamination.<sup>44</sup>

Unlike greenfield development, developers gain the benefit that "brownfield redevelopment can take advantage of existing urban infrastructures."<sup>45</sup> "Densely concentrated urban areas offer better accessibility to workers...Other potential benefits include aesthetic qualities such as waterfront access and views, proximity to downtown business districts, ...access to major universities and medical centers, and ancillary benefits of spending by rejuvenated industries and their workers on local goods and services."<sup>46</sup> Because of these great advantages, developers and municipalities may hastily approve a brownfield redevelopment plan without regard to the surrounding residents. From the outset, an environmental justice advocate should be concerned whether the developer's proposed reclamation plan is benefiting outside investors or present community.<sup>47</sup> Environment justice advocates, speaking at public dialogues held by the Waste and Facility Siting Subcommittee of the National Environmental Justice Advisory Council (NEJAC), "promoted the concept of 'urban revitalization,' a community-based approach focused on building capacity and mobilizing resources, as opposed to 'urban redevelopment,' a gentrification-driven policy that displaces existing communities."<sup>48</sup> The concern that redevelopment may ultimately displace the community is very real. In the urban area south of Memphis, Tennessee, redevelopment is happening in pockets in industrial shipping yards and port areas along

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43. Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 220 (1999); see Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 612 (1998).

44. *Id.*

45. See Eisen, *supra* note 21, at 296. A "greenfield" is a previously undeveloped piece of land.

46. *Id.*

47. See Eisen, *supra* note 43, at 220.

48. See ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16, at 299.

the Mississippi River.<sup>49</sup> As discussed above, minority working and lower classes comprise the majority of residents of downtown areas and areas near the urban river industry. Unfortunately, the results of this redevelopment has created pockets of gentrification, and the resulting increased property values have caused the low-income, black communities to relocate.<sup>50</sup>

“Community activists...must decide whether brownfields programs will provide hope and opportunity to distressed neighborhoods, or exacerbate environmental contamination... and make investors wealthy at the expense of urban residents.”<sup>51</sup> The consequences of a gentrification-driven plan, in light of the current economic state, may be that the plan falters or fails. For example, in Memphis, an entire complex meant for wealthy condo owners was in the course of redevelopment when the real estate development company hit hard times and halted construction. The building stands unfinished and unoccupied to this day.<sup>52</sup>

Environmental justice advocates and attorneys should therefore be alerted to brownfield reclamation plans as early as possible. Attacking a project that may result in environmental inequity early on, before construction begins, and throughout the remediation process is the ideal way to prevent gentrification and displacement of existing urban communities.

### III. FOSTERING PUBLIC PARTICIPATION

Public participation benefits both the community and the brownfield redevelopers. Public participation allows the community to ensure that its interests and environmental justice concerns are addressed in a brownfield remediation plan. As one commentator notes, “[a] favorable response from the community to a proposed brownfield redevelopment project that involves risks is more likely when legitimate representatives of neighborhood interests have been involved in a meaningful decision-making process.”<sup>53</sup> Consequently, developers’ goals may be realized without tensions between the community and the developers delaying or halting the project. This section discusses community empowerment and the issues that arise from public participation of which environmental justice advocates should be aware.

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49. Interview with Alexander Lynch, J.D. 2012, University of Tennessee College of Law (April 15, 2011). Mr. Lynch is a lifetime resident of Memphis, Tennessee, and currently serves as an assistant public defender.

50. *Id.*

51. See Eisen, *supra* note 43, at 220.

52. Interview with Alexander Lynch, *supra* note 49.

53. See Hawley, *supra* note 30.

*A. Community Involvement and Empowerment*

The NEJAC issued a report on community participation in 1995 based on meetings with environmental justice activists and concerned citizens. This report included empowerment of the community as one of the primary ways in which brownfield redevelopment could better serve and involve the public.<sup>54</sup> Community empowerment is therefore the first step toward full public participation in land use decision making. Environmental psychologists have defined empowerment as the “process by which people, organizations, and communities gain mastery over their lives. It becomes evident through social power at the individual, organizational, and community levels...Empowerment is associated with feelings of competence to change a situation and with expectations of positive outcomes for one's efforts.”<sup>55</sup> Luke W. Cole, a leading environmental justice advocate and attorney, states that “[e]mpowered communities make compromises, they bargain to satisfy their most immediate and pressing needs, they take small steps on their way to taking larger ones in the future.”<sup>56</sup>

When a community is empowered they can achieve the steps that ultimately lead to the development plan incorporating environmental justice ideals. “Empowered communities may bargain for environmental improvements, and as the community garners the benefits of redevelopment, the community's economic and political clout may grow, perhaps making room for...priorities down the road.”<sup>57</sup> Ancillary positive effects of empowerment include helping “show disenfranchised community members who are leery of the government that they are a wanted and needed part of the state and national communities.”<sup>58</sup> Additionally, “[p]eople in environmental justice communities generally distrust government and police. Seeing government officials and others in authority positions caring about the future of their communities, causes this distrust to dissipate.”<sup>59</sup> “Thus, these programs are shown to strengthen the relationship between the government and citizens”<sup>60</sup> and promote community interests and environmental goals.

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54. See Felten, *supra* note 4, at 680 n 1.

55. Peter Horvath, *The Organization of Social Action*, 40:3 CAN. PSYCHOL. 221 (1999) (citations omitted).

56. See Paul D. Flynn, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 20 VA. ENVTL. L.J. 235, 238 (2001).

57. Paul D. Flynn, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463, 489 (2000).

58. See Felten, *supra* note 4, at 695 (discussing the positive effects of community development programs).

59. *Id.*

60. *Id.*

*B. Issues with Community Empowerment and Participation***1. Discriminatory Decision-Making**

Even if environmental justice advocates and attorneys actively strive for community empowerment, Professor Bradford C. Mank posits that existing public participation procedures may not fully “address the fundamental differences in expertise and resources between minority communities and industry. Environmental agencies may ignore or discount the comments of community members because of subtle biases against members of minority groups or in favor of industry experts with advanced degrees.”<sup>61</sup> Though society has come a long way, existing public participation practices nevertheless often ignore the differences between cultural and ethnic groups.<sup>62</sup> Furthermore, “temporal, financial, educational, or language barriers may make it more difficult” for minority and low-income residents to participate fully in the brownfield remediation process.<sup>63</sup>

Additionally, “[b]ecause high-income whites may use the political process more effectively than low-income minorities, developers may steer controversial projects to poorer communities.”<sup>64</sup> This problem is exacerbated when community advisory boards are not “sufficiently representative of the community at large.”<sup>65</sup> Professor Mank notes that “these boards [should] include a significant percentage of local residents,” and the greatest challenge to procedural equity involves “the criteria for selection of appropriate community representatives.”<sup>66</sup> In a particular project, there exists a “[d]iverse range of stakeholders,” which may not include members of poor minority groups who are generally uninvolved in politics.<sup>67</sup> Hence, environmental justice advocates are understandably doubtful whether community working groups or similar community advisory boards can sufficiently represent those citizens.<sup>68</sup>

**2. Early Participation**

Early opportunity for public participation is crucial in order for communities to successfully influence a brownfield remediation

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61. Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 181 (2000).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 182.

67. *Id.*

68. *Id.*

project.<sup>69</sup> “Failure to include the neighborhood at an early stage in the planning and remediation process is likely to cause resentment and misapprehension among the local population, which could ultimately result in the failure of an otherwise meritorious redevelopment effort.”<sup>70</sup> Early participation in the brownfield redevelopment process is also important because “[m]any decisions about the sites are made before informing the community, and the developers tend to ignore or undervalue any improvements or changes requested by the community because of the cost of changing the plans.”<sup>71</sup>

An environmental justice advocate recognizes that “[b]y taking into account public concerns early on, a developer can avoid costly challenges to his or her project that could have been warded off merely by making some minor and insubstantial changes to the project from the outset.”<sup>72</sup> Conversely, early access to information allows the community to deliberate carefully and make informed decisions regarding a brownfield redevelopment project.<sup>73</sup>

### 3. Evidencing Public Health Risk

“A number of states provide explicitly that the [standard of] cleanup required at a [brownfield] site must be based on the public health risk that is expected in light of the site’s proposed or reasonably anticipated future use.”<sup>74</sup> In these jurisdictions, the community and its representatives must work together to gather specific evidence that a brownfield redevelopment project may pose a public health risk. In gathering evidence of this public health risk, a number of legal and practical problems can arise.<sup>75</sup> One problem confronting researchers and community organizations is that each group’s underlying philosophy may conflict. Researchers may push for theory development and collection of data, while community organizations are more practically concerned with delivery of services.<sup>76</sup> “At times, the quest for data interferes with the delivery of programs (and vice versa). Moreover, many researchers are unaccustomed to relinquishing responsibility to

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69. See e.g., *id.*, at 176.

70. *Id.*

71. See Felten, *supra* note 4, at 680.

72. See Skelley, *supra* note 13, at 418.

73. *Id.*

74. See Eisen, *supra* note 21, at 298.

75. See ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16 (discussing the problems of gathering evidence and using evidence to prove the existence of adverse health effects).

76. David G. Altman, *Sustaining Interventions in Community Systems on the Relationship Between Researchers and Communities*, 14:6 HEALTH PSYCHOL. 526 (1995).

service organizations for research programs designed and implemented within a research protocol.”<sup>77</sup>

Second, neighborhoods contending intensive use sitings the past, such as the Diamond Community in Louisiana,<sup>78</sup> have had to struggle with inconsistent evidentiary statistics on the concentration of chemicals in the area that were provided by biased developers. Advocates also recognized that there were problems acquiring evidence of contamination. In this community, residents who were trained by a local environmental agency acquired air samples on their own with relatively simple equipment.<sup>79</sup> However, this practice may undermine the precision and credibility of the evidence in court. Third, statistics acquired from medical agencies and databases are likely skewed against the presence of health risk. For example, in the Diamond Community, those who received treatment for asthma and other problems caused by air contamination were not included in the database for that particular region because the majority of residents received treatment out of state, where better medical facilities are located.<sup>80</sup>

#### 4. Risk Awareness and Environmental Psychology

Environmental psychology can be employed by community representatives to foster better public participation in the brownfield redevelopment process. Studies in environmental psychology have found that “[f]eeling capable of influencing events may increase the individual's sense of obligation to do something about the issues. . . . In sum, a cohesive set of perceptions and motives appear to act as goals or prods to social action. . . .”<sup>81</sup> Thus, disunity in traditional legal methods, and even in the utilization of community empowerment tools, can cause a community effort to falter. Not often, “[c]ommunity leaders . . . were fully aware of the benefits and risks involved with brownfield redevelopment in their communities, [and hence more involved, c]itizens of those communities. . . were more satisfied with the process . . . [and] more aware of what was happening.”<sup>82</sup>

To understand how individuals and their community perceive risk, one must recognize that the

American population includes individuals who differ in their beliefs about cancer and other possible consequences of exposure to toxic

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77. *Id.*

78. *Fenceline: A Company Town Divided* (PBS television broadcast July 23, 2002).

79. *Id.*

80. *Id.*

81. See Horvath, *supra* note 55 (citations omitted).

82. See Flynn, *supra* note 57, at 487 (citing Michigan study).

agents, who disagree about the trustworthiness of scientific risk data and regulatory agencies, and who differ in the importance they assign to economic versus health considerations that are weighted in acceptable risk decisions.<sup>83</sup>

These data compilations are not often geared toward specific socio-demographic groups, among which “[a]ttitudes regarding and behavioral responses to many environmental risks . . . have been shown to vary significantly.”<sup>84</sup> If necessary, risk issues should be framed among diverse groups.<sup>85</sup> Additionally, the risk issues must be framed in personal judgments.<sup>86</sup>

The risk information presented to . . . lay populations usually offers risk estimates at the aggregate level—that is, these communications present data for the population as a whole and cannot estimate the risk for any one particular individual. However, the layperson often reframes an issue as one of personal risk. If general health information is not judged to be personally relevant, assessments of risk may be minimized and self-protective behavior less likely to occur.<sup>87</sup>

Note, however, that “[a]lthough ‘[i]nformation is one of the sources of power in organizations and in community action, . . . [a]wareness of the issues by itself, is usually not enough to induce people to engage in successful coping action. People also need motivation and confidence in their abilities.”<sup>88</sup>

### *C. A “Moderate” Framework for Public Participation*

This article posits a “moderate” framework for promoting public participation in land use planning and brownfield redevelopment. This moderate framework takes into account the progressive environmental justice model for public participation, while also involving the public in deciding a specific course of legal action.

Currently, progressive environmental justice advocates and attorneys, such as Luke Cole, focus on community empowerment and seem to steer away from incorporating community participation in legal strategies. Even environmental psychology affirms the importance of community empowerment. Studies have found a strong relationship

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83. Elaine Vaughan, *Individual and Cultural Differences in Adaptation to Environmental Risks*, 48 AM. PSYCHOLOGIST 673, 674 (1993) (citations omitted).

84. *Id.* at 673.

85. *Id.* at 677 (citations omitted).

86. The risk issues must be framed in personal judgments, as opposed to societal judgments. *Id.*

87. *Id.*

88. See Horvath, *supra* note 55.



“between perceived control and risk responses, even when controlling for factors such as information, formal education, and amount of exposure, suggests the importance of this factor in accounting for individual differences in responses to a chronic environmental risk.”<sup>89</sup> Similarly, Cole has criticized legal tactics, stating, “As is so often the case, there may not even *be* a legal solution to the problem faced by the community.”<sup>90</sup>

Cole also argues that “the legal approach may radically disempower the community [and] [t]ranslating a community’s problems into legal language may render them meaningless.”<sup>91</sup> This approach can reinforce “the ‘psychological adaptations of the powerless—fatalism, self-deprecation, apathy, and the internalization of dominant values and beliefs.’”<sup>92</sup> Finally, Cole argues that “lawsuits take fights into the arena most controlled by the adversary and least controlled by the community”<sup>93</sup>—a fact that, in the least, traditional attorneys who tend to underutilize community participation should recognize when deciding the appropriate remedy for environmental injustice. Rather than compel community members to stand in the line of fire in the adversarial judicial process that lawsuits incur, environmental justice advocates should find other legal avenues that allow full public participation and recognition of the community’s interests without demoralizing their clients.

This article argues that the best way to create environmental change is to apply these ideals of progressive environmental justice advocates to the legal tactics of traditional lawyers representing those communities.<sup>94</sup> Luke Cole and other environmental justice advocates seem to underestimate the lay-citizens’ intelligence and ability to assess legal situations when provided with adequate context and legal translation. Lay clients can make informed decisions regarding their legal representation in the most complex of cases when given clear explanations as to the law and consequences of each potential action. For example, lay clients forming a new business entity do not recognize the many risks and liabilities involved, but, when an attorney translates and explains the relevant aspects of business and tax law, lay clients are able to understand those risks and liabilities and make their decisions accordingly.

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89. See Vaughan, *supra* note 83, at 674 (citations omitted).

90. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16, at 439 (citation omitted).

91. *Id.* at 436.

92. *Id.*

93. *Id.*

94. Specific tactics that may include public participation are discussed in Part IV, *infra*.

Thus, community psychological empowerment need not exclude appropriate legal remedies; in fact, community empowerment can only enrich public participation in the legal arena. Environmental justice lawyers should strive to implement programs or procedures that both empowers the community and avails it of its legal rights and potential courses of action. Such procedures may include the hiring of translators and cultural experts before presenting a course of legal action at a community forum. Lawyers may also consider asking a member of the community to act as the liaison between the legal staff and the community. This moderate framework suggests that the environmental justice advocate is subject to a similar duty of communication imposed by the lawyer-client relationship, as defined in each state's ethics rules regarding professional conduct.<sup>95</sup>

#### IV. APPLYING THE PUBLIC PARTICIPATION FRAMEWORK TO ZONING LAWS

Applying progressive ideals such as community empowerment to traditional legal methods such as institutional controls and other land use practices is an effective way to address environmental justice concerns regarding a new brownfield reclamation plan. This section explores land use practices that may influence the nature of communities currently employed by municipalities and the public participation issues that arise from these land use practices. This section then discusses the importance of public participation in the zoning process to ameliorate environmental injustices incurred by an inadequate brownfield redevelopment plan. Finally, this section discusses specific zoning practices that can allow for public participation.

Land use practices, such as zoning, influence the nature of communities and regional patterns. Local governments are generally given autonomy to apply traditional land use controls like zoning and activity and use limitations (AULs).<sup>96</sup> These traditional land use decisions directly involve issues of environmental justice. For example, choosing sites for locally unwanted land uses addresses geographic

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95. See, e.g., MODEL RULES OF PROF'L CONDUCT (2012). ABA Model Rule 1.4 requires the lawyer to promptly inform the client of any decision or circumstance that requires the client's informed consent. Informed consent means that the lawyer has sufficiently explained the material risks and reasonable alternatives before the client agrees to a proposed course of conduct. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012). Further, ABA Model Rule 1.4 requires the lawyer to keep the client reasonably informed about the status of the matter and about the means by which the lawyer plans to accomplish the client's objectives. Note that ABA Model Rule 2.1 allows the lawyer to give a client advice beyond the law, such as moral, economic, social, or political advice when relevant to the client's situation.

96. Kushner, *supra* note 5, at 866.

equity; issues of procedural equity that underlie public hearings; and, “[s]ociological factors, including which groups hold the political power to control land use decisions” raise issues of social equity.<sup>97</sup> These zoning provisions, however, have facilitated sprawl, thereby rendering inner-city and brownfield communities unattractive.<sup>98</sup> “With the exception of a few states that imposed mandatory inclusion of affordable and multi-family housing obligations of developing communities,”<sup>99</sup> communities are free to use zoning to protect the status quo or to instigate change. Note, however, that in order to most effectively facilitate public participation, environmental justice-minded attorneys should keep in mind the issues inherent in rendering minority, low-income community participation, such as discriminatory decision making by officials and language barriers.<sup>100</sup>

#### A. Note on Institutional Controls

Traditionally, land use law has been employed by brownfield remediation programs in the form of institutional controls; however, traditional implementations of these methods have proved inadequate in addressing environmental justice concerns in brownfield redevelopment. Institutional controls, such as zoning, are “legal mechanisms” within the “political economy of brownfields.”<sup>101</sup> Activity and use limitations (AULs), another kind of institutional control, limit “the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern or to prevent activities that would interfere with the effectiveness of a response action” and provide notice to the public of the presence and location of residual contamination.<sup>102</sup>

Institutional controls rely on complex local zoning processes and are subject to changing societal preferences.<sup>103</sup> Conversely, “the efficacy of institutional controls based on zoning ordinances relies on the consistent application of those ordinances. Yet...requests [are frequently] made for amendments to the law (i.e., requests for rezoning) or so many minor revisions made to the law under the guise of an administrative

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97. Keiner, *supra* note 11, at 101, 102.

98. *Id.*

99. *Id.*

100. *See supra* Part III.

101. Robert Hersh & Kris Wernstedt, *Out of Site, Out of Mind: The Problem of Institutional Controls*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16, at 304.

102. Andrea Ruiz-Esquide, *The Uniform Environmental Covenants Act—An Environmental Justice Perspective*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16, at 302.

103. Robert Hersh & Kris Wernstedt, “Through a Lens Darkly”—*Superfund Spectacles on Public Participation at Brownfield Sites*, 9 RISK: HEALTH SAFETY & ENV’T 153, 171-72 (1998).

action.”<sup>104</sup> Therefore, to ensure that institutional controls are enforced and the community’s preferences are promoted, it is crucial for the community to gain the empowerment necessary to successfully participate in general local zoning practices.

Because “[s]tates have tended toward incorporating...institutional controls into the cleanup process to reduce remediation costs and make returns on cleanup projects more economical,”<sup>105</sup> municipalities may neglect objectives such as environmental equity. Further, the requirements for “states to commit resources for long-term monitoring” are often unenforced.<sup>106</sup> Additionally, many states do not have the financing available to implement these controls, which are costly even without continuing maintenance requirements.<sup>107</sup> Finally, “much of the available financing underwriting brownfield redevelopment cannot be used for institutional [controls].”<sup>108</sup> Thus, it is imperative that environmental justice advocates employ full community participation to ensure that the local government realizes their environmental justice objectives.

### *B. The Nexus between Environmental Justice, Public Participation, and Brownfield Redevelopment*

Although local municipalities can potentially employ certain existing zoning techniques to address environmental justice concerns,<sup>109</sup> the community cannot completely rely on the zoning board to implement these techniques on their own, particularly in the wake of an aggressive brownfield redevelopment plan. For example, there may be conflicts of interest in local land use planning and ethical considerations regarding representatives on zoning boards also being members of developers or

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104. See Hersh & Wernstedt, *supra* note 101, at 304.

105. See Orien & Word, *supra* note 35.

106. *Id.*; see also ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION, *supra* note 16, at 304-07 (discussion on the failure to enforce institutional controls).

107. See Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, But Never Too Late*, 14 FORDHAM ENVTL. L.J. 313, 333 (2003).

108. *Id.*

109. These techniques include: *conditional uses*; *overlay zones* (“Imposing further requirements on an existing zoning district that apply additional environmental protections and impose a variety of specific conditions for industrial and commercial activities in predominantly low-income and minority neighborhoods.”); *performance zoning* (regulating the impacts of harmful land uses “by, for example, providing standards that limit certain nuisance-like activities”); *buffer zones* (“Usually local zoning districts that buffer or serve as a transitional area between two or more uses considered to be incompatible; they could include physical screening, landscaping, significant set-backs, open spaces, and even other lower-intensity commercial uses that might serve as better transitions from residential neighborhoods to more industrial areas.”); *floating zones*; and *exactions and mitigation fees*. See Keiner, *supra* note 11, at 106.

other contrary parties.<sup>110</sup> Another issue regards localities that “can appoint individual community representatives to planning and zoning boards.”<sup>111</sup> If an appointed representative has a conflict of interest or does not suitably represent the community, the community’s interests may be directly opposed in the decision-making process. Furthermore, current legislation may not provide adequate avenues for the community to voice their concerns over potential inequities that a brownfield redevelopment plan, or other land use decision, will incur.

Thus, environmental justice activists involved in land use planning should advocate for “[c]omprehensive land-use plans [that] provide active involvement by people of color and low-income residents in developing the prospective goals and future visions for local comprehensive plans.”<sup>112</sup> Local zoning laws or ordinances should provide for an adequate amendment process to reflect community interest, and local zoning ordinances that do not accomplish the environmental justice goals of the comprehensive plans should be invalidated.<sup>113</sup> Advocates and attorneys should facilitate community participation during the remediation process to ensure that specific community concerns are addressed.

When zoning decisions are passed, the neighborhood surrounding a proposed unwanted land use like a potential brownfield redevelopment site may wish to address practical and immediate concerns. For example, residents may wish to “fine tune the development plan,”<sup>114</sup> or active residents may wish to become regular contributors in the decision making process. Participation can provide reassurance to neighborhood

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110. Patricia E. Salkin, *Ethical Considerations in Land-Use Planning and Zoning: Trends and Decisions*, in CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING 169, 178 (Patricia E. Salkin ed., 2004). For example, a zoning board member may own controlling shares in a commercial real estate development company that plans to redevelop a brownfield. A more complex situation arises if such a board member is also a member of the community opposing the redevelopment plan. Further, a board member with environmental justice concerns may also owe a fiduciary duty to the redevelopment company. That member would be faced with a personal conflict of interest that may affect the performance of his or her duties as fiduciary. Attorneys acting as zoning board members with ties to the community and/or the development company may also incur professional ethics violations that are outside the scope of this paper’s discussion.

111. See Keiner, *supra* note 11, at 107 (citing studies such as NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING iii (July 2003)). “A 1987 APA survey on the composition of planning commissions reveals that their members are now predominantly male, white (more than nine out of ten members), over 40, and professionals, such as businesspeople, lawyers, engineers, etc.” *Id.*

112. *Id.* at 105.

113. *Id.*

114. See Skelley, *supra* note 13, at 397-98.

residents that their concerns regarding the property will be addressed,<sup>115</sup> including concerns relating to those issues that may be simply overlooked by zoning board members who do not reside in the affected community. Also, as one critic aptly pointed out, if a state voluntary remediation program fails to provide the community with adequate opportunities for participation, the local zoning process “may serve as a vehicle by which the public can force the state environmental agency, the developer, or both, to consider neighborhood concerns. Moreover, if the parties to the voluntary remediation fail to consider pertinent community desires, neighborhood activists may very well utilize the local zoning function to delay, if not eliminate, redevelopment efforts.”<sup>116</sup>

### 1. Zoning Law as a Vehicle for Public Participation

Zoning is “one of the primary vehicles for community self-determination, allowing a municipality to control the type and extent of the development within its borders. The intersection of land use and brownfields legislation” can therefore provide for public participation if the state voluntary remediation program denies meaningful community input.<sup>117</sup>

The zoning process is comprised of multiple stages, during which the community can participate: (1) comprehensive planning and zoning, (2) post-zoning development review, (3) post-zoning and rezoning, and (4) the quasi-judicial approach. During these stages, public participation is encouraged by open meeting laws, or “sunshine laws,” which apply to municipal governing bodies such as planning commissions and boards of adjustment.<sup>118</sup> These statutes require that public hearings be held, particularly during the comprehensive planning and zoning process.<sup>119</sup> “A zoning hearing for each targeted site provides an open forum conducive to a full and free exchange of information between the potential developer and the affected community.”<sup>120</sup> Public hearings are an essential element of the comprehensive planning and post-zoning development review stages;<sup>121</sup> however, who exactly constitutes a member of the “public” and the extent to which members can participate

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115. *Id.* at 397. “For example, if children frequently use the property as a cut to or from school, the risk of exposure to various contaminants may increase, dictating either a more stringent cleanup standard or the use of some type of institutional control such as warning signs and fencing.” *Id.*

116. *Id.* at 398.

117. See Skelley, *supra* note 13, at 396-97.

118. DANIEL R. MANDELKER, *LAND USE LAW* § 6.76 (5th ed. 2003).

119. *Id.*

120. See Skelley, *supra* note 13, at 410.

121. See John J. Delaney, *Development Review Wars: Failing the Fairness Test*, in *PLANNING REFORM IN THE NEW CENTURY* 58, 59-60 (Daniel R. Mandelker ed., 2005).

are threshold issues that have not been adequately addressed by state statutes and local ordinances.<sup>122</sup> The majority of cases allow third party standing to “aggrieved”<sup>123</sup> parties who “can demonstrate that they may suffer special harm or injury from the proposed use, over and above its expected impact upon the public generally.”<sup>124</sup>

*a) Comprehensive Planning and Zoning*

The first stage of the zoning process in which the public may participate is the comprehensive planning and zoning stage. The comprehensive planning and zoning stage is well publicized and public involvement is often extensive.<sup>125</sup> Unfortunately, a state comprehensive plan may very well fail to address brownfields all together.<sup>126</sup> From a planning perspective, remediating an abandoned or underutilized property can “alter[] traffic patterns and density, increase[] noise, and change[] the balance of uses in a particular area, e.g., creating more industrial and commercial sites in a community that had been previously predominantly residential.”<sup>127</sup>

*b) Post-Zoning Development Review*

Next, site-specific development review proceedings, such as hearings, implement the plan. Administrative agencies generally conduct these hearings are responsible for determining the adjudicative facts<sup>128</sup> relevant to the parties, their properties, and effects of the site’s activities.<sup>129</sup>

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122. *Id.* at 61 (citing *Bryniarski v. Montgomery County Board of Appeals*, 230 A.2d 289, 293-96 (Md. 1967)).

123. See Delaney, *supra* note 121, at 60 (a critique on the limiting nature of the “person aggrieved” standard, and proposes a standard where “virtually any member of the public could participate in a site-specific proceeding without having to demonstrate aggrieved status under the ‘special harm or injury’ test.”).

124. *Id.* at 61.

125. *Id.* at 60.

126. See e.g., Stuart Meck, *Notes on Planning Statute Reform in the United States: Guideposts for the Road Ahead*, in *PLANNING REFORM IN THE NEW CENTURY*, *supra* note 121, at 31, 42.

127. See Skelley, *supra* note 13, at 394.

128. Controlling or operative facts that concern the parties and help the court or agency determine how the law applies to those parties, cf. legislative facts. See *BLACK’S LAW DICTIONARY* (3d Pocket ed. 1996).

129. Delaney, *supra* note 121, at 61.

c) Rezoning and Amendments

Local governing bodies are authorized by law to amend zoning ordinances,<sup>130</sup> such as making changes directly to the text of the zoning ordinance and implementing map amendments. A map amendment “changes the zoning regulations for a tract of land by reclassifying it to a different zoning classification . . . [Unfortunately t]he map amendment process is legislative in most states, so a refusal to rezone cannot be appealed.”<sup>131</sup>

Many zoning acts and local zoning ordinances contain requirements such as “a three-fourths vote by the legislative body to adopt a zoning amendment if it was protested by twenty percent of the owners of the affected or adjacent area.”<sup>132</sup> The courts in these jurisdictions note that though the local municipality “retains the authority to approve or disapprove the amendment, . . . amendments require closer scrutiny when landowners who are most affected indicate their objection.”<sup>133</sup> A small minority of zoning statutes and ordinances require the consent of neighbors for a zoning amendment, and these consent provisions may be held unconstitutional.<sup>134</sup>

Note, however, that “courts may set aside a zoning decision if they believe that a favorable response to neighborhood opposition tainted the zoning action with an improper motive or purpose . . . A number of cases have invalidated zoning approvals found to have been improperly influenced by neighborhood opposition.” Conversely, courts will likely uphold a zoning decision, “despite neighborhood opposition, if they believe the decision was based on legitimate zoning purposes.”<sup>135</sup>

d) Quasi-Judicial Approach

A minority of courts have held that the adoption and rejection amendments to the zoning map may be reviewed more rigorously if the court determines “that a rezoning is a quasi-judicial, rather than a legislative, act.”<sup>136</sup> An increasing number of courts are treating rezoning as quasi-judicial in nature, such as the court in *Fasano v. Board of County Comm’rs of Washington County*,<sup>137</sup> which has been followed by

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130. See e.g., U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT §§ 4, 5 (1926), available at <http://www.planning.org/growingsmart/pdf/SZENablingAct1926.pdf>.

131. MANDELKER, *supra* note 118, § 6.24.

132. *Id.* § 6.04.

133. *Id.*

134. *Id.*

135. *Id.* § 6.75.

136. *Id.* § 6.26.

137. *Fasano v. Bd. of County Comm’rs of Wash. Cnty.*, 507 P.2d 23 (Or. 1973).



roughly twelve other state courts.<sup>138</sup> Under this approach, “[t]he presumption of constitutionality accorded legislative actions disappears, and the municipality has the burden of proof to justify the zoning change. The legislative body must also adopt adjudicative procedures for zoning changes and make adequate findings of fact.”<sup>139</sup>

Thus, “greater procedural due process protections for participants exist”<sup>140</sup> because courts are required to become “super zoning boards”<sup>141</sup> who oversee lengthy proceedings, which likely will require hearing examiners, resulting in higher costs for the government and for development.<sup>142</sup> Unfortunately, only some statutes and courts require that “all phases of the decision-making process of quasi-judicial bodies to be open to the public.”<sup>143</sup>

## 2. Methods for Effective Community Participation in Zoning

Because the stages of the zoning process may not adequately address environmental inequities affecting urban communities, environmental justice advocates and the affected neighborhood can employ certain methods during the zoning process so that a community’s interests are addressed in a proposed brownfield remediation plan. Such methods may include the following: utilizing post-zoning moratoria; challenging the zoning map amendment or rezoning; alleging that the proposed use is not in accordance with the comprehensive plan; classifying the rezoning decision as quasi-judicial; and making a claim for aesthetic regulation.

Unfortunately, many of these remediation plans inadequately address the environmental justice and practical issues inherent in brownfield redevelopment. For example, “[a] major disagreement exists about whether the redevelopment of contaminated ‘brownfield’ properties in low-income and minority neighborhoods is essential for economic development in those areas, or whether it exacerbates existing cumulative pollution problems in these communities.”<sup>144</sup> In response to a proposed plan that the community believes will be detrimental to their interests, environmental justice advocates can employ the moderate

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138. See JOHN J. DELANEY, STANLEY D. ABRAMS & FRANK SCHNIDMAN, *HANDLING THE LAND USE CASE: LAND USE LAW, PRACTICE & FORMS* 5-16 (3d ed. 2005).

139. MANDELKER, *supra* note 118, § 6.26; see also Delaney, *supra* note 121, at 65 (discussion of the separation of powers issue).

140. Delaney, *supra* note 121, at 66.

141. *Id.*; MANDELKER, *supra* note 118, § 6.26.

142. *Id.*

143. MANDELKER, *supra* note 118, § 6.76.

144. Mank, *supra* note 61, at 115.

framework for public participation discussed above<sup>145</sup> when challenging a plan or its parts. An effective community use of zoning should include “a multi-pronged attack on the zoning decision”<sup>146</sup> that incorporates full public participation in the implementation of the attack. Such methods may include the following: (1) utilizing post-zoning moratoria, (2) challenging the zoning map amendment or rezoning, (3) alleging that the proposed use is not in accordance with the comprehensive plan, (4) classifying the rezoning decision as quasi-judicial, or (5) making a claim for aesthetic regulation.

*a) Utilizing Post-Zoning Moratoria*

Post-zoning moratoria<sup>147</sup> is one way to incorporate full public participation into the multi-pronged attack. Using post-zoning, site-specific development review “as a forum for rearguing broad public policy issues that have been decided at the comprehensive planning/zoning stage”<sup>148</sup> can allow environmental justice advocates and the public another chance to voice their concerns with the plan. Some critics argue that this use of moratoria is an abuse of the process and contributes to unnecessary delay.<sup>149</sup> However, post-zoning moratoria is arguably an advantageous legal tactic<sup>150</sup> because those delays can effectively hinder a proposed plan when the community needs more time to gather resources or organize.

*b) Challenging the Zoning Map Amendment or Rezoning*

“The most obvious chance for a community to determine the fate of a voluntary remediation proposal occurs when the current use classification conflicts with the developer’s more intensive proposed use for the parcel.”<sup>151</sup> Additionally, participation “in a voluntary remediation program may envision a use of the property that is in conflict with current zoning ordinances.”<sup>152</sup> To proceed in either case, the developer must seek a zoning amendment for the property. If landowners wish to

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145. See *supra* Part III.

146. See Singband, *supra* note 107, at 403-04.

147. An authorized postponement, usually lengthy; suspension of a specific activity. BLACK’S LAW DICTIONARY (3d Pocket ed. 1996).

148. See Delaney, *supra* note 121, at 62.

149. See *e.g.*, *id.* Delaney posits that there is potential for abuse with moratoria; Meck and the American Planning Association support the use of moratoria and the *Tahoe-Sierra* decision. See Jerry Weitz, *Comments on Delaney and Meck Papers*, in *PLANNING REFORM IN THE NEW CENTURY*, *supra* note 121, at 86.

150. See, *e.g.*, *supra* note 143 and accompanying text.

151. See Skelley, *supra* note 13, at 399.

152. *Id.* at 394.

develop a brownfield, but the zoning ordinance does not allow it for that parcel, they may also apply for rezoning.<sup>153</sup>

When “the local government rezones a brownfield to a more intensive use, the plaintiffs can first argue that the decision is arbitrary and capricious,<sup>154</sup> and contend that allowing the voluntary remediation to continue constitutes a threat to public health, safety and welfare.”<sup>155</sup> Second, neighboring landowners can attempt to bring a declaratory judgment or injunction to challenge a rezoning map amendment.<sup>156</sup>

*c) Alleging that the Proposed Use is Not in Accordance with the Comprehensive Plan*

A number of states require consistency with a comprehensive plan;<sup>157</sup> additionally, a “court may require consistency with a comprehensive plan if the municipality has adopted one, even in states that do not have a consistency requirement.”<sup>158</sup>

Comprehensive plans may require municipalities to plan for affordable housing, which makes zoning revisions necessary to provide for affordable housing, and designate sites to be zoned for affordable housing.<sup>159</sup> Note, however, that case law suggests that “requiring zoning to be consistent with a comprehensive plan may give the courts rather than municipalities the final authority to interpret planning policy.”<sup>160</sup> Thus, whether to allege the inconsistencies in the court, by way of injunction or other remedy provided by law, or directly to the municipality, by way of zoning hearings, is a decision that the attorney would make based on local case law and his or her experience.

*d) Classifying the Rezoning as Quasi-Judicial*

Classification of the rezoning decision as quasi-judicial rather than a legislative proceeding, when the zoning change would affect only a single parcel of property, would allow the decision to be more easily overturned.<sup>161</sup> As discussed above, the quasi-judicial approach to zoning gives the burden of proof to the municipality to justify a zoning change, and the legislature is forced to adopt procedural due process protections

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153. MANDELKER, *supra* note 118, § 6.25.

154. Such decisions will be overturned. *See e.g.*, *Twigg v. County of Will*, 627 N.E.2d 742 (Ill. App. Ct. 1994).

155. *See Singband, supra* note 107, at 403-04.

156. MANDELKER, *supra* note 118, § 6.24.

157. *See Singband, supra* note 107, at 340.

158. MANDELKER, *supra* note 116, § 6.32.

159. *Id.* § 3.11.

160. *Id.* § 6.33.

161. *See Skelley, supra* note 13, at 404.

for those affected by the change.<sup>162</sup> Thus, a quasi-judicial proceeding may result in more accurate fact finding that would more likely reflect any environmental inequities that were previously overlooked.

*e) Making a Claim for Aesthetic Regulation*

A community blighted with a contaminated and unsightly brownfield can attempt to preemptively appeal to the municipality that any redevelopment that diverts from the general surrounding aesthetics should be regulated to fit within the residential design scheme. “A clear majority of courts hold that aesthetics alone is a legitimate governmental purpose in land use regulation.”<sup>163</sup> This follows dictum from the U.S. Supreme Court in *Berman v. Parker*<sup>164</sup> that the concept of public welfare is broad and inconclusive and that the values it represents can include aesthetic as well as monetary concerns. The Court stated, “It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>165</sup>

### **3. Issues with Community Use of Zoning Law**

Though the community can rely on zoning laws as a vehicle for participation in brownfield redevelopment, the methods described are not without downfalls. For one, “community resistance will likely focus most upon proposed industrial, and to a lesser extent, commercial, uses. Most contaminated brownfield sites, however, are likely to be abandoned commercial or industrial sites, and hence will already be zoned for such activities.”<sup>166</sup> Hence, a proposed less intensive use will already be permitted, no zoning amendment would be necessary to develop the site, and the public would not have the opportunity to challenge the plan.<sup>167</sup>

Second, “if a community finds a proposed voluntary remediation to be objectionable, it may be successful in killing a project altogether, by making the particular site less attractive than other properties available to the developer as a result of the time, expense, and negative public relations surrounding the challenged project.”<sup>168</sup>

Third, bias and conflicts of interest can taint zoning decisions by members of administrative or legislative bodies. This issue goes to the

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162. MANDELKER, *supra* note 118, § 6.26.

163. *Id.* § 11.05.

164. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

165. *Id.*

166. Skelley, *supra* note 13, at 399.

167. *Id.*

168. *Id.* at 403-04.

heart of procedural equity in land use law. “Conflicts of interest usually arise when a member of a zoning agency has a pecuniary interest in a zoning decision or a personal relationship with the applicant for a zoning change.”<sup>169</sup> However, “a pecuniary benefit from property ownership may not create a conflict of interest if the benefit is indirect.”<sup>170</sup> Nevertheless, “[c]ourts find an improper conflict of interest when close personal or business relationships exist between a member of a zoning board and an applicant for a zoning change.”<sup>171</sup>

A successful claim of bias or conflict of interest can disqualify members in states where rezoning is considered quasi-judicial, or in a minority of courts despite if the process is held to be legislative in nature.<sup>172</sup> Several states have specific bias and conflict-of-interest statutory provisions that prohibit planning commission and board of adjustment members from participating with “any direct or indirect personal or financial interest. The statutory prohibition sometimes extends to members of legislative bodies.”<sup>173</sup> Therefore, when implementing a “multi-pronged attack” on a potentially unfair brownfield redevelopment plan, environmental justice advocates who actively involve public participation in their decision-making should be aware of these issues with community involvement in the zoning process.

## V. CONCLUSION

As our greenfields diminish due to urban sprawl and our economy flounders due, in part, to inadequate employment, many critics have strongly appealed to administrative agencies and planning commissions with ideas of urban revitalization and brownfield redevelopment. In order to properly initiate these programs, however, environmental justice advocates stress that attention should focus on the needs of previously ignored minority and low-income communities within urban centers. When a proposed brownfield remediation program comes to light, the community has few opportunities to participate in the planning and implementation of the cleanup project.

Public participation is crucial for the community to successfully challenge or provide input regarding a proposed brownfield remediation plan, particularly when it fails to address potential issues such as gentrification or displacement. The cultural, economic, political, and

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169. MANDELKER, *supra* note 118, § 6.74.

170. *Id.*

171. *Id.*

172. *Id.* § 6.72.

173. *Id.*

evidentiary problems associated with public participation by low-income, minority communities can be mitigated by what progressive environmental justice advocates call community empowerment. However, empowerment practices need not avoid legal tactics. When legal tactics are not employed, advocates and attorneys underestimate the community's abilities to participate in and understand legal proceedings.

Because traditional land use law, such as zoning, already provides the public with ample opportunities to participate, limiting the community to non-legal tactics would in effect limit the extent of community self-determination. When applying the moderate framework of public participation to zoning practices, i.e., rezoning hearings, neighborhoods affected by urban brownfields can more likely provide adequate input or succeed in challenging a plan. However, this framework can work only if the attorneys and advocates involved provide the necessary legal information, cultural context, and psychological empowerment to successfully include the community in brownfield remediation planning.