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Nonprofit Organizations in Brownfields Redevelopment: Leveling the Playing *Brownfield*

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**Nonprofit Organizations in Brownfields Redevelopment:
Leveling the Playing *Brownfield***

Ellen B. Sturm*

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“We must preserve what is still wild in nature and rehabilitate what has been abused. We must put our common house in order by being more parsimonious, more careful with the infrastructure, more dedicated to research and development, more cooperative in our pursuits....”¹

INTRODUCTION

If you travel east on Broadway, just leaving the downtown area of the City of Buffalo, New York, there is a playground located at the corner of Broadway and Spring Streets that is barely noticeable because of the gigantic structure looming behind it. The playground serves the needs of the young inhabitants of the neat, orderly houses that line Spring Street and the surrounding neighborhood—modest homes where childrens’ artwork is taped haphazardly to the front picture windows. The old Buffalo Forge plant—some 500,000 square feet of vacant industrial space occupying fourteen acres of land²—is the sleeping Goliath that dwarfs the Spring Street playground and its small visitors. Buffalo Forge opened in 1874 and employed thousands of workers over the course of its years of industrial viability.³ But the combination of the deindustrialization of the United States, certain environmental laws, and land use planning decisions has meant that the old Buffalo Forge plant—like thousands of similarly-situated brownfields—lies dormant.⁴

As defined by the United States Environmental Protection

¹ ALBERT BORGMANN, *CROSSING THE POSTMODERN DIVIDE* 127 (1992) (discussing blighted city centers and urban decay, and the need to “forge an inclusive communal order” to ameliorate these ills). *Id.*

² See *Can Green Dream Come True? A Coalition of Environmentalists, Politicians and Business People Would Like to Turn the Old Buffalo Forge Plant Into an Incubator and Industrial Park for Envirobusiness*, BUFFALO NEWS, Sept. 24, 2000, at B-15 [hereinafter *Green Dream*].

³ See *id.*

⁴ See Barry E. Hill & Nicholas Targ, *Redeveloping Brownsfields: Environmental Justice in Action*, 6 PRAC. REAL EST. LAW. 8 (2000).

Agency (EPA), brownfields are “abandoned, idled or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.”⁵ These sites are generally “associated with distressed urban areas ... that once were heavily industrialized, but since have been vacated.”⁶ Rather than deal with a brownfield site, many developers choose to build on unstigmatized⁷ greenfields—“previously undeveloped land outside the city,”⁸ resulting in such undesirable consequences as urban sprawl, pollution caused by commuting, loss of land suitable for agriculture, and increased energy use for transportation.⁹ Furthermore, the failure to redevelop brownfields

⁵ United States Environmental Protection Agency, Office of Solid Waste and Emergency Response, *Brownfields Glossary of Terms*, at <http://www.epa.gov/brownfields/glossary.htm> (collected on Jan. 21, 2000, on file with the Buffalo Env'tl Law J.). Significantly, not all brownfields are highly-contaminated, old industrial sites. They are often commercial buildings having little or no environmental contamination. They can be: parking lots, warehouses, landfills, former gas stations, former dry cleaners, abandoned railroads, air strips, bus facilities, and factories—though this is not an exhaustive list. See ENVTL LAW INSTITUTE, 1999 Research Study: *A Guidebook for Brownfield Property Owners*, at <http://www.eli.org/store/rr99guidebook.html> (collected on Feb. 10, 2001, on file with the Buffalo Env'tl Law J.).

⁶ TODD S. DAVIS & KEVIN D. MARGOLIS, *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 5* (1997) [hereinafter *A COMPREHENSIVE GUIDE*].

⁷ “Stigma” in the environmental sense has been defined as the “result of an undesirable event that disrupts the balance of an environmental system” which results from perceptions of uncertainty and risk. MICHAEL R. EDELSTEIN, *CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE 6* (1988). See also *A COMPREHENSIVE GUIDE*, *supra* note 6 at 80-81.

⁸ CHARLES BARTSCH ET AL., *NORTHEAST-MIDWEST INSTITUTE, COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DEVELOPMENT OPPORTUNITIES*, CH. 1, at 2 (1996), at <http://www.nemw.org/cmclean1.htm> (collected on Oct. 9, 1999, on file with the Buffalo Env'tl Law J.) [hereinafter *COMING CLEAN*].

⁹ See *A COMPREHENSIVE GUIDE*, *supra* note 6, at 12; E. Lynn Grayson & Stephen A.K. Palmer, *The Brownfields Phenomenon: An Analysis of Environmental, Economic, and Community Concerns*, 25 ENVTL. L. REP. 10337, 10338

results in urban decay, deterioration of existing infrastructure, loss of tax revenue, and diminished economic opportunities for nearby residents.¹⁰ No urban area is immune from the difficulties inherent in addressing brownfields, as these sites are estimated to number a staggering 500,000 nationwide.¹¹

The chief impediment to brownfields redevelopment is the fear developers have of liability for environmental cleanup of these sites.¹² When Congress established the Superfund¹³, its liability provisions were so strict that it had the unfortunate result of “contribut[ing] to the decline of older industrial cities” as developers and lenders avoided any involvement in these sites.¹⁴ Another barrier to brownfields development may occur at the local level, where residents fear the effect of contaminated properties on public health and safety.¹⁵

(1995); Paul Skanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 596 (1998).

¹⁰ See COMING CLEAN, *supra* note 8, at 2.

¹¹ *Id.* The magnitude of the brownfields problem in our country is illustrated by an estimate of the United States General Accounting Office that it would take \$650 billion to remediate these sites, which are located primarily in older cities of the Northeast and Midwest. See Hill & Targ, *supra* note 4.

¹² See ROBERT A. SIMONS, TURNING BROWNFIELDS INTO GREENBACKS vii (1998) [hereinafter TURNING BROWNFIELDS]; A COMPREHENSIVE GUIDE, *supra* note 6, at 9.

¹³ See 42 U.S.C. § 9601 *et seq.* (1988). Superfund is the revolving trust fund established in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to cover the cost of cleanups.

¹⁴ TURNING BROWNFIELDS, *supra* note 12, at vii. See also A COMPREHENSIVE GUIDE, *supra* note 6, at 41 (discussing “innocent parties’ fears in inheriting cleanup liabilities” as a major obstacle to brownfields redevelopment). *Id.* See also Thomas M. Parris, *Browsing for Brownfields; Websites on Brownfields*, ENVIRONMENT, June 1998, at 3. CERCLA and its state statutory counterparts have “paradoxically” had the effect of discouraging investment in potentially contaminated properties, while their goals were to encourage environmental cleanup. CERCLA provides for joint and several retroactive liability. See John M. Scagnelli, *Brownfields Redevelopment: Is There a Need for Additional Legal Incentives?*, 5 ENVTL. COMPLIANCE & LITIG. STRATEGY 1 (2000).

¹⁵ Grayson & Palmer, *supra* note 9, at 10340.

More recently however, a “plethora of state and federal initiatives”¹⁶ have been targeted to promote brownfields redevelopment, some in an attempt to reduce liability risk.¹⁷ In general, these brownfields programs are market-based reforms that have been criticized for their streamlined cleanup processes and site-specific standards which may “force inner-city communities to accept substandard” remediation.¹⁸ In their efforts to achieve urban renewal and job creation, local residents may find themselves “becoming environmental ‘second class’ citizens.”¹⁹

The focus of this paper will not be an in-depth examination of these many and varied initiatives—indeed to do so would prove daunting in this nascent though burgeoning area of law and policy.²⁰ Rather, the discussion will focus on how the redevelopment of brownfields brings into convergence goals which form a new “paradigm of environmental policy” called eco-development²¹, which may, in many instances, be best realized by the nonprofit sector.²²

¹⁶ Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL’Y F. 187, 192 (1999).

¹⁷ Under CERCLA, a property owner may be held responsible for remediation of property even if the environmental contamination existed prior to the current owner’s acquisition of the property. *See* 42 U.S.C. § 9601 *et seq.*; HAROLD J. RAFSON & ROBERT N. RAFSON, *BROWNFIELDS: REDEVELOPING ENVIRONMENTALLY DISTRESSED PROPERTIES* 10 (1999) [hereinafter *DISTRESSED PROPERTIES*].

¹⁸ Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Justice?* 56 WASH. & LEE L. REV. 111, 142 (1999).

¹⁹ Grayson & Palmer, *supra* note 9, at 10340.

²⁰ Within the last three years in particular, legislative initiatives at both the federal level and in New York State have given priority to removing the barriers to brownfields redevelopment created not only by CERCLA, but by its state counterparts. *See* Daniel Riesel et al., *Federal and State Brownfields Initiatives*, 438 PRAC. LAW INST. 281 (1999); David J. Freeman & Gregory R. Belcamino, *Brownfields Redevelopment Becomes Priority Focus on Federal, State Programs*, N.Y.L.J., Mar. 8, 1999, at 9 (highlighting various legislative initiatives).

²¹ William A. Shutkin, *Realizing the Promise of the New Environmental Law*, 33 NEW ENG. L. REV. 691, 697 (1999).

²² *See id.*

Against the backdrop of brownfields redevelopment is the issue of environmental justice—defined by the EPA as the “fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies”²³ — which is often at odds with profit-motivated cleanup and planning for subsequent use.²⁴ Because the vast majority of brownfields are located in economically-distressed inner-city cores whose residents are, by and large, minorities and the poor, these populations bear a disproportionate share of the negative environmental consequences resulting from these sites.²⁵ As environmental justice advocates seek “to build healthy and sustainable communities”²⁶ through community participation in brownfields redevelopment, tension arises because their goals and those of brownfields initiatives designed to lessen fear of liability under state and federal environmental laws often conflict.²⁷ Government, with its dual, and sometimes bifurcated, objectives of economic development and environmental protection, tends to get mired in bipartisan haggling where “[t]oo often, politics carry the day, getting in the way of effective environmental and development decisionmaking.”²⁸ Furthermore, because of its cumbersome nature, government lacks the ability to “respond quickly to changed circumstances, to experiment, to serve isolated or discrete interests

²³ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, Environmental Justice Index, at <http://www.epa.gov.swerosps/ej/index.html> (collected on Jan. 21, 2000, on file with the Buffalo Env'tl Law J.).

²⁴ See Kristen L. Raney, *The Role of Title VI in Chester Residents v. Seif: Is the Future of Environmental Justice Really Brighter?*, 14 J. NAT. RESOURCES & ENVTL. L. J. 135, 150 (1999) (considering the case at hand—one alleging that the Pennsylvania Department of Environmental Protection discriminates in the process by which it grants waste facility permits—in the broader brownfields context and asserting that “the redevelopment of brownfields is in direct conflict with the goals of environmental justice”). *Id.*

²⁵ See COMING CLEAN, *supra* note 8, at Chap. 2, 13.

²⁶ *Id.*

²⁷ See Eisen, *supra* note 16, at 205.

²⁸ Shutkin, *supra* note 21, at 699.

that lack public support.”²⁹

Where governmental institutions and for-profit organizations fall short in handling the sensitive and complicated issues surrounding the redevelopment of brownfields, the nonprofit sector, which “exist[s] to correct market and government failures”³⁰ can play a vital role. This comment will discuss that role and the extent to which legislative initiatives in brownfields redevelopment should (and in some cases do) give special consideration to the third sector.³¹

Part I of this comment discusses the legal background of the nonprofit sector generally, then describes specific organizational purposes for which nonprofits may be granted tax exemption by the Internal Revenue Service in redeveloping brownfields. Part II describes a new paradigm of sustainable development—termed eco-development—which is a new form of environmentalism that encompasses the multidisciplinary approach to cleanup and subsequent land use endeavors. A not-for-profit’s plan for developing the Buffalo Forge site will also be discussed in Part II. Part III distinguishes the two types of nonprofit entities involved in brownfields—community-based organizations, which may serve

²⁹ Barbara K. Bucholtz, *Reflections of the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL’Y 555, 565 (1998) (discussing Lester M. Salamon’s examination of “government failure”). See LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 8, 9 (1992).

³⁰ Avner Ben-Ner, *Who Benefits from the Nonprofit Sector? Reforming Law and Public Policy Towards Nonprofit Organizations*, 104 YALE L.J. 731, 756 (1994). “Nonprofit organizations . . . come into existence when for-profit firms and the government fail to meet the demands of certain groups in a particular market.” *Id.* at 734. One example would be the demand for quality day care. Consumers, sponsors, and donors may lack the capacity to monitor and evaluate a for-profit’s services, while the government does not have structures in place to correct the failures of for-profit entities. See *id.*

³¹ The nonprofit sector of society has been termed the “independent sector”, the “voluntary sector”, the “philanthropic sector”, as well as the “third sector” (the other two sectors being the governmental and for-profit sectors). See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 5 (1998) [hereinafter *LAW OF TAX-EXEMPT*]; JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 1 (1995) [hereinafter *NONPROFIT*].

multiple functions, and nonprofits specifically set up for the purpose of developing brownfields. Additionally, Part III will discuss a study of nonprofit organizations from around the country who are engaged in brownfields redevelopment. Specifically, the study set out to identify and investigate various value-added claims relative to nonprofits involved in these ventures. Part IV discusses current and proposed legislative initiatives in New York State which grant nonprofits special status when they engage in remediating the State's abundant brownfields. The use of tax credit incentives relative to not-for-profits (tax-exempt entities) will be given particular focus. Finally, Part V gives an overview of arguably the most important concern in redeveloping brownfields, that of environmental justice. With the vast majority of these sites located in our nation's poorest neighborhoods, it is essential that brownfields efforts embrace environmental justice as an intrinsic goal.

PART I: NONPROFIT ORGANIZATIONS— LEGAL BACKGROUND

Nonprofit organizations are generally encompassed by the Internal Revenue Code at Title 26, Section 501(c) which exempts from federal income taxes those listed organizations that meet the statutory criteria.³² The organizations that qualify for tax exemption are generally deemed to confer some benefit on society and are thus called nonprofits, though they may, and sometimes do, earn profits.³³ A key distinction between a for-profit entity and a nonprofit—one that has been granted its coveted tax-exempt status by the IRS—is the prohibition against any private inurement.³⁴ That is, the nonprofit may not “distribute its profits (net earnings) to those who control it (such as directors and officers).”³⁵ Section 501(c) covers not only “charitable organizations” but also:

³² 26 U.S.C. § 501(c) (1997).

³³ See NONPROFIT, *supra* note 31, at 1.

³⁴ See LAW OF TAX-EXEMPT, *supra* note 31, at 5.

³⁵ *Id.*

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.³⁶

Will an environmental nonprofit engaged in brownfields redevelopment be deemed to possess the requisite purpose, so that it qualifies for tax-exemption? On whether such an entity's organizational purpose would qualify for 501(c)(3) status, the IRS announced that "efforts to preserve and protect the natural environment for the benefit of the public constitute a charitable purpose."³⁷ The Service noted that Congress recognizes conservation and protection of resources "as serving a broad public benefit,"³⁸ having earlier established that environmental conservancy is a charitable purpose.³⁹ More on point with the redevelopment of

³⁶ 26 U.S.C. § 501(c)(3) (1997).

³⁷ Rev. Rul. 80-278, 1980-42 I.R.B. 8.

³⁸ *Id.*

³⁹ Rev. Rul. 76-204, 1976. The organization seeking the Service's ruling had been formed by a multi-disciplinary group of scientists, educators, conservationists, and representatives of the community. The organization acquired land either as a recipient of a charitable gift or bequest, or as a purchaser. The Service

brownfields, the tax-exempt status of an organization was upheld where its organizational purpose went beyond environmental conservancy to actual restoration.⁴⁰

In order to qualify for income tax exemption under Section 501(c)(3) of the Code, an organization must be “organized and operated exclusively” for one or more of the purposes set forth therein.⁴¹ A nonprofit entity organized to engage in brownfields redevelopment is likely to meet the criteria based on the charitable, scientific, and educational purposes.⁴²

A. *Organized for Charitable Purposes*

The term “charitable” has been defined to include: lessening of the burdens of government, promotion of social welfare by organizations designed to accomplish the various purposes, promotion of social welfare by organizations designed to combat community deterioration, and advancement of education or science.⁴³ A nonprofit organization engaged in assisting local governments by researching and developing solutions for “common regional problems” was found to qualify under § 501(c)(3).⁴⁴ In that ruling, the Service held that “assisting the municipalities of a particular region in the study of problems such as water and air pollution, transportation, water resources, and waste disposal is charitable within the meaning of the applicable regulations since it lessens the

noted that “by acquiring and preserving (whether by self-maintenance or through transfer to a governmental agency) ecologically significant undeveloped land, the organization is enhancing the accomplishment of the express national policy of conserving ... resources” and is “enhancing education and science and is benefiting the public in a manner that the law regards as charitable.” *Id.*

⁴⁰ *Dumaine Farms v. Commissioner of Internal Revenue*, 73 T.C. 650 (1980).

⁴¹ 26 U.S.C. § 501(c)(3) (1997).

⁴² *See id.*

⁴³ Treas. Reg. § 1.501(c)(3)-1(d)(2).

⁴⁴ Rev. Rul. 70-79, 1970.

burdens of government.”⁴⁵ Additionally, the environmental purposes for which the entity was formed were deemed educational activities.⁴⁶

The Service applies a facts and circumstances test in determining whether an organization is lessening the burdens of government, with special consideration as to (1) “whether the organization’s activities are activities that a governmental unit considers to be its burden” and (2) “whether such activities actually ‘lessen’ such governmental burden.”⁴⁷ In its ruling, the IRS announced that an effective working relationship between the governmental unit and the entity creates a strong presumption in favor of exemption.⁴⁸ There is no doubt that environmental cleanup and redevelopment efforts are a function of all levels of government.⁴⁹ Nonprofit entities considering brownfields redevelopment will want to consider forging these “effective working relationships” with applicable governmental units as a means of qualifying for the “lessening the burdens of government” element.⁵⁰

Organizations that are exempt under the Code may engage in a limited amount of legislative activity.⁵¹ If a substantial amount of lobbying or any amount of electioneering is engaged in (even if such activities are in furtherance of the its exempt purposes), the entity will not qualify for exemption.⁵² An entity considering brownfields as its mission needs to carefully consider its status in this regard, as the tax-

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Rev. Rul. 85-2, 1985.

⁴⁸ *Id.*

⁴⁹ *See Freeman, supra* note 20, at 9. “The redevelopment of brownfields has become a priority for federal, state and local governments.” *Id.*

⁵⁰ Rev. Rul. 85-2, 1985.

⁵¹ 26 U.S.C. § 501(c)(3) (1997).

⁵² ALLEN R. BROMBERGER & LIVIA D. THOMPSON, GETTING ORGANIZED 128 (1993). If an organization is found to be an “action” organization, that is, if a substantial part of its activities are involved in attempting to influence legislation, it cannot qualify under § 501(c)(3), though may qualify under § 501(c)(4). Treas. Reg. § 1.501(c)(3)-1(c)(3). Donations to organizations which are exempt under § 501(c)(4) are not tax-deductible to the donor. *See id.* at 129; LAW OF TAX-EXEMPT, *supra* note 31, at 293.

deductibility of donations is only conferred on § 501(c)(3) organizations.⁵³ The qualified charitable donees are “eligible to attract charitable contributions that are deductible for federal tax purposes.”⁵⁴ Since a key obstacle to brownfields redevelopment is up-front financing to acquire and investigate the property⁵⁵, access to grants, foundation support and other charitable gifts put nonprofits at an important advantage in brownfields redevelopment.⁵⁶

Relative specifically to urban problems and programs, the IRS has asserted that “combating community deterioration in the ‘charitable’ sense involves remedial action leading to the elimination of the physical, economic and social causes of such deterioration.”⁵⁷ Supporting the remedial action concept, an organization that had been “created to develop and disseminate a land use plan . . . [that] offer[ed] solutions in major urban problem areas” was held to be exempt.⁵⁸ Additionally, such a plan serves to educate the public on community concerns.⁵⁹ The Service has consistently applied its position that combating community deterioration was a charitable purpose for which entities were granted exempt status.⁶⁰

B. *Organized for Scientific Purposes*

In brownfields redevelopment, “technical expertise is available in many different forms from community and nonprofit

⁵³ I.R.C. §§ 170(c)(2) (income tax deduction), 2055(a)(2) (estate tax deduction), 2522(b)(2) (gift tax deduction).

⁵⁴ LAW OF TAX-EXEMPT, *supra* note 31, at 85.

⁵⁵ See Charles Bartsch, *The Color of Redevelopment*, AMERICAN CITY AND COUNTY, Nov. 30, 1999, at B-2 (discussing the high price of brownfields cleanup generally, beginning with site assessment). See also ROBERT S. BERGER, ET AL., A ROLE FOR NON-PROFITS IN BROWNFIELD REDEVELOPMENT: BROWNFIELD ACTION PROJECT 3-16 (1999) [hereinafter BAP REPORT].

⁵⁶ BAP REPORT, *supra* note 55, at 4-10.

⁵⁷ Rev. Rul. 67-6, 1967.

⁵⁸ Rev. Rul. 67-391, 1967.

⁵⁹ *Id.*

⁶⁰ See Rev. Rul. 76-147, 1976; Rev. Rul. 68-655, 1968.

organizations.”⁶¹ Often other not-for-profit groups—some that are issue-specific organizations—will partner with community groups and nonprofits to provide a wide range of technical assistance, including environmental assessment, end user identification and redevelopment strategies.⁶² A multi-disciplinary plan is essential to any brownfields problem.⁶³ Four tests must be met for the Service to conclude that an organization qualifies as an exempt scientific organization under the Code: (1) whether the organization conducts scientific research, (2) whether the scientific research is conducted incident to commercial or industrial operations, (3) whether the organization meets the specific public interest tests in Reg. 1.501(c)(3)-1(d)(5)(iii) and (iv), and (4) whether the organization meets the general public interest test in Reg. 1.501(c)(3)-1(d)(1)(ii).⁶⁴ Similar to the concept of nonprofits engaged in brownfields redevelopment, a Missouri district court actually addressed the specific issue of encouragement of industrial development.⁶⁵ On the question of whether scientific research performed by an independent nonprofit organization for private sponsors qualified as tax-exempt, the court held that it did “at least when the research is performed for the purpose of aiding industrial development in a particular geographic area.”⁶⁶ Similarly, a nonprofit entity whose research contracts were directed toward stimulating industrial growth and technological development was found to have performed those contracts in the public interest and thus were substantially related to the organization’s exempt functions.⁶⁷ Though brownfields

⁶¹ DISTRESSED PROPERTIES, *supra* note 17, at 170.

⁶² *Id.*

⁶³ See generally Shutkin, *supra* note 21; THE PHOENIX LAND RECYCLING COMPANY, A Non-Profit Organization Working for the Redevelopment of Discarded Sites, at <http://www.brownfieldsnet.org/moreplrc.htm> (collected on Oct. 9, 1999 on file with the Buffalo Env'tl Law J.).

⁶⁴ Treas. Reg. § 1.501(c)(3)-1(d)(5).

⁶⁵ *Midwest Research Institute v. United States*, 554 F.Supp. 1379 (W.D. Mo. 1983).

⁶⁶ *Id.* at 1391.

⁶⁷ *IIT Research Institute v. United States*, 9 Cl.Ct. 13.

redevelopment is a relatively new concept, consensus is building that it can present a “unique opportunity to solve many problems concurrently.”⁶⁸ Curbing sprawl, making more efficient use of land, improving air quality, reducing traffic congestion and preserving open space and farmland are but some of the goals.⁶⁹ To that end, a host of players from various scientific (and social) disciplines need to be assembled, but, in the words of the founder of a nonprofit environmental organization specializing in this area, “[c]urrently, few institutions exist that are dedicated to spearheading and facilitating eco-development projects.”⁷⁰

C. *Organized for Educational Purposes*

Education, for federal tax purposes, goes beyond formal schooling.⁷¹ Relative to brownfields redevelopment, the concept of “educational” relates to the “instruction of the public on subjects useful to the individual and beneficial to the community.”⁷² At issue before the court in a case involving seed certification for a university was whether the association was organized and operated exclusively for exempt purposes.⁷³ The IRS argued that the educational activities primarily benefited “the business interests of commercial seed producers and commercial farmers and only incidentally benefit the public.”⁷⁴ But the court held that the educational activities served a dual purpose, both “to instruct individuals for the purpose of improving their capabilities as well as to instruct the public on

⁶⁸ ANN EBERHART GOODE, ET. AL., GUIDE TO FEDERAL BROWNFIELD PROGRAMS 2 (Oct. 1999), available at http://www.nemw.org/BF_fedguide.htm.

⁶⁹ *Id.* at 3.

⁷⁰ Shutkin, *supra* note 21, at 703. Professor Shutkin is the President of New Ecology, Inc. which focuses its attention in hard-hit urban communities in New England.

⁷¹ See LAW OF TAX-EXEMPT, *supra* note 31, at 167.

⁷² Treas. Reg. § 1.501(c)(3)-1(d)(3)(i).

⁷³ Indiana Crop Improvement v. Commissioner, 76 T.C. 394 (1981).

⁷⁴ *Id.* at 400.

subjects beneficial to the individual and the community.”⁷⁵

In the complicated brownfields context, where the “integration of multiple disciplines (law, science, finance, engineering, and public policy among others)”⁷⁶ are teamed with and represent governmental entities, as well as for-profit concerns, the third critical “teaming element is community participation.”⁷⁷ Indeed, not only because community support is essential to development success, but also because environmental justice issues have come to the fore, “[f]ederal legislators have incorporated this idea of broad community participation into several recent bills which address hazardous waste.”⁷⁸ In implementing the goal of community participation, specific recommendation has been made that public dialogue—obtaining comment and generating ideas—“contain an educational component.”⁷⁹

PART II: ECO-DEVELOPMENT & NONPROFITS

William A. Shutkin, who founded an environmental nonprofit that specializes in sustainable development, explains that the three elements of eco-development are brownfields, smart growth, and industrial ecology—all “policy initiatives aimed at protecting the environment while promoting sustainable economic development.”⁸⁰ This triad forms a new “paradigm of environmental policy,” a synergistic and cohesive approach whose time is now.⁸¹ Interests

⁷⁵ *Id.*

⁷⁶ Madeline June Kass et al., *Brownfields: Where the Market Makes Green*, 13 NAT. RESOURCES & ENV'T 345, 347 (1998).

⁷⁷ *Id.*

⁷⁸ Kris Wernstedt & Robert Hersh, “*Through a Lens Darkly*”—*Superfund Spectacles on Public Participation at Brownfields Sites*, 9 RISK: HEALTH SAFETY & ENV'T 153, 154 (1998).

⁷⁹ *See id.* (discussing the presentation made by John Chambers and Michelle Meertens who suggested ways to improve public outreach efforts at the Brownfields 1997 Conference).

⁸⁰ Shutkin, *supra* note 21, at 691.

⁸¹ *Id.* at 697.

formally seen as oppositional—“such as suburban-versus-urban, or industrial-versus-environmental”—are now woven together with a common mission, that of ameliorating blight and sprawl.⁸² In describing a blighted area of Boston—South Bay—a typical example of so many inner-city cores throughout the nation today—Shutkin eloquently states that it is “an example of land use as a window to the soul of American society.”⁸³

It tells the story of a society that has given up on its inner-cities, wantonly abused the urban environment, locked up many of its young people, and, in the course of its flight from the urban core, paved over its edge-cities and suburbs with massive roadway projects, office parks, malls, and subdivisions.⁸⁴

Key to environmentalism, economic development and community revitalization is primacy of land use, with suburbanization playing the most significant role in the environmental harms we face today.⁸⁵ As upwardly-mobile Americans made their exodus from the cities to the suburbs, they never could have imagined that their quest for clean air and green lawns would result in the smog, traffic and sprawl evident today.⁸⁶ Yet despite the key role land use plays towards goals of environmental protection, “it has been the orphan of environmental law and policy.”⁸⁷

That sustainable development is directly relevant to a discussion of brownfields is evident.⁸⁸ “The link between

⁸² *Id.*

⁸³ *Id.* at 694.

⁸⁴ *Id.*

⁸⁵ *See id.* at 695. *See generally* Shelby D. Green, *The Search for a National Land Use Policy: for the Cities' Sake*, 26 *FORDHAM URB. L.J.* 69 (1998).

⁸⁶ Shutkin, *supra* note 21, at 695.

⁸⁷ *Id.*

⁸⁸ Eisen, *supra* note 16, at 189. *See also* John Pendergrass, *Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health*, 29 *ENVTL. L. REP.* 10243 (1999).

brownfields and sustainability seems obvious.”⁸⁹ Various initiatives have recently come about touting that principle. For example, the \$9.5 billion in “Better America Bonds” was authorized to promote “smart growth,” the Environmental Protection Agency “seemingly cannot describe any of its brownfields policies without pairing the phrases ‘sustainable’ and ‘reuse of brownfields,’” and the “Brownfields National Partnership Action Agenda” lists initiatives formulated to promote “sustainable reuse.”⁹⁰

A. *Brownfields Policies Addressing Sustainable Development*

“[E]co-development is the means by which sustainability is realized.”⁹¹ Though the federal government has instituted some brownfields initiatives linked to sustainability, “the primary initiators of change have been the states.”⁹² To date, forty states have developed voluntary cleanup programs (VCPs) intended to accelerate the cleanup of brownfields sites, but no two states have identical programs (though the process is similar in most states).⁹³ State programs are voluntary and commence with a developer expressing interest in investigating and remediating a site.⁹⁴ An investigation ensues to ascertain the level of contamination, with the developer then remediating the site to “site specific” cleanup standards.⁹⁵ At the end of the process, the developer is given liability protection from the state, though generally not from the federal government.⁹⁶

On the federal level, the EPA’s “Brownfields Economic Redevelopment Initiative” includes a number of initiatives targeted

⁸⁹ Eisen, *supra* note 16, at 189.

⁹⁰ *Id.* at 189-190.

⁹¹ Shutkin, *supra* note 21, at 691.

⁹² Eisen, *supra* note 16, at 192.

⁹³ *Id.* at 193. *See also* Riesel, *supra* note 20, at 288.

⁹⁴ Eisen, *supra* note 16, at 193.

⁹⁵ *Id.*

⁹⁶ TURNING BROWNFIELDS, *supra* note 12, at 21-4.

to pilot projects and “Brownfields Showcase Communities” that enable cities to serve as laboratories in the cleanup and sustainable reuse of their brownfields.⁹⁷ Additionally, Congress has authorized a tax deduction for brownfields redevelopment,⁹⁸ and has also “reduced the risk of liability under CERCLA for lenders involved with brownfields sites.”⁹⁹

Despite all these efforts, “[d]eveloping ‘indices of ecosystem sustainability’ is obviously not something accomplished overnight.”¹⁰⁰ A critical problem keeping the eco-development model from being fully realized is that “existing institutions across sectors are not equipped to take advantage” of these promising new opportunities.¹⁰¹ The private sector remains fixated “on the traditional bottom line” and lacks the vision to see how this new paradigm could provide a competitive advantage.¹⁰² Similarly, the government sector is ill-equipped to implement these “integrated, comprehensive, planning-oriented policies.”¹⁰³ Even traditional third sector nonprofit environmentalists are not accustomed to this new model—one that involves cooperation and planning by multiple disciplines.¹⁰⁴ In short, eco-development as a paradigm has evolved faster than “the existing institutional infrastructure”¹⁰⁵ because “existing institutional stakeholders are not equipped to capitalize on

⁹⁷ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, Environmental Justice Index, at <http://www.epa.gov.swerosps/ej/index.html> (collected on Jan. 21, 2000, on file with the Buffalo Env'tl Law J.).

⁹⁸ Eisen, *supra* note 16, at 194 (referring to The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 941(a), 111 Stat. 882 (1998)). *Id.*

⁹⁹ Eisen, *supra* note 16, at 194 (referring to The Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, to be codified as amended in scattered sections of 42 U.S.C.).

¹⁰⁰ Eisen, *supra* note 16, at 219.

¹⁰¹ Shutkin, *supra* note 21, at 691.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 697.

its underlying environmental and social policy goals.”¹⁰⁶

New institutions are needed now that can not only coordinate the stakeholders in each sector, but that have “the know-how and the public spirit of the third sector.”¹⁰⁷ Some of these new brownfields redevelopment players have already come into existence—they are a new breed of nonprofit organization, and they are beginning to fill a critical niche.¹⁰⁸

B. *Eco-Industrial Development*

Closely related in concept to eco-development is eco-industrial development, another innovative model for “managing businesses and conducting economic development” while focusing on environmental protection—goals which can no longer be viewed as mutually exclusive.¹⁰⁹ “By creating linkages among local ‘resources,’ including businesses, nonprofit groups, governments, unions, and educational institutions, communities can creatively foster dynamic and responsible growth. Antiquated businesses strategies, based on isolated enterprises, are no longer responsive to market, environmental, and community requirements.”¹¹⁰ Eco-industrial activity seeks to create inter-connections between companies—where often one company uses materials to sustain its business found in another company’s waste stream.¹¹¹ One form of eco-industrial development is the Eco-Industrial Park, where a community of

¹⁰⁶ Shutkin, *supra* note 21, at 697.

¹⁰⁷ *Id.* at 704.

¹⁰⁸ Some of these organizations have formed The Brownfields Non-Profits Network, sponsored by the Center for Land Renewal and Clean Sites, with support from the Howard H. and Vira I. Heinz Endowments. The Network’s website can be found at <http://www.brownfieldsnet.org/> (collected Feb. 16, 1999, on file with the Buffalo Env’tl Law J.).

¹⁰⁹ See ECO-INDUSTRIAL DEVELOPMENT PROGRAM, What is Eco-Industrial Development?, at <http://www.cfe.cornell.edu/wei/glossy.html> (collected Feb. 10, 2001, on file with the Buffalo Env’tl Law J.).

¹¹⁰ *Id.*

¹¹¹ See generally *Green Dream*, *supra* note 2.

enterprises joins forces, and “[t]hrough high performance work systems, market linkages, closed loop waste exchanges, human and technical resource sharing, and ‘real time’ electronic communication” significantly improve their operating performance and market presence.¹¹² This synergistic model is ideal for the redevelopment of brownfields, where—although assessment and remediation efforts have progressed—end use options have been elusive.¹¹³

A nonprofit organization made up of local government representatives and private companies is studying the feasibility of transforming the old Buffalo Forge facility into such an eco-industrial park.¹¹⁴ The old plant is located in a redevelopment home zone where 100 new homes have been built (many on Spring Street, facing the giant structure) but employment opportunities in the area have been few.¹¹⁵ This means that there are potential employees residing in the immediate neighborhood of the envisioned park. The concept is that a group of businesses would work within the park, sharing facilities such as conference areas, computer rooms, laboratory, library and employee day care center, while recycling waste from each other—benefiting the economy, the local community, and the environment all at the same time.¹¹⁶

PART III: COMMUNITY BASED ORGANIZATIONS & NONPROFIT INTERMEDIARIES

Under the rubric of nonprofit entities involved in brownfields redevelopment are two general types—community based

¹¹² ECO-INDUSTRIAL DEVELOPMENT PROGRAM, *Eco-Industrial Development: Growing in the United States*, at <http://www.cfe.cornell.edu/wei/glossy.html> (collected Feb. 10, 2001, on file with the Buffalo Env'tl Law J.).

¹¹³ ECO-INDUSTRIAL DEVELOPMENT PROGRAM, *Community Investment in the Future*, at <http://www.cfe.cornell.edu/wei/glossy.html> (collected Feb. 10, 2001, on file with the Buffalo Env'tl Law J.).

¹¹⁴ *See Green Dream, supra* note 2. The name of the organization is Green/Gold Development Corp.

¹¹⁵ *See id.*

¹¹⁶ *See id.*

organizations (CBOs) and what has been termed nonprofit intermediaries¹¹⁷ who work in partnership with CBOs.

A community interested in the redevelopment of a brownfield will likely be comprised of various stakeholders—residents, businesses, landowners, environmental groups, religious groups, and health organizations—each with diverse concerns.¹¹⁸ These stakeholders are encountered in groups which “range from longstanding formal organizations to spontaneous, informal coalitions formed around a single issue or cause.”¹¹⁹ Communities play a critical role throughout the process of brownfields redevelopment, and their “readiness, capacity, and support” dictate whether the projects move forward or not.¹²⁰

Communities that are not ready for redevelopment projects may at best be unable to help facilitate a project, and at worst may oppose an otherwise good project out of fear or uncertainty. Communities that *are* ready have organized a working consensus among the stakeholders, have clarity about their vision for the future, and have created the institutional vehicles needed to implement their plans. This enables them to provide important additional assistance and—in the more sophisticated communities—to act as partners throughout the process, from planning to implementation.¹²¹

Developing a shared vision and a working consensus in the

¹¹⁷ See DISTRESSED, *supra* note 17, at 167.

¹¹⁸ See *id.* at 160-161. Property owners may be concerned with property values, safety, health, traffic, noise, job opportunities, and schools; while industrial businesses may be concerned with truck access, parking, security, and a local supply of labor. See *id.*

¹¹⁹ *Id.* at 160.

¹²⁰ See *id.* at 161.

¹²¹ *Id.*

community may be time consuming and hard won. However, once a community has created a broadly held common agenda about what it hopes to achieve—whether to increase affordable housing, meet retail needs, create job opportunities, and/or eliminate environmental hazards—it can then “make a significant impact on the redevelopment potential of a site.”¹²² Additionally, sustainability issues such as infrastructure needs, safety problems, beautification, and amenities can most effectively be addressed at the community level, and can rarely be dealt with on a “property-by-property basis.”¹²³

Once consensus has been reached, the community may form a CBO—a nonprofit entity organized to promote development within a certain geographic area. Alternatively, an existing CBO, organized for more general purposes and functioning in other ways, may assist in the planning and redevelopment of a brownfields site. In either case, the CBO’s board of directors includes residents and other key stakeholders from the relevant community.¹²⁴ If the CBO is sophisticated enough, has done up-front planning, and has laid the foundation for strategic redevelopment, it may be ready to implement a brownfields plan.¹²⁵ Alternatively, the CBO or other community group may partner with a nonprofit intermediary organization that exists, or is set up, to facilitate brownfields redevelopment.¹²⁶

As to brownfields redevelopment, these nonprofit intermediary organizations are new players whose involvement can range from accepting donated property to providing predevelopment

¹²² *Id.* at 165.

¹²³ *See id.*

¹²⁴ In New York State, the proposed legislation that would favor nonprofits involved in brownfields defines “community based organization” as “a not-for-profit corporation incorporated under state and federal laws to promote development within a specified geographic area and whose board of directors shall include but not be limited to residents of the community or communities in such area.” Draft of THE BROWNFIELDS COALITION: Proposed Legislation, § 973-c(c), Nov. 16, 1999, at 1-3.

¹²⁵ *See* DISTRESSED, *supra* note 17, at 167.

¹²⁶ *See id.*

funds for site investigation/analysis.¹²⁷ The mix of services these nonprofits offer varies depending on their market and funding sources.¹²⁸ These nonprofit intermediaries are distinct from CBOs in that they are specifically organized to facilitate brownfields redevelopment and they may not be located in the community where the envisioned redevelopment is to occur. These new third sector organizations are filling the critical niche necessary to achieve eco-development, as they play many roles that add value to brownfields projects.¹²⁹

A. *A Study of Nonprofits—Brownfield Action Project*

In 1999, a coalition of university professors of various disciplines—law, planning and engineering—from the University at Buffalo (called the Brownfield Action Project—BAP)¹³⁰ examined the roles these new nonprofits play in brownfields redevelopment. After gathering data on eleven nonprofit entities from around the country who are involved in brownfields, BAP issued its report,¹³¹ identifying “14 different value-added claims which were grouped into

¹²⁷ *See id.*

¹²⁸ *See id.* at 168.

¹²⁹ *See id.*

¹³⁰ Members of the BAP team were: Robert S. Berger, Professor, State University of New York at Buffalo School of Law; Thomas F. Disare, Clinical Associate Professor, State University of New York at Buffalo School of Law; Ramon C. Garcia, State University of New York at Buffalo School of Planning and Architecture; G. William Page, Professor, State University of New York at Buffalo School of Planning and Architecture; A. Scott Weber, Professor, State University of New York at Buffalo School of Engineering and Applied Science; and Louis P. Zicari, Associate Director, State University of New York at Buffalo Center for Integrated Waste Management.

¹³¹ *See also* Ellen Goldbaum, *Report Urges Action on Brownfields*, UNIV. AT BUFFALO REPORTER, Oct. 21, 1999 at 1. *See generally* BAP REPORT, *supra* note 55. (The BAP team members authored the report, which was funded by the State University of New York at Buffalo Environment and Society Institute and the State University of New York at Buffalo Center for Integrated Waste Management.) *See supra* note 104.

three general categories.”¹³² The reason for the study was to assess and evaluate the “desirability of creating a brownfield redevelopment non-profit in Western New York,”¹³³ a region, like so many throughout the northern and eastern United States, with “thousands of acres of industrial brownfields”¹³⁴ to redevelop.

BAP looked at how each of these nonprofits offers its own array of services. For example, these organizations may provide assistance to the governmental and for-profit sectors by structuring deals or providing training.¹³⁵ Some come into ownership of the problem properties and one uses options to gain site control without taking ownership.¹³⁶

The three general categories of valued-added claims analyzed by the university group were: increased flexibility in the types of projects chosen, approaches taken, and goals; improved access to funding, services, and other benefits; and a better ability to fill a role as coordinator or facilitator.¹³⁷ These nonprofit players were new to the game at the time of the study, “becom[ing] involved in brownfield redevelopment only over the last two or three years,” so that BAP was careful to note that support of these claims was limited.¹³⁸

The first claim examined was of increased flexibility in what projects are chosen and their attendant approaches/goals. BAP surveyed the eleven nonprofits regarding three sub-claims of added value that these entities possess over governmental or profit-motivated organizations. They were: that nonprofits are more responsive to community needs, and/or more likely to address environmental justice issues; that they are able to target smaller, more complicated, and less marketable projects; and that they are impliedly

¹³² BAP REPORT, *supra* note 55, at 1-4.

¹³³ *Id.* at iv.

¹³⁴ *How to Avoid Destructive Competition*, BUFFALO NEWS, June 23, 1999, at B-2.

¹³⁵ *See* DISTRESSED PROPERTIES, *supra* note 17, at 168.

¹³⁶ *Id.* *See also* *UB Eyes Creation of Not-for-Profit Firm to Develop Brownfield Sites*, BUFFALO NEWS, Nov. 5, 1999, at A-10.

¹³⁷ *See* BAP REPORT, *supra* note 55, at 2-1.

¹³⁸ *Id.* at 1-4.

better able to target projects that contribute to brownfields research and that inform broader public policy.¹³⁹ BAP found that the vast majority of the targeted nonprofits seek to work with and have relationships with community-based organizations.¹⁴⁰

It is worth noting that the EPA recognized just how vital community participation is when it issued its Brownfields Action Agenda.¹⁴¹ The main focus of the Action Agenda was the Brownfields Initiative, a program that gives funds to states and municipalities for environmental assessment of certain brownfields sites.¹⁴² One of the salient features to the Initiative “is the call for active community involvement” and a promotion of public participation.¹⁴³ More recent state and federal efforts are being made to improve public participation procedures under traditional environmental laws.¹⁴⁴ However, within the complicated brownfields context where the integration of eco-development requires input from a team of skilled professionals, the “traditional view that community participation is satisfied by a mere opportunity to review and comment on government decisions and policies is defunct.”¹⁴⁵

BAP found that a nonprofit’s financial structure, as well as its origins, influenced its level of community involvement, its response to the needs of the community, as well as the extent to which it is involved in environmental justice.¹⁴⁶ For instance, one nonprofit’s brownfields involvement came about over health concerns stemming

¹³⁹ *Id.* at 2-2.

¹⁴⁰ *Id.* at 3-1.

¹⁴¹ See A COMPREHENSIVE GUIDE, *supra* note 6, at 183.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Johnson, *supra* note 18, at 160-61. “The Resource Conservation and Recovery Act (RCRA), the National Environmental Policy Act (NEPA), and many other laws already allow, but do not require, agencies to provide broader, more flexible public participation procedures, and former President Clinton’s environmental justice executive order encourages federal agencies to take advantage of those authorities.” *Id.*

¹⁴⁵ A COMPREHENSIVE GUIDE, *supra* note 6, at 191.

¹⁴⁶ BAP REPORT, *supra* note 55, at 3-2.

from contaminated properties locally, yet it had originated as a community health center in a poor neighborhood.¹⁴⁷ In contrast, another nonprofit began as a “collaboration between a major utility, a state environmental agency, and a state-wide organization representing municipalities” and while it does provide for community assistance, its primary goal is job-creation.¹⁴⁸ BAP noted that a private foundation’s seed money to a nonprofit often gives it greater flexibility relative to community issues versus more market-driven projects.¹⁴⁹

“Not all brownfields deserve equal attention”¹⁵⁰ because certain brownfields are located on such desirable land, developers are willing to incur whatever costs are necessary to remediate and redevelop. But those brownfields located in our nation’s crumbling inner-cities are not as readily developed. “[B]rownfields redevelopment occurs more often in affluent and predominantly Caucasian areas than it does in areas with many poor and minority residents,” engendering environmental injustice claims.¹⁵¹ Though enthusiasm about the potential for reusing brownfields “has stimulated an impressive range of initiatives at all levels of government,” urban residents are still suffering the inequities and dangers from the “deindustrialization” of American cities.¹⁵²

A report by The Development Fund—a 501(c)(3) organization that develops financing vehicles to procure capital from the private sector for community purposes—outlined a number of obstacles to

¹⁴⁷ *Id.* at 3-3.

¹⁴⁸ *Id.* See also The Development Fund, FIER REPORT OF RESEARCH PHASE: FINANCING INITIATIVE FOR ENVIRONMENTAL RESTORATION, Feb. 1998 [hereinafter FIER REPORT].

¹⁴⁹ BAP REPORT, *supra* note 55, at 3-3.

¹⁵⁰ Kass, *supra* note 76, at 346.

¹⁵¹ Lincoln L. Davies, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 295 (1999).

¹⁵² Michael Allan Wolf, *Dangerous Crossing: State Brownfields Recycling and Federal Enterprise Zoning*, 9 FORDHAM ENVTL. L.J. 495, 495, 497 (1998).

brownfields development.¹⁵³ The organization's report found lenders tended to avoid complicated, high-risk cleanups and that many severely impaired properties were located in areas experiencing depressed real estate values—all making redevelopment very difficult.¹⁵⁴ BAP concluded that in general, smaller, more complicated and less marketable brownfields will be hampered by these barriers, and that while the nonprofits surveyed would like to redevelop them, their newness on the scene made it difficult to judge whether or not they had yet realized that goal.¹⁵⁵

Though the nonprofit entities studied by BAP were “involved in innovative approaches to community redevelopment and environmental remediation models”, BAP concluded that formal research programs were not yet their major focus; none were formally linked with universities; but that they could influence public policy and formation by their “ample opportunities for research.”¹⁵⁶

The second claim BAP assessed was that nonprofits had improved access to funding, services, and other benefits in that they were proficient at financial packaging; had access to governmental grants, foundation funding, and other charitable capital; were better able to negotiate forgiveness of back taxes or provisions of tax abatement to facilitate property redevelopment; were better able to obtain donated properties, money, or services because they can offer tax write-offs; were better able to obtain pro bono and below-market services; and that they possess freedom from taxes.¹⁵⁷

Several of the nonprofits studied had realized some success in financial packaging through the use of various sources: grants, bank loans, private equity, private foundations, and leveraging private and public monies, yet BAP concluded financing “is a persistent problem

¹⁵³ See FIER REPORT, *supra* note 148.

¹⁵⁴ See BAP REPORT, *supra* note 55, at 3-4 (highlighting a sample of the barriers in the FIER REPORT).

¹⁵⁵ *Id.* at 3-6.

¹⁵⁶ *Id.* at 3-7.

¹⁵⁷ See generally *id.*

faced by those concerned with community development.”¹⁵⁸ One of the key advantages 501(c)(3) entities have is that they are able to attract foundation funding and charitable capital to carry out their missions, as well as allow tax write-offs for landowners that donate properties.¹⁵⁹ In assessing whether or not financial resources available to nonprofits gave them added value over the public and private sectors, BAP noted that initiatives like the EPA Brownfield Assessment Demonstration Pilots and the New York State Environmental Bond Act were available to local governments.¹⁶⁰ However, the brownfields nonprofits surveyed did at times attract donations of cash, land or services, and were able to secure foundation funding and government grants.¹⁶¹ Moreover, the exempt status of 501(c)(3) entities make them better able to procure various donations because they can offer tax write-offs, though as of the time of BAP’s findings, few actually had used this opportunity.¹⁶²

Additionally, as tax-exempt organizations, these entities are exempt from paying corporate and franchise taxes under various state laws, are generally exempt from property taxes and from sales taxes at the state and local levels¹⁶³, and from federal income tax stemming from their operations, whereas their for-profit counterparts are not.¹⁶⁴

On the sub-claim that nonprofits were better able to negotiate forgiveness of back taxes or provision of tax abatements facilitating property redevelopment, the BAP study concluded that some indeed were, but this added-value claim was location-dependent.¹⁶⁵ Indeed, in some areas, private developers are “provided tax forgiveness as a

¹⁵⁸ *Id.* at 3-8, 3-9.

¹⁵⁹ FIER REPORT, *supra* note 148, at 39.

¹⁶⁰ BAP REPORT, *supra* note 55, at 3-9.

¹⁶¹ *Id.* at 3-10.

¹⁶² *Id.* at 3-11.

¹⁶³ See Bucholtz, *supra* note 29, at 561-62.

¹⁶⁴ See LAW OF TAX-EXEMPT, *supra* note 31, at 7.

¹⁶⁵ BAP REPORT, *supra* note 55, at 3-10. The Report went on to note that the 1996 New York State Bond Act has been interpreted by the NYSDEC to give “special status” to property owned by nonprofits relative to their eligibility for Bond Act financing. *Id.* at 4-4.

development incentive.”¹⁶⁶

Regarding a nonprofit’s ability to obtain pro bono professional services, BAP found that at least five of the organizations obtained these services, but it was conceivable that the public sector may also be the recipient of pro bono and below market services.¹⁶⁷

The third value-added claim BAP examined was that these organizations are better able to fill a role as coordinator/facilitator, because they have the specialized knowledge required for brownfield redevelopment; that they have the contacts and relationships necessary to facilitate brownfield redevelopment; that they are better able to educate about and advocate for brownfield redevelopment; that they have up-front money available for the environmental assessment and characterization stage of brownfield development; and that they are more likely to be viewed as a neutral third party.¹⁶⁸

Brownfields, under the larger umbrella of eco-development, requires “initiating and coordinating multi-stakeholder, interdisciplinary strategies that promote long-term environmental solutions.”¹⁶⁹ The complex redevelopment of brownfields demands a whole host of actors from the legal, economic, scientific, and social policy fields. The BAP study concluded that nonprofits are able to add value by combining these “numerous and varied disciplines” in brownfields redevelopment.¹⁷⁰ Stemming also from the complexities inherent in brownfields, numerous regulatory entities and agencies, as well as financial institutions, play key roles that affect a nonprofit’s ability to accomplish its mission. Those organizations surveyed by BAP found that forging working relationships with these other

¹⁶⁶ *Id.* at 3-10.

¹⁶⁷ *Id.* at 3-11.

¹⁶⁸ *See generally id.*

¹⁶⁹ Shutkin, *supra* note 21, at 702. Professor Shutkin coins the term “civic environmentalism” whereby new institutions “link and coordinate the various existing stakeholders across each sector, while adding value through disseminating and deploying knowledge and information about best practices, storehousing lessons, ideas, and networks, facilitating local planning and community development strategies, and enacting public values and vision.” *Id.*

¹⁷⁰ BAP REPORT, *supra* note 55, at 3-13.

stakeholders was at times difficult, but that their “unique organizational focus” afforded them a network of professional contacts.¹⁷¹

Technical expertise is available in many different forms from nonprofits.¹⁷² Not only do staff members of the more sophisticated organizations have considerable expertise on their own, they also have access to resources from their board members. Board members “are often selected for their expertise and willingness to provide it—personally or through their companies—at no charge to the nonprofit.”¹⁷³ Nonprofits also have access to issue-specific organizations that can provide “assistance in structuring deals, packaging loans, obtaining media coverage, and so on.”¹⁷⁴ Moreover, the nonprofit can act as an intermediary organization to partner with developers, community organizations and the government.¹⁷⁵

As to whether nonprofits were better able to educate and advocate for brownfields redevelopment, BAP found that these entities indeed serve a valuable role in education and advocacy.¹⁷⁶ This is perhaps the most important added-value nonprofits possess, in light of environmental justice concerns. At sites where “economic development considerations become entangled with site remediation, the objectives of site cleanups are likely to change as different interests get involved in the fray.”¹⁷⁷ “A broad enfranchisement of the public to weigh these tradeoffs and decide upon acceptable cleanup and redevelopment objectives”¹⁷⁸ requires that community members be educated relative to just what is at stake.

The contributions the nonprofit sector makes to the American polity can be subsumed within these

¹⁷¹ *Id.* at 3-15.

¹⁷² See DISTRESSED PROPERTIES, *supra* note 17, at 170.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ BAP REPORT, *supra* note 55, at 3-16.

¹⁷⁷ Wernstedt & Hersch, *supra* note 78, at 172.

¹⁷⁸ *Id.*

categories: (1) participation in the sector teaches the skills of self-rule in the form of consensus-building, decision-making, and concerted action; (2) these three skills in turn develop the habits of compromise, reciprocal respect, tolerance and civility; and (3) the sector itself, both as a totality and through the manifold activities of its constituent organizations, serves to mediate the space between the individual and the other two sectors (governmental and entrepreneurial) by giving “voice,” access, and forum to disparate views and goals and by acting as a ballast—a stabilizing or balancing influence—against overreaching by the other two sectors.¹⁷⁹

As to available money for site assessments, BAP concluded that most banks will not lend funds for site assessments, that cities often lack funds for these purposes, and developers are unwilling to invest in assessments. For this reason, “nonprofits have a significant role to play in site assessment and characterization, especially for smaller and marginal projects.”¹⁸⁰

That nonprofits add value to brownfields redevelopment because they are more likely to be viewed as neutral parties was supported by BAP.¹⁸¹ Because community support and consensus is so vital to brownfields redevelopment, the way an entity is perceived by the public is critical. As background, BAP noted “there is often suspicion among parties involved in the land development process.”¹⁸² For-profit enterprises are generally not perceived as neutral, and even governmental organizations can engender suspicion “when emotionally charged issues such as environmental contamination are involved.”¹⁸³ As to this last value-added claim,

¹⁷⁹ Bucholtz, *supra* note 29, at 603.

¹⁸⁰ BAP REPORT, *supra* note 55, at 3-17.

¹⁸¹ *Id.* at 3-18.

¹⁸² *Id.* at 3-17.

¹⁸³ *Id.* at 3-18.

BAP found that the perception of a nonprofit's neutrality may indeed give it an edge in facilitating projects, over profit-motivated entities, and perhaps even over public organizations.¹⁸⁴

PART IV: NEW YORK STATE'S LEGISLATIVE INITIATIVES: BROWNFIELDS & NONPROFITS

"New York, as the nation's second most populous state, and one of its oldest and most urban, has an abundance of brownfields ... ripe for development if they can be cleaned up."¹⁸⁵ While New York has three important programs¹⁸⁶ and several smaller ones as incentives for the cleanup of brownfields, only those current and proposed initiatives that potentially have an impact on the role of nonprofits in brownfields redevelopment will be addressed.

A. *1996 Bond Act*

Currently, the most significant program, one "with the highest ratio of prominence to actual importance"¹⁸⁷ is the Clean Water/Clean Air Bond Act of 1996.¹⁸⁸ Its \$1.75 billion in bonding authority included \$200 million, called the Environmental Restoration Project Fund, allocated to brownfields cleanups. This sum is the largest brownfields grant program in the country, but its eligibility restrictions have proven to be a major impediment to funding cleanups.¹⁸⁹ One of these impediments for most potential developers is that in order for a site to be eligible for this money, title to the site must be held by a municipality, and the municipality must not have

¹⁸⁴ *Id.*

¹⁸⁵ Michael B. Gerrard, *New York State's Brownfields Programs: More or Less Than Meets the Eye*, ALB. L. ENVTL. OUTLOOK 18 (Winter 1999).

¹⁸⁶ The three programs are the 1996 Bond Act, the Voluntary Remedial Program, and the Title 13 or state Superfund program. *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ N.Y. ENVTL. CONSERV. LAW §§ 56-0101-0611 (McKinney 1997).

¹⁸⁹ Gerrard, *supra* note 185, at 18.

been responsible for the contamination.¹⁹⁰ “The term ‘municipality’ is broadly defined, allowing local public authorities, public benefit corporations, counties, towns, cities, villages, supervisory districts, district corporations, or improvement districts to qualify as municipalities and to receive money and liability protection under the Act.”¹⁹¹

With regard to the topic of nonprofits engaged in brownfields redevelopment, the New York State Department of Environmental Conservation (NYSDEC) seems to have interpreted the Bond Act in a “particularly relevant” way.¹⁹² “The NYSDEC has given ‘special status’ to property owned by nonprofit organizations in terms of Bond Act eligibility.”¹⁹³ If a municipality co-owns a site with a nonprofit organization, it is still eligible for Bond Act funding. Furthermore, if a nonprofit entity owns a property located within a municipally-owned site, “the municipality can include the private parcel in its project’s application.”¹⁹⁴

The Bond Act’s extensive provisions limiting liability are likely its most important aspects.¹⁹⁵ A municipality receiving state assistance for a properly completed Environmental Restoration Project “will not be liable to the State for any statutory or common law cause of action, nor to any person upon any statutory cause of action, due to the presence of any hazardous substance on the property at any time before the effective date of the contract.”¹⁹⁶ A successor-in-title, lessee, or lender receives these same protections as long as they were not a potentially responsible person or owner of the property.¹⁹⁷ In essence, these provisions offer liability protection to

¹⁹⁰ N.Y. ENVTL. CONSERV. LAW §§ 56-0101(7).

¹⁹¹ BAP REPORT, *supra* note 55, at 4-4. *See also* Robert S. Berger, et al., *Development and Financing of Municipally Sponsored Brownfield Projects in Erie County* (1997).

¹⁹² BAP REPORT, *supra* note 55, at 4-4.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See* Gerrard, *supra* note 185, at 19.

the municipality or eligible new owner for the presence of hazardous substances, except for an action arising under a federal statute, particularly under Superfund.¹⁹⁸

B. *Legislative Proposals to Revamp the State's Cleanup Programs*

Two overlapping groups have been working for some time on a comprehensive reform of New York State's programs for cleaning up contaminated sites.¹⁹⁹ Governor George E. Pataki established the Superfund Working Group, whose members number seventeen, and which is chaired by the Commissioner of NYSDEC.²⁰⁰ The other group is the Brownfields Coalition,²⁰¹ whose members "represent environmental, environmental justice and community organizations; real estate, banking, utility and industrial entities; and municipalities."²⁰² Growing out of the work of these groups, two draft bills were introduced into the Legislature.²⁰³ Because of the political climate in New York, it remains to be seen whether either of these bills will indeed be enacted:

The central fact of political life in New York is that the state senate is controlled by the Republicans; the

¹⁹⁸ BAP REPORT, *supra* note 55, at 4-5.

¹⁹⁹ Michael B. Gerrard, *New York's Pending Brownfields/Superfund Legislation*, N.Y.L.J. 3, 3, (Sept. 24, 1999). See also Michael B. Gerrard, *Rewriting New York State's Cleanup Programs*, N.Y.L.J. 3, 3, (May 28, 1999).

²⁰⁰ See *id.* John P. Cahill is the Commissioner of NYSDEC.

²⁰¹ The Brownfields Coalition is a reconstituted group, about two-thirds of the members of the former Pocantico Roundtable for Consensus on Brownfields, which dissolved in May 1999. The Roundtable had agreed in advance that no final report would be issued unless all 25 of its members could reach consensus on each detail in the report.

²⁰² Michael B. Gerrard, *Rewriting New York State's Cleanup Programs*, N.Y.L.J. 3, 3 (May 28, 1999).

²⁰³ Michael B. Gerrard, *New York's Pending Brownfields/Superfund Legislation*, N.Y.L.J. 3, 3 (Sept. 24, 1999).

state assembly is controlled by the Democrats; and the governor's office changes hands from time to time, but is currently held by a Republican. Relations between the senate Republicans and the assembly Democrats are frequently antagonistic. Because no legislation can be passed without the approval of both houses, major environmental statutes are rarely enacted.²⁰⁴

Both the Coalition Bill and the Governor's Bill codify New York State's Voluntary Cleanup Program (VCP), create methods for setting certain cleanup standards that are tied to a site's land use—present and future, and modify NYSDEC's enforcement program for environmental cleanups known as the State Superfund Program.²⁰⁵ However, the Coalition Bill is “far more detailed on issues of community redevelopment”²⁰⁶ and seeks to bring nonprofits into brownfields redevelopment more than ever before.²⁰⁷

As to liability exemptions, both the Coalition Bill and the Governor's Bill “make municipalities and industrial development agencies exempt from liability for involuntary acquisition of properties.”²⁰⁸ The Coalition Bill exempts municipalities for voluntary acquisitions as well.²⁰⁹ The Governor's Bill prohibits municipalities wishing to keep their exemption from actually participating in the management of the site, whereas the Coalition Bill only has the municipality losing its exemption if it participates in the site's

²⁰⁴ Gerrard, *supra* note 185, at 21.

²⁰⁵ Michael B. Gerrard, *New York's Pending Brownfields/Superfund Legislation*, N.Y.L.J. 3, 3 (Sept. 24, 1999).

²⁰⁶ *Id.*

²⁰⁷ See generally THE BROWNFIELDS COALITION: Final Report, at <http://www.nysba2.org/sections/enviro/coalition/coalition.html> (collected on Feb. 10, 2001, on file with the Buffalo Env'tl Law J.) [hereinafter COALITION FINAL].

²⁰⁸ Michael B. Gerrard, *New York's Pending Brownfields/Superfund Legislation*, N.Y.L.J. 3, 5 (Sept. 24, 1999).

²⁰⁹ *Id.*

actual development.²¹⁰ Key for nonprofits is that the Coalition Bill, unlike the Governor's Bill, "also exempts from liability those nonprofit organizations certified by the municipality as acting in the public interest."²¹¹

Indeed the Coalition's legislative initiative calls for CBOs to fulfill a prime role in brownfields redevelopment, as well as a greatly expanded role for nonprofits generally in this pursuit. The Coalition "encourages partnerships between localities and community-based organizations,"²¹² proposes to provide financial incentives for brownfields cleanup and redevelopment to nonprofit CBOs²¹³, and gives special consideration to nonprofit developers and to developers working cooperatively with CBOs in matching funds for environmental assessment investigations.²¹⁴

Additionally, the Coalition's proposed legislation provides for a variety of financial incentives to generate private investment in brownfields remediation/redevelopment, most notably an incentive for "corporations to directly support the participation of nonprofits" in these endeavors, principally through an assignable tax credit.²¹⁵

The idea of a tax credit specifically for contributions to nonprofits doing brownfields redevelopment has merit insofar as the simultaneous designation of such contributions as a CRA-eligible activity would appeal to a wider range of potential contributors (i.e. banks and insurance companies) who might be induced to make contributions to brownfields initiatives by this valuable CRA "credit" opportunity. In addition,

²¹⁰ *Id.*

²¹¹ *Id.* See also COALITION FINAL, *supra* note 207, at 8, which "[r]ecogniz[es] that municipalities often rely on nonprofits to carry out urban renewal activities, [thus] the Program creates a new exemption for nonprofits working in the public interest with a 5 year disposition requirement." *Id.*

²¹² *Id.* at 3.

²¹³ *Id.* at 4.

²¹⁴ *Id.* at 15.

²¹⁵ *Id.* at 20.

combining the two distinct types of economic incentives ... could encourage businesses to contribute to the [f]oundation dedicated to financing [b]rownfields remediation carried out by charitable entities. The application of this idea to brownfields redevelopment would involve both a tax deductible contribution and a tax credit to induce business corporations to make contributions to nonprofits...²¹⁶

This tax credit initiative at the state level is similar to a federal brownfields development tax credit that has been proposed. Specifically, the federal tax credit “would be structured similarly to the existing (and successful) low-income housing tax credit.”²¹⁷ Like the housing tax credit, it would serve to encourage investors to supply equity capital for the cleanup and redevelopment of brownfields by using a syndication method for financing. As in the affordable housing tax credit market, these syndications are made by public offerings and offer limited partnership interests to investors who share in their profits or receive tax benefits from their losses.²¹⁸ It has also been proposed that these federal brownfields tax credits be transferable from nonprofit groups and CBOs.²¹⁹

In affordable housing, the low-income tax credits have been

²¹⁶ *Id.* at footnote 4. CRA, the Community Reinvestment Act was enacted by Congress in 1977. See 12 U.S.C. § 2901. CRA “is intended to encourage depository institutions to help meet the credit needs of the communities in which they operate.” COMMUNITY REINVESTMENT ACT: About CRA, at <http://www.ffiec.gov/cra/about.htm> (collected on Feb. 12, 2001, on file with the Buffalo Env'tl Law J.).

²¹⁷ CHARLES BARTSCH & ELIZABETH COLLATON, BROWNFIELDS: CLEANING AND REUSING CONTAMINATED PROPERTIES 73 (1997) [hereinafter CLEANING AND REUSING]. The Low Income Housing Tax Credit is codified at § 42 of the Internal Revenue Code and was created by Congress in the Tax Reform Act of 1986. See generally Philip Halpern, *Strategies for Financing Affordable Housing*, REAL EST. REV. 48 (Spring 1994).

²¹⁸ CLEANING AND REUSING, *supra* note 217, at 73.

²¹⁹ See EPA Advisory Panel Considers Advice on Promoting Environmental Exports, SOLID WASTE REP., Mar. 9, 2000.

a highly successful tool for leveraging capital. As “[t]he credit amounts are based on the cost of the building and the portion of the building [which will be] occupied by low-income families,”²²⁰ the end use for the development is of critical concern. As reaching consensus on the future use for remediated brownfields is often elusive, perhaps a workable solution would be to incorporate public policy goals (like affordable low-income housing) into a federal brownfields tax credit initiative. This seems to be precisely what the Coalition proposal seeks to achieve at the state level.

As of the writing of this article, Governor Pataki has proposed a 2001-2002 Executive Budget which incorporates many of the initiatives outlined by his Working Group, and also “calls for statewide tax credits for brownfield[s] clean-up, as well as other, targeted tax credits to promote the reuse of already restored brownfields in Upstate New York.”²²¹ The Coalition group is also expected to continue its efforts at making its initiative a legislative reality.

Regardless of the extent to which the State Legislature incorporates these reforms, one thing is clear—nonprofits are well-positioned to link private and governmental stakeholders in smart growth efforts while at the same time helping lower-income and minority communities.

As to environmental justice concerns, the Coalition Bill “requires that, in setting residential standards, the needs of various sensitive populations be taken into account where appropriate.”²²² Arguably, because of their perceived neutrality, nonprofit organizations are ideally suited to mediate issues of community redevelopment and environmental justice that are often in tension. They “mediat[e] the space between the individual and the other two

²²⁰ Halpern, *supra* note 217, at 48.

²²¹ Press Release, *Governor Pataki Introduces 2001-2002 Executive Budget* (Jan. 16, 2001) at http://www.state.ny.us/governor/press/year01/jan16_01.htm (collected on Feb. 12, 2001, on file with the Buffalo Env'tl Law J.).

²²² Michael B. Gerrard, *New York's Pending Brownfields/Superfund Legislation*, N.Y.L.J. 3, 4 (Sept. 24, 1999).

sectors of society, that is, the 'public' or governmental sector and the 'private' or 'entrepreneurial' or 'proprietary' sector ... act[ing] as a counterpoise against excessive displays of power emanating from the public or private sectors."²²³

PART V: ENVIRONMENTAL JUSTICE & NONPROFITS

Any discussion of the reuse of brownfield sites naturally raises "broader issues, such as the quality of urban and small town environments devastated" by de-industrialization.²²⁴ "Landfills, waste transfer stations, incinerators" and other processing facilities too often are located in low-income communities and communities of color.²²⁵ Consensus has not been reached on the "chicken or the egg" genesis of this sad reality.²²⁶ Are these desperate communities "willing hosts" because jobs and increased revenues are promised to them through "disposal fees and other measures" or are property values driven down in these communities because these facilities have been located in them?²²⁷ Regardless of which came first, "nonwhites are 47 percent more likely to live near hazardous waste treatment, disposal, or storage facilities than are whites."²²⁸ In addressing brownfields, issues relative to zoning arise because often former industrial facilities abut low-income residential property. The level of cleanup is often tied to the future uses planned for the site. Understandably, conflicts occur when the planned future use for the property is another industrial facility that, in itself, may not require the site being cleaned to its former pristine state, but the community desires the cleanup

²²³ Bucholtz, *supra* note 29, at 556.

²²⁴ CLEANING AND REUSING, *supra* note 217, at 45.

²²⁵ *Id.* at 46.

²²⁶ *See id.*

²²⁷ *Id.*

²²⁸ *Id.* The author is citing a study based on 1990 census data. *See* William Claiborne, *More Nonwhites Are Living Near Toxic Waste Sites: Racial Disparities Have Grown Despite National Focus on Issue*, THE WASHINGTON POST, Aug. 25, 1994, at A-17.

level to meet residential standards.²²⁹

Environmental justice advocates “feel very strongly that brownfields sites should be redeveloped to support positive, environmentally clean uses.”²³⁰ However, this goal is often at odds with the primary monetary interests of developers and investors because higher cleanup standards are significantly more expensive, and thus may “shelf” a project.²³¹ State and municipal governments thus get caught in a conundrum: encouraging economic development through incentives to profit-motivated concerns in the form of future-use cleanup standards and liability exemptions, which will hopefully lead to local jobs (the trickle-down effect) or the imposition of higher cleanup standards as the starting point to economic revitalization. “In the area of brownfields remediation policy, the critical task will be to place environmental and economic justice issues at the center of the redevelopment process.”²³²

Market-based environmental reforms in brownfields policy tend to be at odds with environmental justice²³³ and this is precisely where nonprofit organizations can be the interstice in eco-development.²³⁴ Unlike private developers whose eye is on the bottom line, and unlike burdensome bureaucratic agencies who bog down the process, nonprofits specializing in brownfields redevelopment can partner with communities and mediate between all parties concerned. “Brownfields activities require public participation from the very inception of the application process. They additionally require an environmental justice plan.”²³⁵ Because the

²²⁹ CLEANING AND REUSING, *supra* note 217, at 46.

²³⁰ A COMPREHENSIVE GUIDE, *supra* note 6, at 188.

²³¹ *Id.*

²³² Kibel, *supra* note 9, at 615.

²³³ *See generally* Johnson, *supra* note 18.

²³⁴ For a more complete discussion of the current policy debates surrounding environmental justice concerns, *see generally* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000). Professor Kuehn examines and discusses environmental justice as distributive justice, procedural justice, corrective justice and social justice. *See generally id.*

²³⁵ *EPA's Title VI Interim Guidance and Alternative State Approaches:*

consequences of brownfields cleanup and re-use will be felt most directly by low-income and minority communities, brownfields redevelopment must exemplify "environmental justice in action."²³⁶

As a final note relative to environmental justice, the United States Supreme Court granted certiorari to hear the first environmental justice case of its kind in the nation.²³⁷ Though not a brownfields case, the case had potential ramifications for cleanup and redevelopment efforts in that context. The case involved a citizens group that charged discrimination based on the fact that during a specific window of time, five waste facility permits had been issued for sites located in their residential district, whereas only two had been issued throughout the rest of the county during that same time

Hearing Before the Subcommittee on Oversight and Investigations, 105th Cong. 110 at 53 (1998).

²³⁶ Hill & Targ, *supra* note 4, at 9. The EPA uses the following working definition of environmental justice:

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. Fair treatment means that no group of people, including racial, ethnic, or socio-economic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or the execution of federal, state, local, and tribal programs and policies. Meaningful involvement means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.

Hill & Targ, *supra* note 4, at 7. Mr. Hill is the Director of the Office of Environmental Justice of the U.S. Environmental Protection Agency. Mr. Targ is the Legal Counsel to the Office of Environmental Justice.

²³⁷ *Seif v. Chester Residents Concerned for Quality Living*, 118 S.Ct. 2296 (1998).

period.²³⁸ However, the issue upon which the Court was to rule was effectively rendered moot when subsequently the waste facility permit was withdrawn by state regulators. The Court vacated the suit without comment when a motion was granted dismissing the suit, because the issue was now moot.²³⁹ However, the Court's granting of certiorari in all likelihood means that environmental justice is a "ripe" issue, in which case, effective organizations capable of bridging the concerns of stakeholders are needed now more than ever.

CONCLUSION

Clearly, nonprofit organizations are filling a vital role in brownfields redevelopment and with legislative initiatives currently in effect (as well as those being proposed), that role is likely to expand. The New York State Bond Act clearly envisions the importance these third sector entities play by granting to them what can best be described as a "quasi-governmental" status. Some brownfield sites will always be redeveloped by private market-based entities, because they are located in highly desirable areas. The government will have to remediate other brownfields simply because the level of contamination is so great, there exists a public health hazard. The vast majority of brownfields, however, are located in the poorest and least desirable communities in America. The level of contamination is usually unknown until someone takes control of the property and performs a site assessment. Acquiring property and performing environmental analyses is often the point in the process where private entities throw up their hands, and instead pursue development of a greenfield. As discussed, this creates a whole host of problems in the vicious cycle of blight/sprawl.

Nonprofits, with their ability to procure private foundation funding, grants, and even donations of property, are ideally suited to fill the need for site acquisition and environmental assessment.

²³⁸ See Raney, *supra* note 24, at 135.

²³⁹ *Id.* at 135.

Moreover, because nonprofits are generally perceived to play a neutral role, they are likely to garner more community input and support in the early planning stages of brownfields redevelopment, as well as to play a critical role in educating the public. It is also likely that nonprofits will be more sensitive to the very real issues of environmental discrimination and justice, in the role they play. Of equal importance, the necessity for a multi-disciplinary approach in brownfields redevelopment means that nonprofits who seek to fill their boards with highly skilled professionals in the varied fields of planning, finance, engineering, science, and law will have access to the brightest of the bright, usually on a pro bono basis.

With the know-how and the public spirit of nonprofits, we can begin to “fulfill the true promise of American environmentalism: a socially, economically, and ecologically healthy and sustainable America.”²⁴⁰

²⁴⁰

Shutkin, *supra* note 21, at 705.

