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Report Card on the Market-Based Approach to Brownfield Redevelopment

The findings of Adam Eckerd and Roy L. Heidberg in their article “Public Incentives, Market Motivations, and Contaminated Properties: New Public Management and Brownfield Liability Reform” represent a long-overdue “audit” of what was a significant paradigm shift in the approach to the cleanup and redevelopment of brownfields in the United States. This shift was undertaken through the enactment of laws by Congress and state legislatures and through regulatory reforms supported by federal and state environmental regulatory agencies beginning in the mid-1990s, going from a command and control enforcement framework to the use of buyer liability protections and public financial incentives to induce more private investment in brownfields. The goals of this shift were to increase the number of cleanups, accelerate the pace of cleanups, reduce the threats to public health and the environment posed by uncontrolled sites of environmental contamination, foster the reuse of blighted properties, restore employment and tax base, and increase reuse of public infrastructure at brownfields, as well as reduce the incentives for greenfield development. This shift enjoyed fairly broad bipartisan legislative support as well as support by regulatory agencies, the business community, local governments, and, to a lesser extent, community and environmental groups, as the old way clearly was not working very well.

I have spent a fair portion of my career working with brownfields, first as a representative of a PRP (potentially responsible party), overseeing the cleanup of brownfields under an enforcement regime, and then as either the owner, seller, buyer, or developer of brownfields, acting as a third-party deal facilitator of brownfield redevelopment and taking advantage of buyer liability protections and packaging public financial incentives in one way or another to effectuate the cleanup and redevelopment of brownfields.

Some of the findings of this article confirm my observations as a longtime practitioner. For example, it is not surprising to me at all to see that there has been more private involvement and faster cleanups for the industrial reuse of brownfields, as I have long held the opinion that the costs of the remedy to achieve a safe and protective cleanup for industrial uses are generally materially less than for residential reuse and therefore much more manageable. Concurrent with the enactment of liability reforms and the creation of brownfields incentives, there were significant changes to determining “how clean is clean” for brownfields in cleanup programs at the federal and state levels. Land use–based and risk-based cleanup standards that led to presumptive remedies and a two-tier system of cleanups—residential and nonresidential (e.g., industrial, commercial)—streamlined the process of cleanups and dramatically reduced their costs.

Another example is that it is not surprising to me to see that the requirement for public hearings appears not to have contributed to more cleanups. Most private developers (and their sources of private capital, both equity and debt) whom I know strive to reduce the level of uncertainty for all aspects of their projects so as to increase the probability of reaching their financial goals. One tenet of uncertainty for developers is that “time is the enemy” of achieving targeted financial returns because the longer you have to finance your carrying costs, the more your financial pro forma gets punished. Public hearings are widely regarded by developers as a wildcard in terms of costs and often are perceived as a cause of significant delay of projects. But, as to the central focus of this article’s exercise, some, myself included, may even conclude that these findings are a vindication the New Public Management approach to brownfields in that there has apparently been an increase in private involvement in brownfield cleanup and redevelopment since the abandonment of the stick and the adoption of the carrot.

While this article provides many valuable insights into brownfield redevelopment trends that have occurred since the mid-1990s, for me, it raises some related questions. First, did the widespread fear of strict,
joint, and several liability under the old order (which peaked in the early 1990s) drive developers and capital away from brownfields and into greenfields—possibly contributing to more urban sprawl—and was it not actually the liability protections and incentives that brought them back to brownfields? I have often speculated that private involvement in brownfields would have dramatically decreased if the enforcement approach to cleanup had been continued. Many can still remember the sense that the “sky is falling” in the early 1990s after the notorious Fleet Factors decision. So, even though the level of private involvement in brownfields does not appear to have increased dramatically after liability reforms and related incentives were adopted, could it be that they were just the antidote to strict, joint, and several liability that the market needed and, without them, brownfield redevelopment would have been a rarity rather than what it has now become, a common subset of the mainstream real estate development market? But for liability reforms and incentives (in lieu of rigorous enforcement of “polluter pay”), would a rational developer even touch most brownfields?

Second, to what extent do liability reforms and incentives enhance the investment quality for developers of brownfields and therefore serve as a catalyst for certain projects? Liability reforms and incentives do not create the underlying market demand needed to attract developer interest or fix other issues affecting redevelopment, such as local crime rates, failing school systems, and so on. But for how many successful brownfield redevelopment projects that came to fruition when there was only marginal underlying market demand did liability reforms and incentives provide the deciding factor in the developer’s involvement by, say, lowering the developer’s cost of capital, reducing the developer’s risk premium requirement, or closing the gap in the developer’s financial pro forma? We may never have enough of the quantitative information regarding the “no-go” deals to know this for sure.

One sure sign for me that an article published in a peer-reviewed journal has had an impact is that it answers some burning questions. Another sign is that it stimulates the asking of even more questions. This work by Eckerd and Heidelberg has done both. This article provides an objective overview of the outcomes of the shift from a regulatory to a market approach to addressing brownfields, which both proponents and critics alike should evaluate and consider in future brownfield policies.

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