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**Public Policy and Law Since Love Canal:
Unintended and Unforeseen Consequences
of Love Canal and the Superfund Legislation**

Robert S. Berger*

I would like to focus on the unintended and unforeseen consequences of Love Canal and the passage of Superfund legislation, instead of the broader issues of environmental regulation and policy and reforming the Superfund program. I also want to tie back to how the conference began and reflect on what we have heard.

Love Canal was initially seen as a health issue. In large part, Superfund was passed to address the serious health issues resulting from the severe problem of toxic contamination. There was little recognition of the significant impact that this legislation would have on land use. The first real statement that I found by someone recognizing this aspect was Chuck Powers' report for Clean Sites, where he stated that for every Superfund site one must ask, "what, in light of what has happened at a specific site, are we going to do with this site . . . what is the appropriate long term use of this site. . .?"¹

Although others may have thought of it before Chuck Powers, it still was monumental in 1992 when he reflected on this aspect of the Superfund legislation arising from Love Canal. It was one of the great anomalies of environmental law that the statute created to address the hazardous waste problem, whose medium was land itself, barely acknowledged that the locus of these wastes and releases was local property. I am going to trace the evolution of the land use issues, their relationship to brownfields and some of the unforeseen, and unusual, consequences resulting from them. Certainly, I will not attempt to give this in great detail. We have heard enough information regarding the liability scheme of Superfund to know that it is an extremely comprehensive program. However, when we look beyond

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¹ Charles Powers, *Property and Land Use as the Key to Cleaning Up Hazardous Waste Sites*, in WORKING PAPERS ON SUPERFUND REFORM: PROBLEM DEFINITION AND POLITICAL MAPPING 89 (1992).

the federal legislation to recognize the numerous state Superfund programs, as well as the many opportunities for private individuals or companies to sue those potentially responsible in either a private cost recovery or contribution action, what emerges is an enormous and extensive liability scheme. One basis for liability particularly relevant to the land use issues is ownership. According to present law, the current property owner is financially liable for the clean-up of that property required by Superfund programs. The justification is that environmental waste sites must be cleaned up and someone must bear the expense; consequently, it is deemed irrelevant whether the current owner actually disposed of the hazardous waste.

Thus, one positive development resulting from the current owner liability provision was the creation of a system in which an environmental assessment of properties involved in land transactions became vital. Environmental assessments have created additional work for environmental lawyers and consultants and assessments are now accepted as a standard component of land transactions. Certainly the liability concerns that we have discussed apply to all land transactions of properties once used for industrial or commercial purposes, a large amount of the available land is many urban areas.

There are a number of other liability concerns which arose with respect to land transactions. As a result of Superfund liability, banks were concerned for their own potential liability, known as lender liability. Consequently, they were extremely nervous about any financial involvement in transactions where contamination was a concern. No one wanted to fall victim to the "Superfund Net" and bear the costs of clean-up. The result was recognition of a new problem, relating to properties which were not Superfund sites, but which many claimed flowed from the liability scheme of the Superfund program. For the past five years we have referred to these properties as "brownfields." The original Environmental Protection Agency definition of a brownfield is an "abandoned, idled, or underused industrial or commercial facility where expansion or redevelopment is complicated by real or perceived environmental contamination." There is certainly a genuine question as to how many brownfield properties cannot be redeveloped due to Superfund

liability concerns. This is the subject of serious debate and actually involves properties not subject to Superfund liability as well, such as those with petroleum contamination. For my purposes I am discussing all of them together. In certain circumstances, I believe the liability issue merely serves as an excuse for suburban development. Pointing to the liability concerns, developers claim that redeveloping an inner city property is not feasible.

There is no doubt, though, that as a result of the liability scheme there are clearly properties, particularly those in the distressed inner city areas, which have a "negative value," that is the cost of cleaning them up exceeds any market value of the property when clean. This, in turn, leads to some very strange results. One is municipalities not wanting to foreclose on properties for back taxes, either because of fear of their own liability or because they cannot sell them to anyone. This leaves the land in limbo. The second is the situation where properties are not put up for sale or reused by their owners, but simply sit idle.

These properties once were seen as having a stigma and nobody, particularly municipal development authorities, wanted to have any of its land called a brownfield. No one wanted to own the next "Love Canal." But in the last few years this has switched around dramatically. Now it seems everything is being called a brownfield when redevelopment is planned or occurring. Indeed, we find EPA in the last few years involved in urban initiatives and redevelopment of inner cities, taking the lead in certain federal efforts. This apparently created some tension with HUD, which traditionally has been the agency heading urban redevelopment initiatives.

So how did these recent changes stem from Love Canal and the 20 years following it? First, agencies moved away from enforcement. We have heard much about that. EPA then moved some of its Superfund money toward brownfields, including its \$200,000 "pilot" grants. Second, consultants and attorneys, reacting to these changes and looking for new areas, found brownfields. Third, economic incentives associated with brownfield initiatives were begun, such as the 1996 New York Bond Act.

No one twenty years ago could have foreseen this resulting from Love Canal and the Superfund legislation. Certainly evolution in other areas of environmental policy also have fueled this concern with redevelopment in urban areas being viewed as an environmental issue. These include the concepts of "sustainable development" and "environmental justice." Still, the real direct link is to the unintended consequences of the legislative reaction to Love Canal.

Let me close with two general conclusions. First, this brief story reminds us that often we have public policies that come into existence in a manner that was never intended and surely never foreseen. Moreover, once you put a major program in place, it is not easy to stop it or change it. Instead, we find that there are reactions to the unintended consequences which can create whole "programs" themselves, such as brownfields. This ultimately may be a good result for urban revitalization, even if not what we expected as a legacy of Love Canal.

The second conclusion is rather ironic and not as hopeful. Whereas we have heard in detail how the responses to Love Canal and the resulting Superfund legislation were originally due to the efforts of local community groups, much of the initial legislative response to the brownfields problem by states has treated public participation and community involvement as, at best, an afterthought. Still, the lessons of Love Canal have at least forced EPA and most states to ensure some minimal notice and public involvement aspects to their brownfield programs. This too hopefully will be an evolving development.