Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization

Douglas A. McWilliams

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# Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization

*Douglas A. McWilliams*

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INTRODUCTION

Two of the most potent strands of criticism leveled at environmental law and policy in the United States are on the verge of a head-on collision. Gathering momentum on one track are urban redevelopment advocates, who lobby for fewer environmental obstacles to the reuse of formerly industrial urban property.¹ Barreling along with its

¹ Urban redevelopment advocates include local and state officials, such as mayors and governors, city planners, and local economic development officials, who are charged professionally or politically with the economic revitalization of urban areas. As these public servants expressed their frustration with the pace and expense of environmental cleanup at old industrial sites, they undoubtedly found business leaders, developers, and their lawyers and bankers willing to commiserate about environmental impediments to urban redevelopment. See, e.g., URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, REMOVING THE BARRIERS TO THE REDEVELOPMENT OF OHIO'S ABANDONED URBAN INDUSTRIAL PROPERTY (1993) (listing both business leaders and public officials as members of the Urban Industrial Property Revitalization Task Force). Together, these groups had
own head of steam is the environmental justice movement, which demands that urban communities be relieved of their disproportionate environmental burdens.\(^2\) One group seeks to attract potentially hazardous industries back to urban "brownfields"\(^3\) while the other strives to shut them out. One group seeks to lower cleanup standards in urban areas, a policy that the other group denounces as racist. One group seeks to streamline government oversight while the other wants to expand opportunities for public participation.

The two groups have avoided direct collision thus far because they have pursued their goals in different arenas. On the one hand, urban redevelopment advocates have lobbied state legislatures to remove environmental barriers to recycling urban industrial sites\(^4\) and have only recently been included in discussions on Superfund reauthorization. In contrast, the environmental justice movement\(^5\) has emerged from local organizing successes as the new front line of the civil rights struggle. Its efforts, including marches, protests, and civil disobedience have attracted media attention and brought a national spotlight to local issues.\(^6\) As civil rights advocates did in earlier little trouble persuading state legislators to favor clearing the way for urban redevelopment. See, e.g., Patrick von Keyserling, Legislation Encourages Redevelopment of Industrial Land, CENT. PA. BUS. J., Oct. 20, 1993, at 6, 6 (stating that both the Industrial Land Reuse Act and the Economic Development Agency Environmental Liability Protection Act passed unanimously through the Pennsylvania Legislature).

2. The phrase "environmental justice" is sometimes used to refer to the people of color environmental movement that challenges the disproportionate risks and burdens of pollution on communities of color, termed "environmental racism" by Rev. Benjamin Chavis, former Executive Director of the NAACP. Tom Stephens, Comments to the International Joint Commission 1993 Biennial Meeting, TOXIC NEWS (Nat'l Lawyers Guild Toxics Comm., Portland, Or.), Dec. 1993, at 1, 10. However, this comment uses a broader definition of environmental justice that includes the whole range of environmental equity issues affecting low income communities.

3. "Brownfields" is a term generally used to connote urban property that has been contaminated by prior industrial or commercial activities, as compared with "greenfields," which are untainted by such contamination. Brownfields include those properties that lenders, owners, or developers assume to be contaminated since these sites face the same initial obstacles to investment and redevelopment that confront sites with verified contamination.


5. Grassroots environmental justice activists are primarily women who, along with their children and grandchildren, are at risk from the environmental harms that their local organizing campaigns target. Francis Calpatura, Speech at Environmental Justice Seminar at Boalt Hall School of Law at University of California at Berkeley (Apr. 5, 1994); see also Cynthia Hamilton, Women, Home & Community: The Struggle in an Urban Environment, RACE, POVERTY & ENV'T (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), Apr. 1990, at 1, 3 (discussing a group of East Los Angeles mothers and other grassroots environmental justice movements led by women).

6. See generally Peter Montague, What We Must Do: A Grassroots Offensive Against Toxics in the '90s, 14 THE WORKBOOK 90, 97-110 (1989) (arguing that grassroots activism, rather than centralized legalistic regulation, is a more effective approach to fighting toxic dumping and industrial pollution).
decades, environmental justice advocates have pursued their goals by pressing constitutional claims in the courts, principally relying on the Equal Protection Clause to challenge racially discriminatory patterns of waste facility siting. This predominantly grassroots movement is also not without its allies in Washington D.C.; President Clinton recently signed an Executive order, directing federal agencies to develop policies to address environmental justice. While their different tactics and modes of operation have kept environmental justice activists and industrial redevelopment advocates insulated from each other during their parallel rises to the national policymaking arena, the urban environment will suffer in the long run if the implicit conflict between their goals is not addressed and resolved.

The conflict between the goals of environmental justice and urban redevelopment can be illustrated by a brief hypothetical. Suppose that redevelopment advocates actively recruited an industrial company to locate a facility on a former industrial site in a blight-ridden part of the innercity. City officials offered the company various incentives designed, in part, to offset the risk of acquiring the environmental liabilities associated with owning a former industrial site. The company conducted initial studies and is prepared to move forward with the redevelopment project.

The neighborhood surrounding the site has deteriorated significantly since the facility that previously occupied the site closed its doors. An unusually high number of nearby residents have experienced health problems which many suspect have directly resulted

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7. Equal Protection challenges in the area of environmental justice have not yet been successful in proving that siting decisions were made with an intent to discriminate against minority communities. See, e.g., Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (finding statistical evidence insufficient to establish that the selection of waste disposal facility sites was racially motivated), aff'd, 782 F.2d 1038 (5th Cir. 1986); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989), aff'd, 888 F.2d 1573 (11th Cir. 1989), replaced by 896 F.2d 1264 (11th Cir. 1989) (finding no evidence of discriminatory intent in placement of landfill); Residents Involved in Saving the Env't, Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (holding that disproportionate impact of siting decision on minority population is insufficient grounds for Equal Protection challenge without a showing of discriminatory intent), aff'd, 977 F.2d 573 (4th Cir. 1992).


9. "Urban environment" is used here to refer to more than the traditional notions of air, water, and soil quality. Jobs, health care, crime, etc., have a huge impact on the urban community and should not be excluded from plans to improve the urban environment.
from industrial releases, a suspicion supported by workers who blame their own health maladies on occupational exposures that resulted from poor corporate environmental practices. No epidemiological studies have been conducted in the neighborhood, but ample anecdotal evidence exists to convince many community members that they are being poisoned by environmental harms emanating from the site. Local residents have begun to meet to express their fears and concerns about the sources of contamination in their neighborhood.

A resident notices increased environmental testing activity at the former industrial site. She contacts the city and discovers that a plan is underway to clean up the site in preparation for a new industrial facility that will provide jobs for the city. She then asks whether this new industrial facility will increase the environmental risk to her neighborhood. She is told that the facility will store and use some hazardous materials and will transport them through her neighborhood. In addition, the facility will emit some toxic air contaminants.

A hearing on the proposed use had apparently been announced in a local newspaper and held over a month ago without community participation. At the next City Council meeting, the Council will decide whether to approve the package of incentives offered to the developers. The concerned resident spends a day calling her neighbors to tell them that the City Council is planning to put another source of toxic risk in their neighborhood unless residents go to the meeting to stop the plan. She contacts a national network (e.g., the Citizens’ Clearinghouse for Hazardous Waste) to find out the health effects of the specific chemicals involved. She also talks to leaders from other communities that have successfully resisted similar projects, and they help plan a strategy for halting the city’s attempt to put the community at risk.

The packed City Council meeting becomes a forum for protest, where residents vent years of community frustration over unresponsive government, toxic exposure, and inadequate health care. They accuse the City Council of making backroom deals that sacrifice the health of the local residents. The community members accuse the company of racism in its choice of a minority community for the site. The company, fearing the fallout from being identified as environmental racists in local and perhaps national media, abandons the redevelopment agreement.

Who won? Perhaps the community can claim a victory. After all, it is probably now better organized, better connected to other community groups and resources throughout the country, and empowered by
However, the site that was targeted for redevelopment is still vacant and polluted with chemicals and debris left by past industrial tenants, none of which is likely able to provide funds to clean it up. As a result of its reaction at the public meeting, the community has foregone the opportunity to use the resources of the redeveloper to start the cleanup process. The community has also abandoned the potential tax revenue for public services, opportunities for direct and indirect employment, and the chance to give the local economy a boost.

On the other hand, the loss of tax revenue and employment opportunities may seem inconsequential when family members and neighbors are dying of cancer and experiencing other maladies associated with the disproportionate environmental risk that the community already faces. Few individuals would choose to poison their families in exchange for the promise of a job. Further, the "promise" of jobs may seem illusory since business development has not necessarily translated into actual jobs for local, unskilled workers who are dependent on underfunded training programs.

If the community in this hypothetical had control of the site from the beginning, would it have rejected this redevelopment opportunity? If it would have, then the community has truly won. However, much of the resistance to such projects probably stems from a community's experience that decisions about its future are made by others, leaving residents with only two options: resignation or resistance. Until the community has the opportunity to exercise a broader range of choices in the development process, projects involving environmental risk will increasingly be stymied by local resistance supported by the expanding resources of the environmental justice movement.

10. Hamilton, supra note 5, at 13. In the battle against the siting of the LANCER incinerator in South Central Los Angeles, "what started as the outrage of a small group of mothers has transformed the political climate of a major metropolitan area." Id.

11. A case study in Cleveland, Ohio, revealing that 70% of the workers in the downtown area do not live in the city, led the authors of the study to conclude that adding jobs alone "would not benefit unskilled, unemployed residents of concentrated-poverty areas." KATHERINE L. BRADBURY ET AL., URBAN DECLINE AND THE FUTURE OF AMERICAN CITIES 282 (1982).

12. In its proposal for Superfund reform, the Clinton Administration recognized that communities are frustrated because their opportunities for input often come only after important decisions have been made. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 6.

13. Under the current system of decisionmaking, grassroots resolve is a community's only hope for shifting the power balance in negotiations with developers and the government. See Hamilton, supra note 5, at 11. "[T]he willingness to compromise has become the official position of the City and the corporation, as a result of the determination of 'a few women.' . . . It may be the case that women, unlike men, are less conditioned to see the value of small advances." Id. "If women maintain leadership positions and resist the 'normal' organizational thrust to barter, bargain, and fragment ideas and issues, they may help set new standards for action in the new environmental movement." Id. at 13.
I come to this discussion with feelings of genuine conflict about the complex issues surrounding urban redevelopment. On the one hand, I support the rights of those bearing disproportionate shares of environmental harm to say no to further imposition of risk. On the other hand, I feel that many of the problems that beset America's inner cities have economic roots, and any restrictions on urban redevelopment should be thoroughly evaluated since redevelopment may benefit the community more than restrictions on redevelopment. Further, as an environmentalist, I find compelling the argument for reusing former industrial sites to prevent the spread of contamination to untainted outlying lands. My internal conflict gives me the ability to write with conviction from each of the different perspectives. My personal struggle has also been the impetus behind my search for solutions that promote cooperation between environmental justice activists and industrial redevelopment advocates to further their common goal of improving the urban environment.

I conclude that those most impacted by redevelopment should be involved early in planning redevelopment projects and in promoting neighborhood sites to attract projects consistent with the community's development vision. Communities with control over redevelopment will be able to shape redevelopment projects so that they are consistent with community character and needs. More complete and timely access to information will enable communities to accurately assess the risks and benefits of proposed projects. Finally, communities that are free to say no will no longer have to resort to obstructionist tactics in order to be heard.\footnote{This conclusion will be criticized by some as setting up communities to be co-opted by redeveloper interests. However, this assumes a polarization of interests that oversimplifies the intentions of both the community and the redevelopment advocates. Rather than adopting a narrow environmental focus, grassroots activities tend to take a holistic view of the many problems that their communities endure—poverty, crime, joblessness, environmental degradation. Luke W. Cole, Empowerment As the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 Ecology L.Q. 619, 641 (1992). Indeed, assuming that only a co-opted community would choose to accept some environmental risk in exchange for economic opportunities imposes a rigid environmental ethic that may not represent the priorities of the community. This said, however, communities that see environmental degradation as a symptom of systematic exploitation of the underclass could be very skeptical of opportunities to collaborate with the oppressor in planning neighborhood development. Communities dominated by this skepticism would presumably choose to limit their outreach to those developers who conduct businesses consistent with the communities' world views. If this does not yield development opportunities, the community membership would have to decide whether to reevaluate the scope of their search or accept the status quo. See infra parts IV.B.1, IV.B.2 and accompanying text for a discussion of structures for community decisionmaking.}

Few urban communities have the resources to pursue their own redevelopment plans without attracting resources from the same public and private sources to which industrial redevelopment advocates
have access. Thus, communities placing a high priority on economic development will likely benefit from reaching out to redevelopment advocates to gain access to outside resources. In addition, urban communities need to create a good business climate in the neighborhood to attract investment, a process that could involve difficult tradeoffs between development interests and community concerns.

In this comment, I seek to provide some of the groundwork necessary to bring redevelopment advocates and environmental justice activists into a collaborative working relationship. The first step is to identify the goals of each group and outline those areas where the goals and tactics of the two campaigns conflict. Then I will discuss those tactics that serve common goals and provide the basis for collaboration. Finally, I identify decisionmaking structures that can facilitate this collaboration by serving community needs, redevelopment interests, and their common purpose—the revitalization of urban communities.

Part I of this comment describes three ways in which urban redevelopment implicates environmental justice issues. First, the decline of America's urban industrial base has left behind a legacy of contaminated sites in urban communities. Second, the subsidized spread of industry to untainted greenfields spreads the risk of contamination to outlying areas. Third, urban redevelopment projects that involve facilities that use, store, or manufacture hazardous substances add environmental risk to neighborhoods where predominantly low income and minority residents already bear a disproportionate share of society's toxins.

Part II provides an overview of the obstacles that federal hazardous waste laws and Environmental Protection Agency (EPA) practices add to the already difficult task of returning urban industrial property to productive use.

Part III then identifies the four primary changes that urban reuse and redevelopment proponents demand in these laws and practices: (1) reducing cleanup standards; (2) limiting developers' liabilities for preexisting contamination; (3) streamlining government review; and (4) using government incentives to attract industry back to urban brownfields. These demands are illustrated by looking at initiatives proposed by "rust belt" states and the Clinton Administration's recent Proposal for Superfund Reform. These proposals are designed

15. Generally, the rust belt states are considered to be Pennsylvania, Ohio, Indiana, Michigan, Illinois, and New Jersey.
to reduce environmental obstacles and promote the reuse of urban properties.

Part IV examines the impetus for community resistance to industrial redevelopment and the success of the environmental justice movement in organizing communities of color and low income communities to oppose redevelopment projects that pose increased health risks. Three principles of the environmental justice movement appear to conflict directly with the demands of industrial redevelopment proponents: (1) universally equitable cleanup standards that do not discriminate against those living in the urban environment;¹⁷ (2) use of government resources to ensure a more just distribution of environmental risks;¹⁸ and (3) the right to participate as equal partners in every level of decisionmaking.¹⁹

Part V examines the apparently conflicting demands of environmental justice and urban redevelopment and concludes that the two movements in truth are seeking many common goals that could form the basis of a working relationship. However, public participation options in current and proposed state redevelopment laws are woefully inadequate. Public hearings beginning late in the life of a project are intended to inform, not to involve. This kind of paternalistic head patting has drawn harsh criticism from community organizers and advocates, who are now poised under the banner of environmental justice to raise community expectations and demand more substantive public participation.²⁰ Relying on the presumptions that an organized community can be an asset to an urban site reuse project and that participation will solve more problems than it creates, this part identifies ways to structure redevelopment decisionmaking to maximize community control over projects from their inception. The community that actively creates a revitalized neighborhood reclaims a sense of control over its future, and this sense of control empowers the community to take even bolder steps toward meeting community needs.


¹⁸. See Call to Action, supra note 17 ("We refuse to accept the deliberate targeting of communities of color and the lands of indigenous peoples as dumping grounds for hazardous wastes and radioactive materials, and the production of pollutants.").

¹⁹. See Principles of Environmental Justice, supra note 17, at 2. This demand conflicts to the extent that public participation contributes to the delays that industrial redevelopment proponents seek to eliminate.

²⁰. See Montague, supra note 6, at 102-10.
I
THE RISE OF URBAN REDEVELOPMENT AS AN ENVIRONMENTAL ISSUE

The flight of capital from urban areas has been cast as an environmental issue because of the dichotomy between the contaminated, predominantly urban brownfield, and the clean, predominantly rural greenfield, each of which competes for a limited pool of development projects. Three environmental issues emerge from the effort to recycle urban industrial property. First, urban areas have become littered with abandoned industrial sites because of the perception that the costs of remediating contamination outweigh the value of the properties. Second, siting industrial facilities on greenfields spreads the risk of contamination to new, untainted properties that should be preserved. Finally, the siting of new industrial facilities in urban neighborhoods that already bear a disproportionate share of society’s risks raises environmental equity concerns.

A. The Legacy of Urban Industrial Roots: Abandoned Contaminated Sites

Decades of heavy industry in an era with limited environmental awareness have left a legacy of contaminated, often abandoned, industrial structures located on millions of acres of polluted land throughout the United States.21 The huge, empty shells of heavy industry in urban industrial centers are viewed as casualties of a shift in America’s industrial base toward light manufacturing, and a related shift away from rail and waterway transport to interstate highways. In the shadow of these aging behemoths stand the remains of many secondary facilities that once fed off the work generated by them. Closed paint shops, plating shops, and other assorted “job shops” litter the innercity with their own histories of contamination. Also gone are the businesses that relied on worker-generated consumer demand, such as gas stations and dry cleaners; these now sit idle due to releases or suspected releases of the hazardous materials endemic to their operations. The result is an urban environment where soil contamination is

21. CHARLES BARTSCH ET AL., NEW LIFE FOR OLD BUILDINGS: CONFRONTING ENVIRONMENTAL AND ECONOMIC ISSUES TO INDUSTRIAL REUSE 1 (1991). This comment focuses on major urban centers where potential conflicts between redevelopers and environmental justice advocates are most likely to arise. However, many small towns suffer even greater economic devastation when an abandoned facility was once the primary employer. Id. at 3. EPA’s inventory of uncontrolled toxic waste sites reveals that over one-half of all Americans, and three of every five Black and Hispanic Americans, live in communities with one or more such sites. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiv (1987) [hereinafter TOXIC WASTES AND RACE].
presumed, where groundwater and surface water pollution are likely, and where the "polluter pays" principle is failing to generate sufficient funds to clean up the mess.\(^{22}\)

The actual scope of this problem is not known. By 1985, EPA had inventoried approximately 20,000 uncontrolled hazardous waste sites (defined as closed or abandoned sites that pose a threat or potential threat to human health or the environment) across the nation.\(^{23}\) In 1986, a General Accounting Office report admitted that EPA does not know if 10% or 90% of the potentially hazardous waste sites have been identified.\(^{24}\) Gathering information about the extent of the contamination of vacant and abandoned properties is particularly difficult. First, most local governments do not have a systematic means of tracking abandoned and underutilized properties.\(^{25}\) Second, while a few states have begun keeping records of environmental assessments and cleanup plans,\(^{26}\) these have limited usefulness because assessments are conducted only when transfer of the property is anticipated, and owners may choose to remove the property from the market rather than pay for an assessment.\(^{27}\)

Owners of industrial property often suspect contamination and fear that the costs of cleanup could outweigh the value of the property.\(^{28}\) If an owner spends the money to test his property for contamination and finds some, he is required to report the release.\(^{29}\) He would then face joint and several liability for the entire cost of

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22. "Polluters pay" is one of the two premises upon which Congress based CERCLA's site remediation scheme. The other premise is "shovels first," which connotes priority for a prompt and speedy cleanup, at least where imminent risk is posed by abandoned waste sites. Marc C. Landy & Mary Hague, The Coalition for Waste: Private Interests and Superfund, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 67, 68 (Michael S. Greve & Fred L. Smith Jr. eds., 1992).

23. Toxic WASTES AND RACE, supra note 21, at xii.

24. Id. at xi. By 1990, 33,000 sites had been placed on the CERCLA Information System (CERCLIS) database, of which 11,000 needed further investigation, 1200 were on the National Priority List (NPL), and 19,000 required no further action at the federal level. James Boyd et al., Resources for the Future, The Impact of Uncertain Environmental Liability on Industrial Real Estate Development: Developing a Framework for Analysis 15 (1994).

25. See Boyd et al., supra note 24, at 10 (finding that the most comprehensive study of abandoned industrial property was based on interviews with city officials in the 14 largest U.S. cities, and none of the officials had good data on the extent of the problem with derelict lands); see also Michael R. Greenberg et al., The TOADS: A New American Urban Epidemic, 25 Urb. Aff. Q. 435 (1990).

26. See, e.g., N.J. STAT. ANN. § 13:1K-9 (West 1982 & Supp. 1994) (requiring assessment prior to transfer or abandonment of property); see also infra part II.B for a discussion of state laws designed to reduce the environmental obstacles to redevelopment.

27. Boyd et al., supra note 24, at 28-31.

28. See id. at 28.

29. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) an owner or operator is required to notify EPA "as soon as he has knowledge of any release . . . of a hazardous substance." 42 U.S.C. § 9603(a) (1988).
remediating the contamination. As a result, the owner is encouraged to remove the property from the market, thereby losing the resale value of the property but escaping the risk of paying for the entire cleanup.

Owners may also be encouraged to remove potentially contaminated lands from the market for fear of lawsuits brought by successive owners. One company, which was persuaded by the local government to sell its vacant property for productive reuse, was later sued by a subsequent owner when discovery of contamination prevented resale of the property. The company was ordered to pay damages for loss of sale in addition to the cleanup costs. The company now has a policy of keeping potentially contaminated lands off the market to avoid both successive owner lawsuits and agency-mandated remediation. If the owner does conduct a site assessment, finds contamination, and reports the release to EPA, the site may not be cleaned up and returned to the market. The owner can abandon property that is no longer an asset by filing for bankruptcy. A company in bankruptcy may abandon property that consumes the resources and drains the income of the estate, provided that the abandonment is not in contravention of a state law “reasonably calculated to protect public health or safety from imminent and identifiable harm.” Even when contamination has been identified, many lower courts have permitted trustees to abandon land as long as the appropriate agency has been notified and steps have been taken to prevent immediate harm to the public. In essence, if the owner of a bankrupt and contaminated facility mitigates the immediate health hazard (e.g., by fencing to limit access), he can often abandon the property without restriction.

31. BOYD ET AL., supra note 24, at 39.
32. Id.
33. Id.
35. In re Smith-Douglass, Inc., 856 F.2d 12, 15-16 (4th Cir. 1988) (stating that § 554 of the Bankruptcy Code, 11 U.S.C. § 554(a), permits a bankrupt estate to abandon any property of the estate that is burdensome).
36. Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Protection, 474 U.S. 494 n.9 (1986) (holding that a bankruptcy trustee could not abandon property containing 470,000 gallons of contaminated oil that was vulnerable to fire or explosion).
38. Abandoning the land does not release a former owner from CERCLA liability under 42 U.S.C. § 9607(a)(2). However, Bankruptcy Code § 362(b)(5) prohibits the government from enforcing money judgments for past damages. 11 U.S.C. § 362(b)(5) (1988); see Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 278 (3d Cir. 1984) (holding that an equitable enforcement action against a bankrupt polluter did not consti-
Abandoned property becomes the responsibility of the local government, which rarely takes the initiative to prioritize limited resources to clean up a contaminated site. Thus, the property lies vacant until a viable reuse option is proposed and pursued by a prospective purchaser or a creative redevelopment team.

Withholding brownfield property from the market contributes to urban decay by: (1) underutilizing urban property; (2) allowing contaminated sites to go undetected, thereby threatening the environment, unsuspecting users, and local residents; and (3) constricting the supply of brownfields which may encourage undesirable greenfield siting. Also, abandoned and otherwise inactive properties generate less, if any, tax revenue for schools and city services. The jobs that the properties once provided are lost, leaving the less mobile part of the labor force to join the lists of the chronically unemployed, who are dependent on public assistance and lack the mobility to seek jobs outside the decaying urban center. Finally, dilapidated industrial facilities contribute to the blight that erodes urban neighborhoods, discourages investment, and imposes a sense of irreversible poverty on its inhabitants.

B. The Spread of Contamination to Greenfields

When companies leave their urban sites, whether to flee the contamination they have produced or simply to expand or upgrade, they often build new facilities on greenfield sites. But if industrial owners are allowed to use and abandon property at will, current greenfield development will spread the legacy of contamination to outlying areas. Development projects often affect land use choices long after the

\[\text{\ldots}\]
useful life of a project has expired. As a result, future generations will have a smaller quantity of usable land, less drinkable groundwater, and more “brownfields” with limited options for use and greater risks to manage.

While industries are doubtless more environmentally aware today than in past decades, intrusions into the environment continue. Even if industrial practices have matured beyond backyard dumping of dangerous chemicals and pumping toxins into unlined pits, many insidious threats remain. Parking lots are now suspect areas of contamination in environmental assessments due to the runoff of gasoline, oil products, solvents, and antifreeze. Structures built before 1978 are suspect sources of asbestos, and structures painted before 1982 are suspect sources of lead. Site contamination from building materials, parking lot runoff and other releases of hazardous materials can foreclose a multitude of future agricultural, residential, and recreational land uses. Another troubling possibility is that the contaminant of concern tomorrow could be fiberglass or some other currently ubiquitous but nonsuspect substance. Thus, even greenfield development that is considered innocuous today may present an obstacle to future land uses beyond mere structural conversion or demolition.

In addition to restricting future land use options, greenfield development may threaten to degrade the underlying groundwater resources. This is particularly troubling because experience has shown

43. Nuclear power plants offer the most extreme example, possessing a relatively short useful electricity-producing life that restricts land use for hundreds of years due to radioactive contamination. See Keith Schneider, Grants Open Door for Nuclear Waste, N.Y. TIMES, Jan. 9, 1992, at A14. Originally, nuclear power plants were to be dismantled and sent to a low level radioactive waste repository. Id. However, due to siting difficulties and transportation risks, onsite entombment is being considered a more realistic alternative. Id. Other less ominous examples include roads and other infrastructure that strongly influence patterns of development, “literally setting choices in concrete and restricting the options of later generations.” Bruce Seely, The Saga of American Infrastructure: A Republic Bound Together, WILSON Q., Winter 1993, at 18, 39.

44. See, e.g., Rules Easing, supra note 4, at A8. For example, Bill Spaulding wanted to expand his family’s electrical contracting business in Detroit. Id. A Detroit bank refused to lend money to build an addition on the former employee parking lot because the bank was worried about potential liability for traces of oil, antifreeze, and fuel that it assumed had seeped into the ground. Id. Spaulding erected a new building on undeveloped land 60 miles north of Detroit, and Detroit lost the jobs and tax revenue. Id.

45. See Katherine D. Walker et al., Confronting Superfund Mythology: The Case of Risk Assessment and Management (1993) (unpublished manuscript, on file with the Ecology Law Quarterly). The Harvard Center for Risk Analysis conducted a study of risk assessments at 77 Superfund sites and concluded that future land use restrictions are used in a significant percentage of the sites to reduce cleanup costs. Id. at 12.

46. Of course, many rural areas overlie aquifers that are already contaminated by pesticides and other chemicals. See Luke Cole & Susan Senger Bowyer, Pesticides and the Poor in California, RACE, POVERTY & ENV'T (Earth Island Inst., S.F., Cal.), Spring 1991, at 1, 17. However, urban areas with historic concentrations of industry are less likely to depend on groundwater for their drinking water supply, and more likely to overlie contam-
that cleaning contaminated groundwater to drinking water standards is so costly, even where the technology is available, that it may not be feasible given the economic realities of many sites. Thus, developing lands that overlie clean groundwater resources presents a risk not present in the redevelopment of most urban lands where the underlying groundwater is no longer a safe drinking water source. Even where greenfields do not overlie pristine groundwater, adding industrial contaminants to groundwater already contaminated with pesticides may increase the complexity and cost of groundwater cleanup and reuse. Thus, the spread of industrial and manufacturing facilities to surface lands overlying groundwater threatens to further restrict future resource choices by diminishing available fresh water supplies for future generations.

Given these risks and the history of abandonment of urban industrial facilities, owners and operators of new industrial facilities that use hazardous materials ought to be required as a permit prerequisite to set aside adequate financial resources to clean up their properties after they cease operations. If owners of hazardous waste treatment, storage, and disposal (TSD) facilities must prove financial responsibility sufficient to cover environmental harms, why not industrial operations? Any facility where hazardous substances are used and that poses a threat to the environment, should be required to post an environmental bond, or otherwise prove financial responsibility sufficient to cover the potential costs of cleaning up the site, before it can bring hazardous materials onto the property. If the law required the

See Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 8 (recognizing that the current hazard ranking system used by EPA to rank sites on the NPL is biased against urban areas because these areas get their drinking water from offsite public water supplies, as opposed to underlying groundwater sources).


When developing a cleanup program, five pollutant characteristics are considered: solubility, density, affinity to volatilize, adsorptability, and biodegradability. Puszcz & Tumulty, supra note 47. Current treatment technologies favor the cleanup of contaminated sites involving relatively low concentrations of inorganics. Therefore, when chemicals with different characteristics are mixed (e.g., inorganic contaminants associated with industrial activities mixed with organic pesticides), cleanup may be more complex.

49. The Resource Conservation and Recovery Act (RCRA) requires an owner or operator of a hazardous waste TSD facility to provide assurances of financial responsibility "consistent with the degree and duration of risks" associated with the specified hazardous waste. 42 U.S.C. § 6924(a) (1988). These assurances can be provided by insurance, guarantee, surety bond, letter of credit, or by qualifying as a self-insurer. Id. § 6924(t)(1).

50. While a fully developed plan must await another paper, I have a rough idea for implementing this. A developer could be required to post an environmental bond in an
owner of a facility to return the property to the market in as good or better condition than when she acquired the property, the costs of the business would reflect the true costs of contaminating activities. The cost of remediating greenfields to background levels would likely be more expensive than returning a recycled urban industrial property to its background levels. Thus, such a system would require a higher bond for siting a facility on a greenfield than siting the same facility on a brownfield.

Government regulations do not currently require industries to post environmental bonds or to take any predevelopment responsibility for the potential contamination of greenfields. In fact, government dollars are actively subsidizing the spread of industrial facilities to greenfield areas. Local governments, using federal grants and state funds to pay for new utility infrastructure (e.g., sewers, water, and electric) and secondary roads in outlying areas, are in effect duplicating infrastructures that already exist in urban centers. Thus, federal, state, and local taxpayers subsidize the environmentally suspect spread of industrial development to greenfield sites. By contrast, brownfield site redevelopment builds on the existing infrastructures that serve an established urban community. Taxes from a new facility amount based on the average cost of cleanup to predevelopment levels, which would make the bond higher for greenfields. Included in the bond calculations would be the type and quantity of hazardous substances used at the facility, multiplied by a risk factor representing the risk of a release from similar facilities. A discount for years of operation without a release could be incorporated as an interim incentive for good behavior. The bond would be used to clean up contamination found when the property is transferred to a new owner by the bondholder. Because the bond would be returned if no additional contamination was found, the owner has an incentive to run a clean operation. Alternatively, insurance could be required to cover cleanup costs as a way to achieve the same results with less government administration.

51. Although some claim that it may be more cost effective to build new infrastructure rather than to repair the old, see Boyd et al., supra note 24, at 10-14, this assumes that one can allocate public works investment to new infrastructure to the exclusion of investing in the old. Old infrastructure systems must be maintained, repaired, and modernized in accordance with physical need and legal requirements in order to serve the remaining residential and industrial inner-city users. Thus, shifting public works resources to greenfield development instead of maintaining the existing system may be irresponsible in a time of shrinking public works resources.

52. According to a survey of some 2000 firms conducted by the Bureau of Census, the availability of public works facilities is characterized as a “critical” or “significant” factor in location decisions. Pat Choate & Susan Walter, America In Ruins: Beyond the Public Works Pork Barrel 17 (1981). A large number of communities are limited in their economic revitalization efforts because their basic public facilities are too obsolete to handle additional capacity. For instance, the Department of Commerce reports that 46% of communities’ wastewater treatment systems are operating close enough to capacity to preclude additional industrial load until major new investments are made in basic facilities. Id. at 15-16. Given this critical situation, decisions to spend a shrinking pool of public works investment dollars to reproduce industrial infrastructure capacity for outlying greenfields effectively subsidizes the flight of capital out of urban areas and into greenfields. See id. at 4, 17.
on a recycled site provide local government with the resources necessary to reinvest in the integrity of its infrastructure, upon which so many people already depend.\textsuperscript{53}

Greenfield development also has some indirect adverse impacts on environmental quality by affecting transportation. For instance, by siting new facilities in dispersed outlying areas instead of in concentrated innercities, greenfield development encourages a car-dependent work force because mass transit cannot economically serve these low density areas of development.\textsuperscript{54} Further, locating jobs beyond the reach of public transportation could add to the financial woes of existing urban transit systems by decreasing their ridership, which is often already substantially below capacity.\textsuperscript{55} Efficient mass transit use increases fuel efficiency, and reduces air pollution\textsuperscript{56} and the use of hazardous substances associated with auto maintenance.\textsuperscript{57} These factors, combined with increasing fuel costs, may ultimately encourage reinvestment in the urban corridors along which mass transit operates.

Greenfield siting may also limit urban workers' access to jobs in outlying areas for reasons unrelated to job performance or skills. To reach a suburban job site, urban workers need dependable transportation, which would not be an obstacle if the job site were accessible by public transportation. The urban labor force may be restricted from moving closer to job opportunities in greenfields by lack of financial resources, housing discrimination, or an unwillingness to abandon neighborhoods and disrupt families.\textsuperscript{58}

\textsuperscript{53} The urban infrastructure is in great need of an infusion of resources for maintenance. See id. To get around the catch-22 that cities must have adequate infrastructure to attract the redevelopment projects needed to generate the tax revenue to pay for the infrastructure, municipalities have relied on bond revenues and tax increment financing. See infra part II.B.3.a and accompanying text.


\textsuperscript{55} William Robbins, Dependant on Buses, Midwestern Towns Fight Cuts in Service, N.Y. Times, Oct. 14, 1986, at A14 (stating that the trend toward cutting services in many cities is caused in large part by a continuing decrease in ridership).

\textsuperscript{56} World Resources Inst., supra note 54, at 87-93. Automobile emissions of reactive compounds are two to four times higher than EPA originally estimated and may be the primary reason for nonattainment of the Clean Air Act standards for ozone precursor pollutants. Id. at 90.

\textsuperscript{57} Cars create soil, water, and noise pollution. In fact, the runoff of oil products, antifreeze, de-icing agents, solvents, and lead leaking from old batteries has turned auto junkyards into Superfund sites. Henry Clark, Speech at Toxic Site in Richmond, California (Mar. 6, 1993); Sally Hicks, Zoning Law Closes Junkyard Housing Toxic Chemicals, St. Petersburg Times, May 26, 1990, at 1.

\textsuperscript{58} New housing built in greenfield areas is too expensive for most moderate income and low income households to occupy without direct subsidies. Bradbury et al., supra note 11, at 166. Minorities may also face housing discrimination as an obstacle to relocation. See Paul Mohai & Bunyan Bryant, The Disadvantaged Face Greater Risks, Race, Poverty & Envt (Earth Island Inst., S.F., Cal.), Mar.-Apr. 1992, at 3, 6; see also Robert D. Bullard & Beverly H. Wright, Blacks and the Environment, 14 Humboldt J. Soc. Rel. Sci. 1994, at 3.
While urban redevelopment does not guarantee jobs to the unskilled urban labor force, an urban job location removes a number of obstacles that are presented by greenfield job locations. For instance, concentrated urban job locations may facilitate efficient job training programs because resources are concentrated in a single facility that is accessible to the targeted urban workforce and to the job placement locations.  

Removing de facto greenfield subsidies may allow recycled sites to compete more equally against greenfield sites for new facilities. This could be accomplished by refocusing public works investment toward brownfields and away from greenfields, refurbishing the urban infrastructure, and retraining the urban labor force. Moreover, recycling orphan sites will require affirmatively enticing prospective purchasers and lenders to invest in urban areas. The current state of public policy and environmental law not only fails to entice urban industrial site recycling, but it actively creates disincentives to urban investment.

C. Siting Environmental Hazards in Urban Areas

Thus far, this comment has focused on the environmental benefits of urban industrial redevelopment. However, industrial redevelopment also promotes the concentration of environmental hazards in urban areas, which raises environmental equity issues. Low income, predominantly minority urban residents already bear the brunt of the

165, 166 (1987) (listing a number of factors that limit housing options for Blacks, including discrimination, income, and federal housing policies).


60. Requiring local governments to stop providing incentives for development in greenfield communities, while advocating for incentives in urban areas, is obviously a double standard. However, it is one I defend as reducing waste. Urban infrastructure, the urban labor force, and urban industrial properties are substantial resources that can be reused with investment in their productive capacities.

61. Orphan sites are generally abandoned sites where owners have gone bankrupt and the property has escheated to the local government. Industrial sites, as opposed to waste disposal facilities, usually have few, if any, potentially responsible parties. At orphan sites, the past and present owners are not viable. As a result, prospective purchasers are the only option for covering cleanup costs without using the Superfund. Bradford C. Mank, The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster, 19 B.C. ENVTL. AFF. L. REV. 239, 249-72 (1991) (discussing methods of encouraging development of abandoned sites and the remediation of orphan sites in particular).

62. See infra part II.A for a discussion of the obstacles to urban redevelopment that discourage urban investment.
environmental externalities from industrial activity. Attracting industries back to urban areas will only increase this disproportionate burden.

The environmental risk will vary considerably depending on the type of industrial facility that is being sited. The risk posed will depend on the nature of the chemicals and the amounts stored, used, or transported. Many industrial facilities emit air contaminants by burning fuel or using solvents, or as byproducts of the production process. Most also discharge some wastewater, transport some hazardous waste products through the surrounding community to offsite storage and disposal facilities, and pose some risk of releasing hazardous materials into the soil, air, or groundwater. Because the pathways of risk exposure vary greatly from industry to industry, the community needs reliable and adequate information about the particular facility proposed in order to assess the increased risk it is being asked to accept as compared to the benefits the facility offers. The community also must have time to digest and respond to the information.

Further, redevelopment can radically alter the character of the community in ways that would present a hardship for local residents. Siting a new facility that needs a block of land larger than existing vacant parcels may require the condemnation and demolition of existing affordable housing and productive commercial facilities. It is hard to justify such an intrusion into the community by extolling the virtues of local economic development if the displaced residents do not reap these benefits.

Residents are unlikely to embrace the risks of redevelopment unless they know that the benefits will outweigh those risks. One of the typical benefits heralded by redevelopers is the increase in job opportunities. However, urban redevelopment does not necessarily mean local jobs, particularly in areas where the labor pool is unskilled and

63. See Toxic Wastes and Race, supra note 21 (finding that communities with greater minority percentages of the population are more likely to be sites for hazardous waste facilities).

64. An extreme example is the razing of the Poletown neighborhood in Detroit, Michigan to make room for a new General Motors (GM) plant. See David R.E. Aladjem, Public Use and Treatment As Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff, 15 Ecology L.Q. 671, 673-75 (1988). Although the Poletown neighborhood provided the necessary access to rail and highway transportation arteries, there was no vacant parcel large enough to accommodate the GM plant. Id. at 673. The City of Detroit, with the support of GM, the United Auto Workers, the Carter Administration, and even the Catholic Archdiocese, decided to use its eminent domain authority to acquire and demolish 1176 buildings, including 143 businesses, 6 churches, 2 schools, 1 hospital, and 1362 households. John J. Bukowczyk, The Decline and Fall of a Detroit Neighborhood: Poletown v. G.M. and the City of Detroit, 41 Wash. & Lee L. Rev. 49, 61-63 (1984). Poletown was not an urban wasteland; it was a stable, integrated neighborhood composed largely of elderly Polish-Americans and Blacks, with budding neighborhood organizations undertaking revitalization efforts. See id.
suffers from a low level of education. Richmond, California presents a stark example. Although Richmond is the home of Chevron USA's largest oil refinery, it also has one of the highest unemployment rates in the San Francisco Bay Area. Local activists have repeatedly called on Chevron to hire more local residents to help offset the environmental burdens that the community endures. Thus, unless a representative of community interests can ensure that redevelopment negotiations will yield provisions for the employment and training of local workers, the community will bear the environmental consequences of an industry without reaping the employment benefits it putatively offers.

Although the increase in tax revenue generated by a facility may enable the local government to provide better public services, the local benefit is diluted. The revenue is usually placed in a general fund and used in other areas of the city that have a higher priority need for city services.

Secondary economic benefits from an industry and its workers spending money on local goods and services may provide some additional small business opportunities for local residents. However, this benefit also may be diluted when companies provide in-house food service and shops, resulting in further alienation of the host community from potential economic benefits.

The keys to community acceptance of industrial redevelopment are information and involvement. First, legitimate representatives of community interests should be involved early in the redevelopment planning effort and should have access to all relevant information on the risks posed by a facility. Further, they should have the opportunity to establish conditions that assure sufficient benefits will flow from the redevelopment effort to the local community to offset the environmental costs the community is asked to bear. To the extent that they consider community interests at all, redevelopment advocates in the legislature, the business community, and city planning offices, generally assume that any economic development will benefit inner-city residents. This naive assessment leads to an assumption


67. Willy Morris, Chevron Will Give Neighbors $850,000, W. COUNTY TIMES, June 3, 1994, at 1A, 16A.

68. See, e.g., Bukowczyk, supra note 64, at 66 (noting that residents of Poletown were particularly hurt by Detroit officials' insulting insistence that the area was a blighted urban wasteland not worth preserving when faced with the substantial economic development opportunity offered by General Motors).
that public participation in redevelopment planning is unnecessary since community interests are adequately represented by well-intentioned advocates in the local government.

In sum, industrial redevelopment serves the environment by recycling contaminated urban properties and reducing the spread of contaminating enterprises to untainted outlying lands. On the other hand, industrial redevelopment promotes the concentration of these enterprises in urban areas, perpetuating the inequitable distribution of environmental risk to poor and minority residents of innercities. Yet a community properly involved in planning a redevelopment project may be willing to accept this incremental increase in risk if it can ensure that the benefits it will receive from the housing facility offset the risk.69

In order for communities to have the option of accepting redevelopment and modifying it to suit their needs, a number of obstacles must be removed. In the next part, I discuss in more detail the obstacles to redevelopment created by environmental law and the perceived risk of environmental liability mentioned above. These are not the only obstacles to redevelopment, or perhaps even the most important.70 However, they are in large part an unintended byproduct of the evolution of environmental law, and the responsibility for their resolution should therefore fall on environmental lawyers.

II

REFORMING ENVIRONMENTAL LAWS TO REMOVE OBSTACLES TO URBAN REDEVELOPMENT

The magnitude and uncertainty of environmental liability costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)71 pose significant obstacles to urban industrial redevelopment. Other environmental laws either heighten these barriers or prevent their removal. First, prospective purchasers and developers shun ownership of urban industrial property because they fear liability for past contamination.72 Second, lenders are reluctant to invest in industrial properties due to the prospect of direct lender liability and the fear that discovery of contamination will erode

69. See, e.g., Morris, supra note 67, at 1A, 16A. The West County Toxics Coalition, a grassroots environmental justice organization composed primarily of residents living adjacent to Chevron's Richmond Refinery in California, negotiated an agreement with Chevron. Id. at 1A. Chevron agreed to a combination of emission controls, early warning systems, and community compensation in exchange for the Coalition's withdrawal of its administrative challenge to Chevron's air district permit for a $660 million expansion of the refinery that would increase local emissions and toxic risk. Id. at 16A.

70. See BOYD ET AL., supra note 24, at 10-12.


72. BARTSCH ET AL., supra note 21, at 4.
collateral value and push borrowers to default on loans. 73 Third, even when developers and lenders are interested in a project, the threat of spiraling environmental assessment and remediation costs creates financial uncertainty and makes predicting future development costs difficult. 74 Finally, this financial uncertainty is compounded by the complex regulatory context. 75 Taken together, these difficulties discourage the recycling of urban industrial property and encourage the siting of new industry on outlying greenfields. 76

Urban redevelopment advocates have reacted to these obstacles by trying to win reform in four areas of hazardous waste cleanup law. These reforms are aimed at removing barriers to industrial redevelopment both by lessening the burden of remediation costs and by permitting investors to calculate those costs with more certainty. The four objectives are: (1) reducing cleanup standards in industrial areas; (2) limiting liability for purchasers and lenders; (3) streamlining government review through standardized cleanup levels, more responsive agencies, and federal-state coordination of enforcement actions; and (4) increasing government incentives to attract industry back to urban brownfields. 77

A. Obstacles to Urban Redevelopment

1. Prospective Purchaser Liability

CERCLA, the primary legal tool for cleaning up sites where hazardous materials are present, designates the present owner of a contaminated property as a liable party. 78 The courts have interpreted CERCLA liability as strict, joint, and several, and retroactive. 79 Thus any purchaser of contaminated property, even one who neither created nor contributed to the contamination, is liable under CERCLA and can potentially be held responsible for the entire cost of remediating the property. 80 Apart from the threat of potential liability, the

73. Id. at 4-5.
74. Id.
75. URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, supra note 1, at 5.
76. See BARTSCH ET AL., supra note 21, at 4-7 (discussing factors that inhibit reuse of industrial sites).
77. See URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, supra note 1, at 10-34 (discussing legislative and nonlegislative recommendations for lifting impediments to urban redevelopment).
80. See United States v. Waste Industries, Inc., 734 F.2d 159 (4th Cir. 1984) (holding the current owner of a landfill liable under CERCLA for the waste that continued to leach
uncertainty involved in projecting the costs of assessment and remediation means that a prospective purchaser cannot be confident that the purchase price is sufficiently discounted to reflect the purchaser’s share of the cleanup costs. Therefore, the value of a brownfield property to the purchaser would have to be quite high to offset the substantial risk of liability that accompanies acquisition of the property.

While prospective purchasers can theoretically escape from CERCLA’s liability scheme, they rarely do. Recognizing the burden that CERCLA liability places on property buyers, Congress amended the statute in 1986 to include a defense for the innocent landowner. To be eligible a landowner must show that she “did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.” To establish this, an innocent landowner must have, at the time of acquisition, conducted all appropriate inquiries into the previous ownership and uses of the property and found them to be consistent with good commercial or customary practices. Courts, however, have generally been reluctant to release a potentially responsible party (PRP) based on the innocent purchaser defense. CERCLA clearly places the burden of proof on the new landowner to show that she had no reason to know of the contamination at the time of purchase. With the benefit of hindsight, a court is likely to deem inadequate any assessment of industrial property that failed to find the contamination. Thus, prospective purchasers of urban property are reluctant to rely on a diligent environmental assessment to protect them from owner liability under CERCLA.

from the landfill even though the current owner had no active involvement in the disposal activity). But see 42 U.S.C. § 9601(35)(A) (1988) (providing an “innocent purchaser defense” that narrowly allows a present owner to avoid CERCLA liability for past contamination if she diligently took all appropriate steps to determine that there was no contamination on the property at the time of purchase, even if it was later found that there was contamination).

81. See Boyd et al., supra note 24, at 25-26.
83. Id.
84. Id. § 9601(35)(B). In determining the innocence of the landowner, the court must take into account “the relationship of the purchase price to the value of the property if uncontaminated.” Id. Therefore, purchasers benefiting from a discounted purchase price due to the presence of contamination will not be able to benefit from a release of liability.
87. Most purchasers still find it advantageous to conduct site assessments prior to the time of purchase, often because lenders will not otherwise consider loans to develop the property. Bartsch et al., supra note 21, at 22.
A second possible exception to CERCLA liability is the Prospective Purchaser Agreement (PPA). If a pre-purchase investigation reveals contamination or reason to suspect contamination, a prospective purchaser may avoid owner liability by entering into an agreement with environmental enforcement agencies before purchasing the tainted property. Under a PPA, a purchaser offers assistance in the cleanup effort in exchange for a covenant not to sue from EPA and state environmental agencies, and contribution protection to ward off suits by other PRPs. In theory, these agreements allow prospective purchasers of known or potentially contaminated property to secure a release from environmental liability for a sum certain before they buy, thereby limiting the risk involved in reusing urban industrial sites.

While PPAs appear to be an attractive device, only four were signed in the two years after EPA issued a guidance memorandum to its regional offices setting criteria for issuing PPAs. This may be due to a general reluctance on EPA’s part to release owners from CERCLA liability, or it could be an indication that EPA is demanding a larger contribution toward cleanup than most prospective purchasers are willing to make. Regardless, PPAs have an insufficient track record for prospective purchasers to confidently rely on them when assessing the liability risks of purchasing an urban industrial property.

2. Financing and Lender Liability

The second obstacle to recycling industrial sites is the reluctance of lenders to finance development on property that is contaminated or likely to be contaminated. The reluctance to accept such property as security for a loan stems from the reality that if foreclosure becomes necessary, banks and other lenders may be held liable as owners.


89. 54 Fed. Reg. 34,235 (1989) [hereinafter EPA Guidance]. Contribution protection in a consent decree with the government can protect settling parties (like prospective purchasers) from suits brought by nonsettling, jointly and severally liable parties seeking to recover a proportionate share of the nonsettling parties’ cleanup contribution.

90. Ross MacFarlane & Jennifer Belk, Washington State Enters First “Prospective Purchaser Agreement;” Resolves Environmental Liability in Advance of Purchase, UPDATE (Environmental & Land Use Dep’t of Preston Gates & Ellis, Seattle, Wash.), Oct. 1993, at 2. A prospective purchaser of property on Lake Union in Seattle was able to negotiate an effective agreement by offering to conduct monitoring and use best efforts to realize its vision of creating an 85-acre city park on the site. Id. The Washington Department of Ecology agreed not to sue the purchaser or its successors and protected them from lawsuits by other parties who would be forced to pay cleanup costs at the property. Id.

91. Feldman, supra note 88, at 318 n.112.
under CERCLA. Additionally, cleanup costs can lead an otherwise viable borrower to default on a secured loan, and the value of the contaminated collateral property will rarely cover the lender's security interest.

Some courts have imposed CERCLA liability directly on lenders even before they have participated in the management of a contaminated facility through foreclosure proceedings. In response, EPA issued a lender liability rule to help clarify the ambiguities in the statute that led to inconsistent court interpretations of CERCLA's secured creditor exemption. According to the EPA rule, lenders were liable only if they participated in management either by taking specific “responsibility for the borrower's hazardous substance handling or disposal practices” or by assuming “overall management responsibility encompassing the day-to-day decisionmaking of the enterprise.”

The rule explicitly stated that participation in the management of a facility “does not include the mere capacity, or ability to influence, or the unexercised right to control, facility operations,” and required some actual participation in management to overcome the secured creditor exemption. Further, the new rule allowed lenders to foreclose, take steps to preserve the value of the collateral, and hold the premises, provided the property is offered for sale and reasonable offers are not rejected, all without becoming liable as an owner.

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92. CERCLA's secured creditor exemption applies only when “a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest.” 42 U.S.C. § 9601(20) (1988). Despite this language, courts have extended liability to lending institutions in some circumstances. See, e.g., United States v. Md. Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (holding that bank that foreclosed and then purchased the facility at the foreclosure sale is liable under CERCLA).

93. See BARTSCH ET AL., supra note 21, at 20. Even if the property retains some value, superlien (or “environmental lien”) laws in some states prioritize cleanup costs over mortgage loan security in bankruptcy proceedings. See Ohio v. Kovacs, 469 U.S. 274, 286 (1986) (O'Connor, J., concurring) (“[A] State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens.”). The states currently using superliens to prioritize environmental cleanup costs over secured mortgage creditors are Connecticut, Massachusetts, New Jersey, and Tennessee. David H. Topol, Hazardous Waste and Bankruptcy: Confronting the Unasked Question, 13 VA. ENVT. L.J. 185, 224 n.189 (1994).

94. See, e.g., United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (extending liability for the mere capacity to affect hazardous waste disposal decisions), cert. denied, 498 U.S. 1046 (1991); In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990) (limiting liability to secured creditors who actually participate in the management of the facility).

96. Id. § 300.1100(c)(1).
97. Id.
98. Id. § 300.1100(c)(1)(ii).
99. Id. § 300.1100(d).
However, on February 4, 1994, the Court of Appeals for the D.C. Circuit vacated EPA's lender liability rule. The court held that EPA overstepped its statutory rulemaking authority when defining and limiting lender liability under CERCLA. By providing for private rights of action under section 107, Congress designated the courts, not EPA, as the adjudicator of the scope of CERCLA liability. Although the EPA lender liability rule could continue to serve as a policy statement to guide agency enforcement actions away from eligible lenders, lenders excused by EPA would still be susceptible to private cost recovery actions from fellow PRPs seeking contribution from deep pocket financial institutions. Nevertheless, the court recognized that its decision presents a hardship: "We well recognize the difficulties that lenders face in the absence of the clarity EPA's regulation would have provided. Before turning to this rulemaking, EPA sought congressional relief and was rebuffed. We see no alternative but that EPA try again."

Although lenders have a substantial, though somewhat inconsistent, body of judicial precedent from which to fashion a secured creditor exemption defense, the rejection of EPA's lender liability rule may inject more uncertainty into lenders' loan decisions. This uncertainty may keep lenders cautious about lending money to develop contaminated properties. The result of this caution is the

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100. Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994).
101. Id.
102. Id. at 1107-08.
103. Id. at 1108.
104. Id. at 1109.
106. There are at least three reasons for this: (1) the brief and volatile history of litigation on lender liability, see Francine Bellet, Lender Liability, in TOXIC TORT PRACTICE GUIDE 34-1 (James T. O'Reilly ed., 2d ed. 1992) (discussing how courts have interpreted EPA's final lender liability rule); (2) the more active government oversight of lending patterns in the wake of the savings and loan crisis, forcing all lending institutions to be more risk averse in their lending practices, see, e.g., BOYD ET AL., supra note 24, at 26 (stating that the FDIC has notified banks and thrifts that they must create internal review procedures to limit their exposure to environmental liability); and (3) the fear that the property will not retain its collateral value due to spiraling cleanup costs that force borrowers to default, id. at 27.
“greenlining”107 of urban properties by lending institutions that refuse to risk limited loan dollars on potentially contaminated sites.108

Industrial reuse projects in urban areas are particularly susceptible to greenlining because they have multiple disadvantages in the eyes of a lender. First, virtually by definition, a property available for reuse has previously been the site of a facility where hazardous materials were used or stored and may have been released into the environment. This factor alone is enough to discourage one-half of the smaller financial institutions from considering financing reuse projects.109 Second, if the new use planned for a site involves a manufacturing or industrial facility associated with hazardous materials, it could be ineligible for financial assistance from many lending institutions.110 Gentrification projects designed to create residential facilities out of abandoned industrial properties have also run into severe lending resistance as bankers continue to circulate horror stories about industrial use projects gone awry for environmental reasons.111

Another disadvantage characteristic of most abandoned urban properties is the absence, or financial instability, of current and former owners. The perverse consequence is that small businesses are frozen out of the redevelopment market. Abandoned properties that become the subject of publicly assisted reuse efforts get little financial support from prior owners, thus placing greater potential liability on the new owner and developer and, in the event of their default, on their lender. Lending institutions will favor large corporate developers that can weather the potential costs of a cleanup without defaulting on their loan agreement.112 This leaves small entrepreneurs, who

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107. “Greenlining” refers to the withdrawal of financing from areas with potential environmental problems and shares characteristics with the discriminatory “redlining” of certain areas of a city by lenders refusing to make house loans to prospective buyers in certain communities because of environmental concerns. Restoring Contaminated Sites, Issues in SCI. & TECH., Mar. 22, 1994, at 74.

108. See James T. O'Reilly, Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-Fill Incentives, 11 YALE J. ON REG. 43 (1994).

109. BARTSCH ET AL., supra note 21, at 21. A recent American Bar Association poll of financial institutions with less than $250 million in assets found that 43% had already stopped making loans to companies associated with environmental contamination, and another 11% intended to curtail such lending. Id.

110. Businesses that have been categorically greenlined include tool and die shops, semiconductor facilities, utilities, high-technology metal fabricators, and bottling and canning facilities. Id.

111. See, e.g., id. For example, in 1981 a developer paid $3.5 million for an abandoned Alcoa factory with plans to convert the facility into luxury apartments. Id. Ten years later, after the discovery of massive polychlorinated biphenyl (PCB) contamination inside the building, the development project was abandoned, and the developer sold the property back to Alcoa for $10. Id.

112. Id. at 22.
already face an uphill battle for financing, without adequate support to start businesses in the urban area.113

3. The Uncertain Regulatory Context

a. Overlapping State and Federal Jurisdiction

One wild card that pervades the application of environmental law is the overlapping jurisdiction of state and federal environmental enforcement agencies. CERCLA expressly reserves the right of states to impose additional liability or cleanup requirements on those releasing hazardous substances within their borders.114 Therefore, even if property owners and lenders are not liable under CERCLA, they may nevertheless be liable under state law.115

For example, states are free to regulate materials excluded from CERCLA’s definition of hazardous substances.116 Under this regulatory system, a site can contain contaminants that are regulated exclusively under state law and contaminants subject to regulation under both state and federal law. Moreover, states may set thresholds for cleanup that are more stringent than federal standards. The property owner is thus subjected to a potentially inconsistent and certainly complex regulatory environment.

Under CERCLA, cleanup is required for any release or threat of release of a hazardous substance in an amount equal to or greater than an EPA-designated reportable quantity.117 In practice, once EPA becomes aware of a potentially contaminated site, it will assess the site and assign a hazard ranking based on the site’s potential for harm to human health and the environment. Only sites receiving a hazard ranking above EPA’s threshold will be added to the National

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113. See id. at 25. ("The real loser here is the small business community, well-run, credit-worthy businesses that cannot obtain the financing they need to survive because their lenders are afraid of Superfund liability.") (quoting Rep. John La Falce, Chairman of the House Small Business Committee).

114. 42 U.S.C. § 9614(a) (1988) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."). Cleanup standards at a Superfund site are established in accordance with applicable or relevant and appropriate requirements (ARARs), which may include the environmental standards of the state in which a site is located. Id. § 9621(d)(1), (2)(A)(ii) (1988).

115. See, e.g., United States v. Hooker Chems. & Plastics Corp., 739 F. Supp. 125, 126-29 (W.D.N.Y. 1990); Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651 (N.D. Ill. 1988) (holding that CERCLA does not preempt state law remedies to recover costs of site cleanup from parties who are not liable under CERCLA but are potentially liable under state law), aff’d, 861 F.2d 155 (7th Cir. 1988).


Priorities List (NPL) for a Fund-led cleanup.\textsuperscript{118} Thus, states will have primary responsibility for the many sites that do not rise to the threshold for federal action.\textsuperscript{119} Unfortunately, the determination of whether a site will be subject to federal or state oversight is made well into the site assessment process, making it difficult to anticipate the regulatory requirements before substantial funds are spent on a redevelopment project.

Given the states' important role in the cleanup of federally unassessed sites, as well as low level or petroleum-based contaminant sites, states have attempted to craft innovative solutions to the uncertainty problems of unlimited CERCLA liability.\textsuperscript{120} However, state agreements to limit liability, release prospective purchasers, or certify a site as clean do not preclude EPA from bringing an enforcement action under federal law.\textsuperscript{121} Likewise, federal settlements do not necessarily preclude state liability claims.\textsuperscript{122} The greater the state innovation, the higher the possibility that EPA will involve itself in a state cleanup program. Despite the fact that EPA's resources are over extended and the NPL is currently overwhelmed with far more sites being added to the list than removed,\textsuperscript{123} there is the risk of EPA overfiling, particularly at high profile redevelopment sites. This risk adds to the pervasive uncertainty that discourages brownfield investments.

\textit{b. Delays and Uncertainty in Agency Actions}

Even if all environmental enforcement authority was concentrated in a single state agency, it would not guarantee predictable agency behavior. One of the costs of state innovation is regulatory uncertainty.\textsuperscript{124} For example, in 1983, New Jersey created the Environ-

\textsuperscript{118} 42 U.S.C. § 9604 (1988). States have responsibility for 10\% of the capital costs and all operating and maintenance costs for Superfund-financed cleanup at National Priorities List (NPL) sites. \textit{Id.} § 9658 (1988).

\textsuperscript{119} See, e.g., \textsc{Boyd et al.}, supra note 24, at 17. For example, as of 1990, Massachusetts had 15 federal NPL sites, but had 383 on its state priority list with an additional 1486 on a hazardous site registry. \textit{Id.} at 17 n.19.

\textsuperscript{120} See, e.g., McSlarrow et al., supra note 85, at 10,374 (discussing Alabama's attempt to restrict the use of in-state disposal facilities by banning import of wastes not complying with CERCLA's capacity assurance provisions, which was rejected by the court as a barrier to interstate commerce).

\textsuperscript{121} \textsc{Bartsch et al.}, supra note 21, at 13.

\textsuperscript{122} See, e.g., United States v. Union Gas Co., 743 F. Supp. 1144, 1155 (E.D. Pa. 1990) (finding that CERCLA did not preempt state law claims based on subject matter not covered by the federal agreement).

\textsuperscript{123} See \textsc{Office of Emergency and Remedial Response, U.S. Env'tl Protection Agency, OSWER Pub No. 9200.5-01B, EPA/540/8-91/003, The Superfund Program: Ten Years of Progress} 5, 11 (1991). The NPL, which began in 1981 with 115 sites, now contains over 1200 sites and is expected to add 100 new sites per year, making the list exceed 2100 by the year 2000. \textit{Id.} To date, only 29\% of all removal actions have taken place at NPL sites. \textit{Id.}

\textsuperscript{124} \textsc{Bartsch et al.}, supra note 21, at 29.
mental Cleanup Responsibility Act (ECRA), an innovative and comprehensive “buyer protection plan” that requires owners or operators of most industrial establishments to remediate contamination before closing or transferring operations. ECRA requires owners and operators to notify the New Jersey Department of Environmental Protection (NJDEP), to undertake a complete and thorough environmental audit, and, if necessary, to perform an environmental cleanup before they can relinquish industrial property.

ECRA has been criticized as overly intrusive and burdensome on industrial property transactions. Compared with other states, New Jersey’s transaction costs have increased dramatically, leading some to conclude that ECRA has encouraged industry to flee the state. Further, NJDEP’s administration of ECRA has added uncertainty and delay, which exacerbates the regulatory burden on industrial property transactions. At first NJDEP was ill-prepared and understaffed for the onslaught of reviewing site assessments and remediation plans, and preparing administrative orders. This caused significant delays in the regulatory process, and in turn, costly and unpredictable delays in transactions. Allowing case-by-case NJDEP approval brought flexibility at the cost of increased uncertainty. Moreover, in a well-publicized case, NJDEP sought to rescind its approval of a negative declaration of contamination, claiming that it was issued in error. The court affirmed NJDEP’s authority to rescind but admonished the agency to set sample plan guidelines and cleanup standards to better serve itself and the regulated community. While environmental cleanup of former industrial sites is one of ECRA’s primary objectives, the increased transaction costs and slow, unpre-

125. N.J. STAT. ANN. §§ 13:1K-6 to -35 (West 1982 & Supp. 1994). ECRA defines closing, terminating, or transferring operations to include any change in ownership or use, sale or transfer of stock, termination of the enterprise, or financial reorganization. BARTSCH ET AL., supra note 21, at 34.
129. Id. at 550.
130. Compliance with ECRA can take from six months for findings of “no significant contamination” to many years for full remediation. Id. at 551.
131. See BARTSCH ET AL., supra note 21, at 35-36.
133. Id. at 83-86.
dictable cleanup procedures have become a significant impediment to revitalizing New Jersey's urban areas.\textsuperscript{134}

c. The Spiraling Costs of Assessment and Remediation

Increasing costs of assessment and remediation also discourage the reuse of urban property. The prospect of owner and lender environmental liability has institutionalized site assessments as an integral part of commercial real estate transactions. Today, when lenders consider making any loan secured by property, extensive environmental testing is conducted both to protect the lender from liability and to ensure the value of the collateral.\textsuperscript{135} Developers, insurance companies, and prospective investors have a common interest in knowing whether and to what extent contamination exists before committing to a project site.

While some of these concerns are certainly justified, unrealistic fears of liability\textsuperscript{136} may mean that redevelopers and their lenders do not always act rationally in relation to the actual risk of liability. Highly publicized horror stories may fuel fears of extensive environmental liabilities, making participants even more risk averse. As a result, potential investors feel they must make substantial preliminary investments to assess a site's potential contamination. Even without actual evidence of contamination, concerns over the spiraling costs of assessing potential environmental problems and the inability to predict remediation and liability costs may discourage investment in urban areas.

Unless an urban industrial site has clear economic advantages over alternate greenfield sites, assessment costs alone could chase development money away from urban sites. Further, where a property owner perceives the cost of remediation as exceeding the benefits of the transaction, he will avoid conducting a site assessment even if it means keeping the site off the market.\textsuperscript{137} The actual amount of contamination is irrelevant to this decision since an assessment is never

\textsuperscript{134} "According to a recent article ECRA has financially terrified New Jersey companies awaiting a time consuming and costly transfer of property." Motiuk & Sheridan, supra note 128, at 564.

\textsuperscript{135} See BARTSCH ET AL., supra note 21, at 22.

\textsuperscript{136} Evidence indicates that lenders, for instance, have not borne the brunt of cleanup responsibility. EPA testified in April, 1991 that only eight of 18,392 formal potentially responsible party (PRP) notifications went to private lending institutions because of a lender/borrower relationship. \textit{Id.} at 20. Further, one study has shown that only 3% of small manufacturing businesses of 500 employees or less have been turned down by lenders due to possible environmental liability problems. \textit{Id.} (citing National Manufacturer's Association survey (1991)).

\textsuperscript{137} See BOYD ET AL., supra note 24, at 30.
done. These self-imposed restrictions on the supply of urban property contribute to a higher demand for substitute greenfield property.\footnote{138} 

Assessment and remediation costs are inherently difficult to predict because the cost of each step is dependent upon what was discovered in the previous step. A Phase I environmental assessment consists of evaluating a site's history and using aerial photographs and government databases to determine if hazardous materials are currently, or were in the past, stored or used on the site or on neighboring sites.\footnote{139} The average cost of this assessment ranges from $2,000 to $7,000.\footnote{140} In the case of an industrial site intended for reuse, a Phase I site assessment is virtually certain to generate sufficient evidence to warrant further assessment expense.

If a Phase I assessment indicates a likelihood of contamination at a site, a consultant hired by the developer will conduct a Phase II assessment. Phase II assessments consist of soil and groundwater sampling\footnote{141} and thus may vary widely in cost, depending on the size of the facility and the number of locations within the site where hazardous substances were used or stored. A Phase II property assessment on a parcel with prior industrial activity is likely to cost $25,000 to $250,000.\footnote{142} In addition, there are the typical costs and delays associated with oversight by local, state, and federal agencies who must be contacted if any contamination is found in the site assessment.\footnote{143} 

Lenders, developers, and investors are likely to be risk averse when deciding whether or not to invest in a Phase II site assessment or to look to an alternative site. Developers or lenders must decide in advance how much to invest to determine whether environmental liability will be an insurmountable obstacle to development.

Many marginal projects, including most small business development projects, may find assessment costs hard to justify when the risk of finding contamination is significant. If a developer's interest in a site does not warrant the cost of a Phase II assessment, the developer will most likely abandon the site if the Phase I assessment suggests the existence of contamination. Thus, the decision to remove a site from consideration may be made even before the extent of contamination is fully identified.

\footnote{138} Id. at 29-30.
\footnote{139} URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, supra note 1, at 6.
\footnote{140} BARTSCH ET AL., supra note 21, at 31; see also URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, supra note 1, at 6 (estimating the range of Phase I costs from $500 to $2500 for simple properties and much higher for industrial sites).
\footnote{141} URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, supra note 1, at 6.
\footnote{142} Id.
\footnote{143} BARTSCH ET AL., supra note 21, at 23 (stating that developers who must deal with these agencies to ensure adequate cleanup often encounter procedures and paperwork that complicate and delay redevelopment).
This process may limit urban redevelopment projects to large, well-financed expansions by major corporations because they alone have the funds to invest in site assessment and cleanup.\textsuperscript{144} Cities often compete for these limited corporate redevelopment projects by providing incentive packages.\textsuperscript{145} However, the community may have difficulty exerting control over the projects, and the projects run the risk of overwhelming the character of a community.\textsuperscript{146}

Even if the Phase II assessment reveals no contamination, the prospective purchaser and the lender are still faced with the threat of future liability.\textsuperscript{147} Purchasing the property means purchasing liability for any contamination the assessment may have overlooked. Environmental property assessments vary widely in quality, in part because most states do not license or otherwise certify site assessment companies,\textsuperscript{148} and also because site-specific variations hamper attempts at standardization.\textsuperscript{149} Without standardized methods and state certification, prospective developers cannot be certain that environmental assessments are reliable. This is yet another reason for developers to shun brownfields altogether in favor of less risky alternate sites.

If the Phase II assessment detects contamination, the project will remain viable only if the site-specific benefits outweigh the identifiable costs and the risks of unidentified future costs. At this point, known costs can include the costs of further investigating and creating a remediation plan acceptable to overseeing agencies, estimating the implementation and monitoring costs of the remediation plan, and developing a contingency plan for future liability in case the remedial action fails to achieve the cleanup requirements or new contamination sources are discovered.\textsuperscript{150} Thus, combined with prospective purchaser

\textsuperscript{144} Compare the General Motors plant siting in Poletown, in which the potential economic boon to Detroit was so significant that the city paid some $200 million to acquire and clean the site before selling the property to GM for constructing a new assembly plant. See Bukowczyk, \textit{supra} note 64, at 61-62. Nonetheless, the large size of the project and the financial clout of the GM Corporation were essential elements in the city's decision to invest in site assessment and cleanup. See \textit{id.}

\textsuperscript{145} See, e.g., Aladjem, \textit{supra} note 64, at 673 n.18 (noting that GM was able to extract several conditions from Detroit before agreeing to remain in the city).

\textsuperscript{146} One of the genuine disadvantages of these large expansion projects is that they leave little, if any, of the positive attributes of a community's character intact. See \textit{id.} at 716 n.250 (describing the total destruction of a neighborhood to make way for a new GM plant).

\textsuperscript{147} \textit{BARTSCH ET AL.,} supra note 21, at 32-33 (noting that information overlooked by assessors and fluctuating cleanup standards may add to the uncertainty of cleanup costs and the potential for future liability).

\textsuperscript{148} See \textit{id.} at 32.

\textsuperscript{149} See \textit{id.} at 31. ("Both environmentalists and private developers suggest that the vastness and diversity of potential problems defies standardization and would only lead to surprises—or loopholes.").

\textsuperscript{150} See \textit{id.} at 29-32 (discussing the process for identifying and addressing contamination).
and lender liability for site remediation costs, the uncertain regulatory environment and unpredictable costs of cleanup create significant obstacles to the redevelopment of urban industrial sites.

B. Changes Sought by Urban Redevelopment Advocates

In response to these obstacles, urban redevelopment advocates have focused on attaining reform in the following four areas of hazardous waste cleanup law: (1) reduced cleanup standards; (2) limited liability; (3) streamlined government review; and (4) increased government incentives to attract industry back to urban brownfields.\(^\text{151}\)

Reform in these areas faces substantial political hurdles. Even if lawmakers are willing to champion the reduction of government oversight, this support will have negligible effects when regulators who must implement the policy are opposed to relinquishing regulatory authority.\(^\text{152}\) Although CERCLA's joint and several liability provisions have been the target of substantial criticism, the upcoming CERCLA reauthorization proceedings are unlikely to significantly change CERCLA's liability scheme.\(^\text{153}\) At the same time, the need for fundamental consistency with the federal liability scheme restricts state attempts to limit redevelopers' liability. Finally, lowering cleanup standards may be the most politically difficult change due to communities' perception that government is sacrificing local public health for economic gain.\(^\text{154}\)

1. Reducing Cleanup Standards

Advocates for lowering cleanup standards argue that present standards are based on unrealistic assumptions that inflate perceptions of the true risk at Superfund sites.\(^\text{155}\) If this is correct, remediation standards could be reduced without increasing the actual threat to human health and the environment.

One target of this critique has been EPA's risk assessments for contaminated sites. EPA uses a baseline risk assessment to: (1) deter-
mine if actions are required at a site; (2) help determine the maximum levels of chemicals that may remain onsite without endangering public health;\(^{156}\) (3) compare the potential health impacts of various remedial actions; and (4) evaluate and document public health threats at a site.\(^{157}\) EPA has been criticized for using unrealistic assumptions in its risk assessment methodology\(^ {158}\) by calculating risk using exposure pathways that assume a future use or activity on a contaminated site that may never occur.\(^ {159}\) For instance, some argue: Why assume public ingestion of groundwater in an area where no one drinks or plans to drink the water?\(^ {160}\) Similarly, the critics contend that EPA's risk assessments should not assume future residential exposure pathways (i.e., long-term ingestion and dermal absorption of soil contaminants) where a site has no foreseeable residential development potential. A recent study found that future risk scenarios that assume alternative uses of the land account for 90% of the exposure pathways considered in assessing risk at Superfund sites.\(^ {161}\) Improving the assumptions of risk assessment methodology to avoid exaggerating risk can reduce

\(^{156}\) A selected remedial action must protect human health and comply with all applicable or relevant and appropriate requirements (ARARs) contained in federal and state environmental statutes. 42 U.S.C. § 9621(d) (1988 & Supp. IV 1992). The baseline risk assessment determines which remedy is selected only if no ARAR is applicable or if an ARAR is inadequate to protect human health at a site. \textit{Id.} Thus, the baseline risk assessment plays a supplemental role in setting specific cleanup standards. See Walker et al., \textit{supra} note 45, at 17-18 (finding that only one of 52 Superfund sites reviewed relied on risk-based goals alone).


\(^{158}\) Risk assessments have also been criticized from the environmental justice perspective as a fundamentally flawed device, “the goal of which is to obtain permission to kill people and to destroy the environment.” Stephens, \textit{supra} note 2, at 10, 11.


\(^{160}\) High background contamination levels in urban groundwater may render drinking water standards unattainable. In such cases, perimeter treatment wells can stop the movement of the contaminated plume at a more reasonable cost than an indefinite pump and treat system pursuing unreachable standards.

\(^{161}\) Viscusi & Hamilton, \textit{supra} note 159, at 608.
the cost and delay of remediation and give the public a more realistic picture of the health risk posed by a site.  

Redevelopment advocates have taken the reform of risk assessment one step further by lobbying for pre-set tiered standards that reflect current and reasonable future land uses. A proposal in Ohio recommends a 3-tiered approach to remedial standards enforced by deed restrictions. First, property remediated sufficiently to reduce the health risk to one cancer per million exposed individuals could be used for any purpose, including residential use. Second, property that retains a health risk of one cancer per 100,000 would be limited to commercial use by deed restriction, and a residual health risk of one cancer per 10,000 would require a deed restriction limiting property to industrial use. In Ohio, like other rustbelt areas, there is little demand for residential development of abandoned industrial properties; therefore, restricting a site to industrial use will have little impact on land values in these areas. If residential use is desired in the future, remediation efforts can always be renewed to reduce contaminant levels enough to free the property from the deed restriction.

New Jersey takes a more direct approach by relaxing cleanup standards for soil in nonresidential areas. In its 1993 amendments to ECRA, New Jersey introduced “nonresidential use soil remediation standards.” Soil, presumably the contaminated media most likely to remain onsite, was targeted for reduced cleanup requirements as a step toward reducing costs without sacrificing the health of the surrounding community. This approach avoids relaxing standards for water and air, while focusing on the contamination least likely to migrate offsite.

Perhaps the ultimate relaxation of cleanup standards is allowing hazardous materials to be stabilized and entombed onsite. Compared to removal of wastes from a site, in situ stabilization eliminates the cost of, and potential exposure risk created by, excavating material and trucking it offsite. The cost of site cleanup may be substantially

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162. See Urban Indus. Property Revitalization Task Force, supra note 1, at 33. But see Walker et al., supra note 45, at 15, 17 (stating that neither increasing nor decreasing the assessment of risk at a site is likely to influence remedial decisions, and that risk assessments are rarely used to define cleanup goals).
164. Id.
165. Id.
166. For a discussion of the environmental equity view of this proposal, see infra part IV.
168. Id.
169. EPA’s selected remedy at the Smuggler Mountain mine site in Colorado was attacked by local residents in part because the excavation of contaminants was stirring up lead dust and raising the probability of accidents during transport of the waste. See Site
reduced by mandating that groundwater located beneath old industrial sites and not currently used as drinking water need not be cleaned to drinking water standards. Lower groundwater remediation standards and soil stabilization remedies curtailed cleanup costs dramatically at a 283-acre Detroit site where contamination had threatened to drive a proposed a $1 billion Chrysler Jeep plant and its 3100 jobs to "greener" fields.\textsuperscript{170}

In situ stabilization has been popular in some states. Indiana expressly defines "remediation" to include actions to limit the migration of hazardous substances taken in lieu of removal actions.\textsuperscript{171} The State of Michigan allows in situ stabilization as a remedy in cases where contamination is minimal and does not threaten potable groundwater.\textsuperscript{172} Industrial redevelopment advocates have also won the Clinton Administration's endorsement of a shift in remedy priorities favoring in situ stabilization. The Clinton Superfund reform proposal would relax the statutory preference for permanent treatment remedies.\textsuperscript{173} It would focus instead on the long-term reliability of a remedy.\textsuperscript{174} This would lower cleanup costs by placing less costly containment remedies, like in situ stabilization, on a level playing field with more expensive treatment remedies.\textsuperscript{175}

Industrial redevelopment advocates will continue to push for lowering cleanup standards and for promoting containment rather than removal in order to reduce the costs of remediation and thereby remove obstacles to redeveloping industrial property. However, differential standards for urban (predominantly minority) environments, compared with suburban or rural (predominantly White) environments, is one of the most potent issues in the environmental justice arsenal.\textsuperscript{176} Thus, lowering cleanup standards must be limited to situations where there is no perceptible increase in risk to human health.\textsuperscript{177}
2. Limited Liability

The means for altering liability for hazardous waste cleanup are limited because fundamental changes in environmental laws must come from Congress, not states, federal agencies, or courts. States cannot effectively limit liability without comparable federal changes since both governments have jurisdiction over a site. For this reason, unilateral state reforms could add inconsistency and uncertainty without reducing risk because the tougher federal standard for liability could always be enforced. Agency-led reform was curtailed by the decision in *Kelley v. EPA*. In its opinion rejecting the EPA Lender Liability Rule, the D.C. Circuit made clear that agencies lack the statutory authority to limit CERCLA liability.

While the courts clearly have the authority to interpret CERCLA, they are unlikely to significantly change its liability provisions. Stare decisis, the historical expansion of CERCLA liability by the courts, and the bounds of reasonable statutory interpretation in keeping with congressional intent, all make the courts an unlikely arena for reducing CERCLA liability. Moreover, the Clinton Administration’s proposal to Congress for Superfund reform offers no changes to CERCLA’s section 107 liability provisions.

Many industrial redevelopment advocates have thus sought to limit liability by increasing certainty at the margins rather than attacking the fundamental strict, joint and several liability scheme.

a. State Certification of Clean Sites

In the absence of national reforms, one strategy for redevelopment advocates has been to limit the duration of liability by encouraging states to certify a site as clean when all appropriate standards have been met. New Jersey, for instance, issues a Full Compliance Letter at the end of its lengthy cleanup process. This letter assures buyers that they are not purchasing environmental liability and helps expedite return of the property to the market after cleanup by guaranteeing that new purchasers will not be held liable for past contamination. Indiana’s unique Voluntary Remediation Program encourages the return of contaminated sites to productive use by cap-

179. *Id.* at 1109-11.
180. *Id.* at 1101-03.
183. See Motiuk & Sheridan, *supra* note 128, at 549, 550-52. As an absolute precondition to sale, transfer, or closure of most industrial facilities, New Jersey requires that a complete and thorough environmental audit and, if indicated, environmental cleanup be conducted at potentially contaminated facilities. *Id.* A transfer of property can only pro-
ping the extent and cost of liability in exchange for an agreement to voluntarily conduct a site remediation.\textsuperscript{184} The Indiana law expressly seeks to harness market incentives to drive voluntary remediations. Current or prospective owners and operators of property where an actual or threatened release of a hazardous substance or petroleum has occurred may participate in the voluntary remediation program.\textsuperscript{185} By involving prospective purchasers, the program attempts to bring investment dollars into the cleanup effort, similar to the manner in which an entrepreneur renovates old houses and sells them for a profit. In theory, developers with expertise in environmental cleanup could purchase cheap contaminated property, conduct a voluntary remediation, receive a certificate of completion and a covenant not to sue, and subsequently sell the "clean" property for a profit. Eventually, a brownfield's Clean Certificate could be marketed as an advantage over competing uncertified greenfield sites.

\textit{b. Prospective Purchaser Agreements}

The second strategy that redevelopment advocates promote for limiting liability is expanding the use of Prospective Purchaser Agreements (PPAs). Federal law and many state laws allow a prospective purchaser to avoid liability when purchasing tainted property by entering into a PPA with environmental enforcement agencies.\textsuperscript{186} PPAs may be the only liability-limiting option for prospective purchasers of presumably contaminated industrial property since purchasers acquiring property with knowledge of contamination are not eligible for the innocent purchaser defense or a de minimis settlement.\textsuperscript{187} However, an examination of EPA's policy concerning these agreements helps explain why the PPA to date has been of limited utility to the urban redevelopment process. To expand the use of PPAs, EPA and state enforcement agencies will likely have to relax existing federal impediments to liability release for prospective purchasers. These obstacles

\begin{itemize}
  \item \textsuperscript{184} IND. CODE ANN. §§ 13-7-8.9, -13, -18 (West 1992 & Supp. 1994). Upon completion of the voluntary remediation, the Governor of Indiana provides a site owner with a Certificate of Completion, including a covenant not to sue for any claim based upon the release of the hazardous substance that is the subject of the approved voluntary remediation work plan. Id. § 13-7-8.9-18(a). This covenant not to sue is transferable to subsequent owners or operators and bars all public and private claims arising from known contamination. Id. § 13-7-8.9-18(b)(2). Limiting coverage to "known" contamination has the added advantage of encouraging diligent assessment of potential environmental contamination in the initial stages of the voluntary remediation. The Indiana Certificate does not release a person from liability to the federal government for claims based on federal law unless specific agreements to the contrary are reached. Id. § 13-7-8.9-18(d).
  \item \textsuperscript{185} Id. § 13-7-8.9-7(a).
  \item \textsuperscript{186} 42 U.S.C. § 9622(g)(1)(B).
  \item \textsuperscript{187} See Feldman, \textit{supra} note 88, at 295, 317 nn.108 & 110.
\end{itemize}
include: (1) the substantial benefit requirement; (2) the covenant not to sue requirements; and (3) the complex requirements of site cleanup regulatory processes.\textsuperscript{188}

\textit{i. The Substantial Benefit Requirement}

In order for EPA to enter into a PPA, it must determine that the agreement generates a “substantial benefit” not otherwise available through site cleanup.\textsuperscript{189} EPA and a prospective purchaser must agree on an amount that the purchaser will contribute toward cleanup to meet the substantial benefit condition. Negotiations over abandoned sites involve high stakes since the negotiating parties may be the only two viable cleanup contributors—the Superfund and the prospective purchaser.

Nonprofit organizations, however, can provide a substantial benefit for abandoned industrial sites by serving as a conduit for public and private cleanup funds.\textsuperscript{190} EPA could encourage the involvement of nonprofit organizations in site preparation and cleanup by extending PPAs to these organizations without requiring up-front contributions to the cleanup effort.\textsuperscript{191} EPA’s substantial benefit requirement could be satisfied by a nonprofit’s work to coordinate state and local financing used for funding cleanup and/or by its commitment to develop cleaned sites for public use and benefit. A substantial benefit could also include a nonprofit organization’s provision of a means for constructive community input into a project’s development.\textsuperscript{192}

\textsuperscript{188.} The other four criteria for entering into PPAs on the federal level are: (1) EPA enforcement at the site is anticipated; (2) future uses of the property, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with the remedy; (3) continued operation or new development will not pose health risks to those persons likely to be present at the site; and (4) the prospective purchaser is financially viable. EPA Guidance, \textit{supra} note 89, at 34,241-42. States may choose to adopt the EPA criteria or to supplement such criteria with their own state standards. \textit{See} MacFarlane & Belk, \textit{supra} note 90, at 3. For example, the Washington State guidance criteria for PPAs require that: (1) the agreement is in the public interest and expedites cleanup; (2) the prospective purchaser is not otherwise a responsible party at the site; (3) other financially viable parties are available to cover the costs; and (4) the agreement may only cover known and documented contamination. \textit{Id}. For simplicity, only the federal criteria are evaluated in this section. Generally, however, to ensure the comprehensiveness of the covenant not to sue in a PPA, individual states must consent to the agreement.

\textsuperscript{189.} EPA Guidance, \textit{supra} note 89, at 34,241-42.

\textsuperscript{190.} \textit{See infra} part IV.B.2.

\textsuperscript{191.} \textit{See} MacFarlane & Belk, \textit{supra} note 90, at 2 (describing a PPA with the Washington State enforcement agency that enabled a nonprofit community group to take title to contaminated land that was slated for an urban park after cleanup).

\textsuperscript{192.} The Clinton Administration has recognized the value of creating channels for community input in cleanup efforts by asserting “[t]hat communities must be involved in the cleanup process from the time a site is discovered to the time it is finally remediated.” \textit{Summaries of Clinton Administration Proposal for Superfund Reform, supra} note 8, at 6.
This interpretation of the substantial benefit requirement is consistent with the policy underlying the criterion: to protect Superfund moneys from profiteers who will not otherwise bring any significant benefits to the site cleanup process. EPA views the Superfund as the responsible party of last resort and will try to avoid expending the Fund's resources on site cleanup. Toward this end, EPA is suspicious of attempts to "privatize" the public subsidy that Superfund provides. Privatization could occur if a prospective purchaser offers a small contribution toward the cleanup of an orphan site in exchange for broad suit protection, leaves the Fund with a substantial bill for remediation, and subsequently sells the property for a profit. While EPA must protect against this kind of PPA abuse, its hardline stance against profiteering at the Fund's expense may be generating overly-antagonistic agency negotiation postures that drive prospective purchasers away.

Protecting the Fund through an uncompromising position may not be the best way that EPA can meet its obligations to serve the public interest. If a prospective purchaser contributes substantial funds to the cleanup, the public interest would be served by the expedited remediation even if the purchaser privatizes part of the public remediation subsidy. One commentator further argues that nonprofit environmental organizations that acquire property for uses that serve the public interest should not be required to financially contribute to the cleanup because such groups pose no risk of profiteering.

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193. See EPA Memorandum: Covenants Not To Sue Under SARA (July 10, 1987), 52 Fed. Reg. 28,038 (1987), reprinted in 17 Envtl. L. Rep. (Envtl. L. Inst.) 35,060, 35,060-61 (Sept. 1987) [hereinafter Covenants Not To Sue]. Generally, EPA is politically driven to extend Superfund dollars as far as possible to justify to its Congressional funding source that the cleanup program is increasing its efficiency (i.e., better cleanup results per Fund dollar spent).

194. Congress has also recognized this potentiality. See 42 U.S.C. § 9601(35)(B), wherein the innocence of a purchaser relates in part to the purchase price relative to the value of the uncontaminated property. Thus, Congress provided EPA with the tools to ferret out purchasers who would use the public subsidy of a Superfund cleanup for their private benefit. However, this is precisely the profit motivation that Indiana attempts to use as the driving force for voluntary remediation. See supra notes 184-85 and accompanying text.

195. The Clinton proposal for Superfund reform adds to this antiprofit stance by giving EPA authority to place a lien on NPL site property to assure that the Fund recovers the increase in fair market value attributable to government-funded cleanup efforts. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 12. In cases between private parties, a less invasive antiprofit option may involve a contract between the prospective purchaser and EPA to share the proceeds from the sale of the property. See Patricia L. Shanks, Alternative Methods of Financing and Expediting Cleanup 2-5 (Oct. 21, 1993) (unpublished presentation to State Bar Cal. Envtl. L. Sec. Envtl. L. Inst. at Yosemite, Oct. 21-24, 1993, on file with the Ecology Law Quarterly).

196. Feldman, supra note 88, at 310, 317, 318 n.112. For example, the Nature Conservancy is a prospective donee of several hundred acres of pristine old growth forest in Oregon upon which a mining operation left hazardous waste. Id. at 299, 313 n.85. The Nature
ing PPAs to environmental organizations would allow them to accept donated contaminated property, clean it up, and open it for public use as a park or recreation area.

ii. The Covenant Not To Sue Requirements

In addition to the substantial benefit requirement, other barriers to using PPAs at orphan sites are found in EPA's general policy on entering into covenants not to sue. First, EPA policy states that covenants should encourage private party cleanups. If a prospective purchaser, however, is the only viable PRP stepping forward with the finances or services to help with, but not lead, the cleanup effort, much of the remediation will be left to a government agency spending public funds. Thus, in this instance, the covenant not to sue would not encourage a private party cleanup.

Second, the policy states that covenants not to sue may grant more complete releases from liability only in exchange for more permanent remedies. However, one advantage to recycling industrial sites for industrial use is that future onsite residential and recreational exposure pathways are eliminated. Consequently the assessed public health risk is reduced, and less costly remedies such as onsite immobilization of contaminants become more viable options. Yet, as a

Conservancy was unwilling to accept the property without a PPA that would release it from liability and shield it from possible contribution actions by some of the same companies that it competes with to secure valuable landholdings. See id. Requiring a significant financial contribution toward cleanup would force the nonprofit to relinquish the property to timber companies eager to allocate some of the timber profits to clean up the contamination. Id. Feldman argues that EPA has a responsibility to take the environmental premium represented by the Nature Conservancy's commitment to preserve the land as an adequate contribution toward the cleanup. See id. at 301, 317, 318 n.112.

197. Id. at 317 n.110, 318-21. Because the essence of the PPA is a covenant not to sue, the statutory requirements for entering into such a covenant must also be considered. CERCLA gives EPA discretion to enter into a covenant not to sue if it is in the public interest and will expedite cleanup. 42 U.S.C. § 9622(f)(1). The Act also requires that the party receiving the covenant is in full compliance with a consent decree, and the response action has been approved by EPA. Id. While these requirements seem inapplicable to prospective purchasers, the subsequent requirement that the covenant not take effect until EPA certifies the remedial action could be problematic if raised in a contribution action prior to certification in an attempt to circumvent the PPA's contribution protection provisions.

198. Covenants Not To Sue, supra note 193, at 35,060. Nonprofit community development organizations that intend to assist in site cleanup and the preparation stages of redevelopment would score high on this covenant not to sue eligibility criterion.

199. Id. at 35,060-61.

200. According to a University of Tennessee and Oak Ridge National Laboratory research project, a remediation policy that emphasizes containment and isolation of hazardous waste instead of removal could save one-third of the costs of cleanup without any significant change in health effects. Milton Russell, Wasteful Waste Disposal, WASH. POST, Mar. 20, 1992, at A25. For example, residues of toxic chemicals at an abandoned factory could be isolated for $3.6 million by burying the residues under a blanket of clay, while the more rigorous cleanup required under CERCLA for the same site would cost between
general principle, in situ stabilization is a less permanent remedy than excavation and removal of all chemical contamination. Accordingly, a prospective purchaser offering to stabilize and contain contamination and to redevelop a site as an industrial facility, may be unable to garner a complete release from future liability arising from past contamination because EPA policy ties the extent of a liability release to the permanence of the remedy.\textsuperscript{201}

Third, EPA policy mandates that a covenant not to sue should protect the public by ensuring that responsible parties remain liable for future remedial action as necessary.\textsuperscript{202} A prospective purchaser needs certainty with regard to future liability in order to evaluate the risk of investing in urban properties. By limiting the covenant not to sue to known and documented contamination, the uncertainty of future liability is reintroduced through the backdoor. EPA may feel particular pressure to reopen liability provisions when costs arise for which the covenantee is the only viable PRP.

With site assessment technology still evolving, the development of more effective detection methods could reveal previously undiscovered contamination for which a purchaser could be liable even though he was not responsible for the pollution. Even a thorough Phase II grid of samples does not guarantee that there are no "hot spots" between the sample points.\textsuperscript{203} Thus, future liability remains a deterrent to purchasing contaminated property even with a PPA.

Despite these obstacles, PPAs may still operate as an effective resource to encourage brownfield reuse. EPA has the discretion to offer more comprehensive PPAs to generate greater certainty in the market.\textsuperscript{204} Further, EPA could ease the substantial benefit require-

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\textsuperscript{201} Covenants Not To Sue, \textit{supra} note 193, at 35,060-61.
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\textsuperscript{202} This criterion arises from CERCLA's requirement that a covenant not to sue concerning future liability to the United States include an exception that allows a reopener clause for future liability related to conditions unknown at the time the remedial action was certified as complete. 42 U.S.C. § 9622(f)(6)(A). Reopener is not required in all circumstances, such as de minimis settlements, and may be waived under extraordinary circumstances. \textit{Id.} § 9622(g); Covenants Not To Sue, \textit{supra} note 193, at 35,062-63. EPA posits that it is not in the public interest to release parties from liability for response actions made necessary by new information. \textit{Id.} at 35,060-61. However, PPAs that facilitate reinvestment in abandoned sites are clearly in the public interest and arguably qualify as extraordinary circumstances, making a waiver of the reopener clause plausible.
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\textsuperscript{203} From EPA's perspective the problem is how to differentiate between new contamination released by the covenantee, which should trigger liability, and old contamination that was merely missed in the initial site assessment. Care must be taken to avoid creating a disincentive to conduct a thorough site assessment. For a covenant to be reopened, EPA should be required to prove a connection between the contaminant and the covenantee, once the covenantee establishes by prima facie evidence that he did not or could not have released the pollutant.
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\textsuperscript{204} Feldman, \textit{supra} note 88, at 318-21.
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ment for issuing PPAs to nonprofit organizations that attract cleanup funds and encourage community involvement in rehabilitating abandoned sites. The Clinton proposal for Superfund reform would mitigate the substantial benefit requirement\textsuperscript{205} and enhance the certainty that PPAs provide.\textsuperscript{206} Clearing these obstacles to involving prospective purchasers in site cleanup and reuse would generate resources to further some of CERCLA's ultimate goals: the remediation of uncontrolled hazardous waste sites.

iii. The Complex Requirements of Site Cleanup Regulatory Processes

Streamlining the government's role in hazardous waste cleanups would encourage the redevelopment of brownfields by reducing obstacles to redevelopment such as transaction costs, delays, and uncertainty in the remediation process. Redevelopment of a contaminated site is a multifaceted project that requires the involvement of many different government entities at the federal, state, and local levels. The number of agencies and the complexity of their regulations make the task of navigating the regulatory process sufficiently daunting to discourage many would-be investors from considering brownfield involvement.\textsuperscript{207}

a. Federal Initiatives

In some instances, the federal government can ease potential investors' burdens by making cleanup costs more predictable. In other instances, the federal government can streamline the remediation process by delegating or deferring to efficient state programs.

\textsuperscript{205} Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 11-12. The proposal would allow limitations on prospective purchaser liability if the purchaser: (1) acquires the property subsequent to disposal of hazardous substances; (2) conducts a site audit or inspection; (3) provides proper notification of releases of hazardous substances; (4) exercises due care to address a release or threatened release and protects human health and the environment; and (5) cooperates with those responsible for response actions. \textit{Id.}

\textsuperscript{206} \textit{Id.} The proposal would amend CERCLA to allow final covenants not to sue without reopener clauses when the covenant is in the public interest and the settling parties agree to pay a premium for the risks of remedy failure and unknown conditions. \textit{Id.} at 17, 19.

Moreover, the proposal would remedy the problem posed under CERCLA that releases of liability are not effective until cleanup has occurred. 42 U.S.C. § 9622(f)(3); see also Covenants Not To Sue, supra note 193, at 35,061. The proposal would offer covenants that go into effect at the time the agreement is reached, but stay in effect only so long as the parties remain in compliance with the decree. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 17.

\textsuperscript{207} See \textsc{Urban Indus. Property Revitalization Task Force}, supra note 1, at 8-10.
President Clinton's Superfund reform proposal would attempt to increase predictability and consistency in remediation efforts by requiring EPA to set chemical-specific, national, generic cleanup levels with two distinct cleanup tiers for industrial and residential land use designations. The national standards would set levels below which no federal action is required. While there is reason to be skeptical about EPA's ability to set chemical-specific standards any time soon, the prospect of predictable cleanup standards would have the support of redevelopment advocates.

The federal government can also reduce the uncertainty of future liability for contaminated urban properties by reducing the cost and delay associated with multiple PRP cost apportionments. Currently, the federal government and most states have the option of seeking cost recovery from one liable party and leaving the cost allocation to private cost recovery actions. Therefore, even if a prospective purchaser or her lender is not pursued by EPA or a state agency, they are susceptible to future private cost recovery actions unless they obtain contribution protection within a government settlement.

Under the Clinton proposal, a liable party would receive a neutral cost allocation that determines her share of liability. Each PRP would have the option of settling for this amount plus a premium to cover the risk of future liability. Orphan shares would be covered, in large part, by the government. This would reduce the extensive legal costs currently associated with obtaining an equitable allocation of cleanup costs among the PRPs and reduce the risk to redevelopment investors of private suits for contribution. Further, the proposal would encourage parties to settle because, in general, suits against the government are more difficult to win than those against

208. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 21.
209. For instance, the 1976 Toxic Substances Control Act authorized EPA to require industry to test potentially harmful chemicals and to regulate their use. 15 U.S.C.A. § 2603 (1988). A study by the General Accounting Office found that “EPA is not taking timely action in completing its assessment of industry's test data and in resolving chemical safety concerns...[due in part to] a general lack of timely management.” General Accounting Office, GAO/RCED-91-136, Toxic Substances: EPA's Chemical Testing Program Has Not Resolved Safety Concerns 4-5 (1991). Of the 60,000 chemicals to which Americans are exposed, EPA requested health and environmental results for 22 chemicals. Id. By 1991 it had analyzed 13 of these chemicals and determined that three were dangerous, but not sufficiently dangerous to justify regulatory action. Id.
211. Id. § 9613(f).
212. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 4.
213. Id.
214. Id.
215. Id.
other private parties. Once enacted and given a chance to prove itself to investors, the proposal could significantly reduce the perceived risk of liability by setting a predictable cost allocation formula.

In addition, the federal government can decrease uncertainty generated by overlapping state and federal regulatory regimes. The Clinton proposal would attempt to reduce uncertainty by delegating lead response authority to state programs that are substantially similar to the federal program. States authorized to take on this responsibility would be given access to federal funds under certain conditions. Whether states would in fact volunteer for greater cleanup authority is uncertain. On the one hand, states in the rustbelt seem interested in gaining control of cleanup authority to reduce federal regulatory barriers to redevelopment. On the other hand, accepting delegations may be costly, and conditional federal funds are unlikely to be either accessible or plentiful enough to fund all of the work generated by accepting the EPA delegation. Hence, states will probably seek site-specific referrals for those sites with high economic development expectations rather than a comprehensive assumption of EPA's CERCLA responsibilities. Site-specific delegations of authority, however, will likely have no effect on the general perception of regulatory burden because a prospective investor will not be able to project when, and to what extent, a given site will remain under the overlapping jurisdiction of federal and state cleanup agencies.

Nevertheless, the Clinton proposal would attempt to encourage the trend toward state voluntary remediation programs by working with states to both enhance existing, and create new, voluntary cleanup programs. The proposal recognizes that most voluntary cleanups are driven by local economic redevelopment concerns, which echoes EPA's belief that states are in the best position to oversee such efforts. While this sounds like hollow approval without substantive assistance, assurance from EPA that it will not interfere in state volun-

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216. For example, the government must only show that its incurred costs are not inconsistent with the NCP, while a private party seeking cost recovery must demonstrate that its cleanup costs are consistent with the NCP. 42 U.S.C. § 9607(a)(4)(A), (B). Thus, CERCLA makes it easier for the government to recover its costs.

217. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 9-10.

218. Id. The conditions include: (1) full state responsibility for site operation and management; (2) bi-annual federal review of state remediation efforts to determine continued funding eligibility; and (3) retention of EPA discretion to withdraw authorization for all or part of a state program. Id.

219. See, e.g., Rules Easing, supra note 4, at A8 (discussing Michigan's regulatory program for site cleanup).

220. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 11.

221. See id.
tary cleanup programs could itself increase certainty for prospective purchasers.

b. State Initiatives

More substantial reforms in the regulatory process have taken place at the state level. Streamlining government review may mean providing experts who assist prospective investors and redevelopment advocates in navigating the hazardous waste bureaucracy. One state innovation designed to encourage redevelopment is Ohio’s proposal to create a quasi-public Urban Industrial Revitalization Board of regulatory experts to provide advice to redevelopers who site facilities within urban redevelopment zones.\(^2\) This Board would solicit redevelopment projects, coordinate financing, and negotiate standardized regulatory procedures.\(^2\) Board membership would include the State Directors of Commerce, Development, and Taxation in order to educate these cabinet officials about how state actions affect redevelopment, and to give redevelopers access to the full range of public financial assistance options.\(^2\)

Another way to lighten regulatory burdens is to reduce agency work loads. This decreases the possibility that overextended state assessors will become a bottleneck in the remediation process.\(^2\) Ohio’s approach would certify private site assessment companies to prepare standardized reports that, in turn, would reduce the fieldwork burden on state agencies.\(^2\) However, from an environmental justice perspective, removing the responsibility for assessing public risk one step further from an accountable public servant could make it more difficult for community activists to obtain full disclosure regarding contamination at a site.

An additional approach to streamlining the state regulatory process is New Jersey’s promulgation of specific mandatory standards for site assessments and public and private remedial plans. Provided a site cleanup remedy is reasonably expected to meet the designated technical standards within five years, property owners in New Jersey have a green light to start soil remediation procedures even before an

\(^2\) See Urban Indus. Property Revitalization Task Force, supra note 1, at 18.
\(^2\) See id.
\(^2\) See id. at 19.
\(^2\) See supra notes 127-33 and accompanying text (discussing New Jersey’s regulatory bottleneck for overseeing site assessments under ECRA).
agency has approved the specific remediation work plan. These regularized procedures can accelerate the cleanup process by reducing the need for prior agency approval.

3. Government Incentives To Encourage Brownfield Use

Given the entrenched federal liability standards and the pervasive perception among prospective purchasers that environmental liability ought to be avoided, many cities have sought to entice development into urban areas by offsetting the perceived cost of environmental liability with increased financial incentives and other government benefits. Cities competing for a large new industrial facility regularly assemble elaborate packages of tax abatements, low interest loans, redevelopment bonds, and other financial resources. In some cases, cities have even taken on environmental liability for contamination in order to clear the way for investment.

Although government incentives such as grants for urban redevelopment may be hard to provide in difficult economic times, states have been creating alternative incentives to promote urban investment for decades. Enterprise zones, for instance, were developed on the premise that removing government-imposed obstacles to development in a region could attract investment. However, environmental contamination presents some new problems for redevelopment, as cities are finding it necessary in some cases to fund cleanup projects before redevelopment can occur.


228. Indiana's Voluntary Remediation Program appears to take the opposite approach by giving an agency head complete discretion to approve a flexible site-specific voluntary cleanup plan without reference to detailed regulations. IND. CODE ANN. §§ 13-7-8.9-9 to -12 (West 1992). However, the sites eligible for the program are limited to those that do not pose an imminent and substantial threat to human health or the environment, provided the agency head follows the notice and comment procedures for public and local government participation. See id. §§ 13-7-8.9-10, -15.

229. See, e.g., Aladjem, supra note 64, at 673-74 n.18 (regarding the incentives package offered by Detroit to General Motors).

230. Id. at 674. Detroit purchased a contaminated site through its eminent domain powers for $200 million and eventually sold the remediated site to General Motors for $8 million. See id.; see also the discussion of the establishment of a tax increment financing district in Wichita, Kansas to fund groundwater remediation, infra notes 237-40 and accompanying text.


a. Tax Increment Financing

Local governments in a growing number of states can generate resources for site cleanup by creating tax increment financing (TIF) zones. After contamination is discovered, the local government reassesses devalued property throughout a designated zone. This significantly lowers the tax collected on the properties in the zone. TIF is based on the assumption that, after cleanup, both the property value and the taxes generated by the property will return to their precontamination levels or higher. The "increment" in TIF is the increased tax that will be realized as the value of the property increases; some states allow cities to borrow against this stream of income.

TIF has been used in the recent past to fund environmental cleanups. In August 1990, EPA notified the city of Wichita of severe groundwater contamination underlying six square miles of Wichita's downtown, including the central business district. Five hundred overlying owners and operators were notified as PRPs, property values plummeted, and all lending to businesses within the district ceased. Any hopes of revitalizing the ailing downtown area were dependent upon aggressive local action.

In response, the city accepted liability for the contamination with a few important side agreements. First, one of the major contributors to the groundwater problem agreed to pay a proportionate share of the cleanup costs in order to avoid the higher costs of an EPA-led cleanup. Also, the primary lending institutions guaranteed that loans would be available to qualifying businesses in the overlying area once the city accepted liability for the cleanup. Because many banks already had substantial investment in the area, they were eager to avoid Superfund lender liability risks and saw the city plan as a way

233. HAAR & WOLF, supra note 231, at 968, 997. TIF zones have traditionally been a way of financing the infrastructure necessary to attract a large redevelopment project, effectively borrowing against the increase in future tax revenues. Id. at 968. However, TIF revenues can be used to fund any of the site improvements required to facilitate an increase in economic activity. Id.
234. Id.
235. Id.
236. Id. at 968, 997 (providing a partial list of states with TIF programs including, Florida, Indiana, Kansas, Michigan, Nevada, New York, and Texas).
238. Id. at 170-71.
239. Id. at 174.
240. Id. at 173.
241. Id.
of retaining local control of the cleanup effort.\textsuperscript{242} A consent decree was carefully drafted and signed with EPA.\textsuperscript{243}

Financing for the groundwater cleanup combined PRP contributions with public finance tools.\textsuperscript{244} The city created a TIF zone that included the contaminated area.\textsuperscript{245} Property values were reassessed to accurately reflect the lower, postcontamination values.\textsuperscript{246} Officials projected that property values would return to precontamination levels after cleanup.\textsuperscript{247} The increment of expected tax revenue increases was used to guarantee bonds that generated income for the cleanup procedure.\textsuperscript{248} The city of Wichita is now engaged in a significant long-term groundwater treatment project and the central business district is alive and well, and generating tax revenue.\textsuperscript{249}

The obvious risk associated with TIF zones is that property values will fail to rebound due to unexpectedly slow cleanups or to economic factors unrelated to the contamination. Under these scenarios the city would have to allocate other revenue to retire the bonds. Thus, it appears that TIF is best suited for property with proven economic viability, such as a central business district. Although most abandoned industrial sites have poorer economic prospects, an industrial redevelopment project with a high chance for success could use TIF to transform a worthless property into a viable business center.

TIF zones are just one of many creative mechanisms available to raise funds for remediation of contaminated orphan sites. While a full discussion of all the available fund-generating mechanisms is beyond the scope of this comment, the following list provides a general idea of some of the sources of government funding available to prepare urban properties for productive reuse.

\textit{b. Federal and State Superfunds}

Superfunds were created to pay response costs for imminent and substantial dangers to human health and the environment caused by releases of hazardous substances where the parties responsible for the contamination were either unavailable for, or incapable of, timely remediation.\textsuperscript{250} However, the amount of money available is dwarfed by the projected amount needed to adequately fund cleanup at con-

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\textsuperscript{242} & Id. \\
\textsuperscript{243} & Id. at 170-73. \\
\textsuperscript{244} & Id. \\
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\textsuperscript{249} & Id. at 169, 170-73. \\
\textsuperscript{250} & McSlarrow et al., supra note 85, at 10,367, 10,368, 10,379-81.
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tarnished sites. Orphan sites that lack viable responsible parties to finance remediation should be prime candidates for Fund-led clean-ups; yet the line for limited Superfund money is long, and cleanup priority shifts depending on the severity of the risk. This uncertainty results in delays that make planning for redevelopment difficult.

The Clinton Administration has proposed funding orphan shares with an additional $300 million. The political impetus for proposing this additional funding is to alleviate some of the burden on PRPs who are jointly and severally liable and are forced to bear the cost shares of otherwise liable, judgment proof PRPs. Thus, when the money would become available, PRPs would actively lobby EPA to use this money to pay the cost shares of judgment proof PRPs at their respective sites. Since abandoned sites have no such active lobbies, orphan sites would not get the lion's share of this additional money.

State funds, where they exist at all, are more accessible than federal monies but less able to cover costs. Thus, Superfunds alone are not the answer to funding abandoned industrial site cleanup projects.

c. Industrial Revenue Bonds

A city or state can inexpensively finance industrial development projects with tax-exempt municipal bonds whose proceeds are used to provide low interest loans to redevelopers. Industrial redevelopment bonds (IRBs) are secured by a promissory note from the industry receiving the bond proceeds. In effect, a state lends its right to issue tax-exempt bonds to businesses in exchange for the promise that the businesses will locate or expand within certain redevelopment zones within the state's jurisdiction. IRBs have generally become such a common way to generate startup capital that businesses may not consider this a source of "extra" money for cleanup.

d. Civil Penalties and Administrative Fines

An Ohio proposal would use penalty money assessed by Ohio EPA for violations of environmental statutes and rules to finance the

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251. Government expenditures of approximately $1.5 billion annually have been used for the cleanup of approximately 220 of the 1300 sites on the NPL. Murray M. Sinclair, No Cleanup of Superfund, DAILY J., Apr. 22, 1994, at 4, 4. An additional 1700 sites are expected to be added to the NPL over the next decade. Id. Thus, assuming an average Superfund site cleanup cost of $25 million, cleaning 3000 sites will cost approximately $75 billion, or 50 times more than the present annual allocation to Superfund.

252. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 4.

253. Due to their tax advantages, tax-exempt municipal bonds can pay lower interest rates than prevailing market rates. HAAR & WOLF, supra note 231, at 967. Thus, cities can acquire capital more economically than private investors can on the market. See id.

254. Id.

255. Id. at 968.
assessments and cleanup of abandoned industrial sites.\textsuperscript{256} Criminal penalties currently retained by counties would be deposited in the Urban Property Revitalization Fund and earmarked for redevelopment projects in the region where the penalty occurred.\textsuperscript{257} In addition, the proposal would divert civil and administrative penalties from the Ohio EPA enforcement budget to the Fund, thereby resolving the appearance of impropriety generated when enforcement personnel have a financial self-interest in the fines they levy.\textsuperscript{258}

\textit{e. Business Development Corporations}

Nonprofit public/private partnership organizations can raise funds from the business community or philanthropic organizations interested in urban renewal projects. Private fundraising could be particularly effective when the redevelopment would enrich the community by including projects such as parks, museums, and training programs.\textsuperscript{259}

\textit{f. Tax Abatements}

Localities can encourage private cleanups by providing tax abatements that offset the environmental cleanup costs. Under this funding scheme a developer puts up the money for site cleanup in exchange for an equivalent amount of tax abatement over a number of years.\textsuperscript{260} While tax abatements are often vilified as the great municipal giveaway,\textsuperscript{261} the idea is more palatable where the tax abatement effectively funds cleanup of hazardous wastes. The tax abatement approach also helps the city by placing the risk that the project will fail to recoup the cleanup investment on the developer, not the city.

In sum, redevelopment advocates have successfully challenged some environmental impediments to recycling urban lands at the state level. Based on the economic redevelopment focus of the Clinton Administration's Superfund reform proposal, they have the attention of federal lawmakers as well. Reducing cleanup standards, limiting liability, and streamlining government oversight all provide a prospective redeveloper with greater environmental certainty and

\begin{itemize}
\item \textsuperscript{256} See \textit{Urban Indus. Property Revitalization Task Force}, \textit{supra} note 1, at 25.
\item \textsuperscript{257} Id. at 25-26.
\item \textsuperscript{258} Id.
\item \textsuperscript{259} See infra notes 371-76 and accompanying text (discussing Davenport, Iowa's public and private fundraising successes).
\item \textsuperscript{260} See \textit{Butler}, \textit{supra} note 232, at 158-59.
\item \textsuperscript{261} Critics contend that corporate location decisions are not strongly influenced by the tax regime in an area. Thus, tax incentives only provide a windfall to companies that have decided to site a facility in the area for other reasons. Id. at 159. However, tax incentives may be effective in an enterprise zone to encourage new small business development. See id.
\end{itemize}
lower cleanup costs. Government incentives and financing also help offset other significant barriers to urban facility siting.

III

ENVIRONMENTAL JUSTICE

While the preceding section highlighted the benefits of urban redevelopment, such redevelopment can potentially lead to a concentration of environmental hazards in urban areas, which raises environmental justice issues. A precondition to forging a working relationship between industrial redevelopment advocates and environmental justice activists is an understanding of the community's resistance to redevelopment. This part looks at the disproportionate share of environmental risk that urban communities and people of color in and beyond urban communities bear. Next, this part discusses the impact that this evidence has had in elevating environmental issues on the civil rights agenda and empowering communities to influence local development decisions. Communities have responded to the mounting evidence of environmental injustice with impressive grassroots organizing feats and have successfully resisted the siting of environmental risks in predominantly minority neighborhoods. In 1991, at a summit meeting, these communities and the growing ranks of environmental justice activists officially christened a movement and adopted principles to guide their actions.\(^\text{262}\)

Today, the flow of resources to environmental justice concerns gives organizers and activists the ability to assist communities in developing resistance to new sources of environmental risk. One of the byproducts of organized community resistance is a sense of empowerment. An empowered community can marshal its strengths and appreciate its unique character. Any attempt to impose redevelopment on such a community without community consent fails to honor this important process of empowerment, and as a result is more likely to face inspired opposition. Communities are developing an increasingly sophisticated arsenal of tactics to undercut redevelopment projects. The incentive for redevelopment advocates to respect communities' objectives is obvious. However, before attempting any discussion of community-friendly urban industrial redevelopment, an understanding of communities' perception of environmental risk is necessary.

A. Disproportionate Impacts on Urban Communities

It seems intuitive that low income, urban communities have a higher rate of exposure to industrial pollutants because they tend to be in close proximity to the industries that emit these toxins. Studies have confirmed this: Urban residents breathe air up to five times dirtier, drink water of lower quality, experience more wastewater and solid waste problems, and are exposed to more toxic heavy metals than nonurban residents. In fact, suburbanites are exposed to less than one-half of the environmental hazards that inner-city residents face.

In addition, many urban residents face an ever-present threat of chemical disaster. In Richmond, California, for instance, residents live with the knowledge that between 39 million and 94 million pounds of deadly substances are stored in their community at any one time. This includes a dozen chemicals that are more deadly than methyl isocyanide, the chemical released in Bhopal, India that killed nearly 3000 people. Accident prevention is complex and dangerously inadequate in Richmond, where over 350 local industries handle hazardous materials, and forty-three of these routinely emit between 733,000 and 889,000 pounds of toxic chemicals into the Richmond air each year.

The concentration of industrial emission sources is compounded by higher mobile source emissions in urban areas. Traffic congestion in urban areas leads to high car and bus tailpipe emissions. Many of these cars carry nonresident commuters coming in from the suburbs to the city center, depositing air pollutants in urban neighborhoods along the way.

While urban communities near industrial areas cope with the emissions of active facilities and motor vehicles, they increasingly recognize abandoned urban industrial sites as sources of insidious environmental problems like soil contamination, groundwater contamination, and other invisible pollutants. In Chicago's indus-

263. Bullard & Wright, supra note 58, at 170; see also Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law, Nat'l L.J., Sept. 21, 1992, at S2, S2. The percentage of Blacks and Hispanics living in areas that EPA has designated as not meeting Clean Air Act requirements for particulate matter, carbon monoxide, and ozone far exceeds the percentage of Whites. See id.

264. Bullard & Wright, supra note 58, at 170.

265. Id.

266. Richmond at Risk, supra note 66, at 1.

267. Id. at 117.

268. The Uniform Commercial Code study, often cited by environmental justice advocates and community organizers, concludes: “The cleanup of uncontrolled toxic waste sites in Black and Hispanic communities in the United States should be given the highest possible priority.” Toxic Wastes and Race, supra note 21, at xv. One of the most prevalent “invisible” pollutants in urban communities is lead. See Kathryn R. Mahaffey et al., Na-
trial Far South Side, for instance, a 6-square-mile area of abandoned steel mills has left a legacy of fifty abandoned factory waste dumps. One dumping lagoon was potent enough to force Illinois inspectors to abort a sampling excursion when their boat began to disintegrate.

The combined effect of this myriad of urban toxic exposure pathways is the increased risk of chronic and acute health problems for urban communities. As yet, however, there is insufficient direct epidemiological data to link environmental exposures to health impacts. Nevertheless, urban communities do suffer a higher incidence of disease and early death, and such communities are exposed to higher levels of dangerous chemicals. Urban residents have understood this nexus to mean that industrial toxins are poisoning them.

B. Race-Based Environmental Inequity

In 1982, when the fourth commercial hazardous waste landfill in EPA's Region VI was proposed for Warren County, North Carolina, which was 66% Black, the local residents challenged the proposal by initiating a civil rights protest. The prospect that race was a factor in siting decisions for landfills and other locally undesirable land uses (LULUs) seemed a natural consequence of the NIMBY (Not In My Back Yard) resistance effectively mounted by predominantly white communities. Few were surprised when a General Accounting Office study determined that three of the four hazardous waste facilities

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270. Id.
271. See Bullard & Wright, supra note 58, at 170 (noting that the inner-city poor suffer to an alarming degree from chronic conditions brought on by pollution).
272. This is due in part to the general paucity of reliable health studies of minority communities. See Michele Melden et al., Health Care Rights for the Poor: An Introduction, 25 CLEARINGHOUSE REV. 896, 900 (1991).
276. Mohai & Bryant, supra note 58, at 3.
277. As one commentator explained: "Public officials and private industry have responded to the 'NIMBY' principle with the 'PIBBY' principle: 'put in blacks' back yard.' " Robert D. Bullard & Beverly H. Wright, The Quest for Environmental Equity, RACE, POVERTY & ENV'T (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), July 1990, at 3, 3.
in Region VI were in predominantly African-American communities.\textsuperscript{278}

Since then, statistical data have demonstrated that the inequitable distribution of environmental hazards is linked more closely to race than to income.\textsuperscript{279} While some of the disproportionate impact can be explained by historical patterns of housing discrimination and low land values,\textsuperscript{280} there is also evidence that some companies have targeted communities traditionally lacking political clout in siting LULUs, such as waste incinerators.\textsuperscript{281} Whatever the intent that precedes the impact, the result is the same—environmental harms overburden communities of color.\textsuperscript{282}

This disparity is consistent across the various media through which pollutants travel. Statistical analyses have confirmed that people of color are exposed to more air pollution; live near more commercial, uncontrolled hazardous waste sites; experience more pesticide poisoning; and consume more toxic fish than communities that are predominantly White.\textsuperscript{283} One study reports that Black children, six months to five years old, were six times more likely than White children to have elevated blood lead levels.\textsuperscript{284} In addition, the concentration of minority workers in the most dangerous occupations

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\textsuperscript{278} General Accounting Office, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities (1983). The fourth community was 38% Black. Id. \\
\textsuperscript{279} See Mohai & Bryant, supra note 58, at 24-26 (providing systematic empirical evidence regarding the burden of environmental hazards by income and race). \\
\textsuperscript{280} Austin & Schill, supra note 65, at 69, 70. \\
\textsuperscript{281} See, e.g., Cerrell Assocs., Political Difficulties Facing Waste-To-Energy Conversion Plant Siting 17-30 (1984) (commissioned by the California Waste Management Board) (informing the Board's choice of sites for the proposed Los Angeles City Energy Recovery (LANCER) project, a waste-to-energy incinerator). The report carefully delineated the demographics where opposition to an incinerator project could be expected, and conversely which populations would be less likely to resist such a project. Id. The report concluded that the path of least resistance would be in lower socio-economic neighborhoods surrounded by heavy industry with little commercial activity. Id.; Dick Russell, Environmental Racism: Minority Communities and Their Battle Against Toxics, Amicus J., Spring 1989, at 22, 25 [hereinafter Russell, Environmental Racism]. The report suggested that local opposition should be targeted with a public participation and public relations campaign and placated with Community Betterment Funds. Russell, Environmental Racism, supra, at 25-26. Eventually, the LANCER project was proposed for a declining area in South Central Los Angeles in a predominantly non-English speaking, low income community with the highest unemployment rate in the city. Id. at 26. \\
\textsuperscript{282} See, e.g., Steven Keeva, A Breath of Justice, A.B.A. J., Feb. 1994, at 88, 90 (quoting Robert Bullard, an urban sociologist at the University of California at Riverside who is considered one of the founders of the environmental justice movement). \\
\textsuperscript{283} See Mohai & Bryant, supra note 58, at 25. \\
\textsuperscript{284} Mahaffey et al., supra note 268, at 578.
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increases the likelihood that these people face exposure to toxics in both the workplace and the home.285

Although the people of Warren County lost the fight against the hazardous waste landfill, their protest marked a milestone for the environmental justice movement.286 The determined local opposition, joined by national civil rights leaders and Congressman Walter E. Fauntroy, inspired a number of grassroots organizing campaigns dedicated to challenging the inequitable distribution of environmental risks burdening people of color.287

C. The Environmental Justice Movement

The environmental justice movement is filled with anecdotal stories of public hearings, traditionally rubberstamps for development, dominated by outraged community representatives. Concerned citizens of South Central Los Angeles shouted down two consultants at a June 1987 hearing held to solicit comments on an environmental impact report for the Los Angeles City Energy Recovery (LANCER) project.288 The meeting culminated eighteen months of intensive community organizing and networking led by Sheila Cannon, a 32-year-old single parent and part-time private-duty nurse.289 The controversy contributed to the subsequent defeat of the pro-LANCER city council president by a staunch environmental advocate.290 On June 15, 1987, community advocates brought to Mayor Bradley’s attention evidence that the Bureau of Sanitation had ignored a physician on its own peer review committee who had warned about cancer-causing agents in the incinerator.291 Two days later, despite five years of planning and $12 million of investment, Mayor Bradley and the city council declared the project dead.292

In communities that used to be politically passive, unassuming leaders from inauspicious backgrounds are leading new community groups in battles against the Goliaths of the development world. More importantly, the community groups are often winning. Espy Maya and Mary Lou Mares, two leaders of the Kettleman City community group El Pueblo para el Aire y Agua Limpio (People for Clean

286. Mohai & Bryant, supra note 58, at 3.
287. Id.
288. Russell, Environmental Racism, supra note 281, at 28. South Central Los Angeles has a 78% unemployment rate and an average yearly income of $8158. Hamilton, supra note 5, at 3.
290. Id. at 28.
291. Id.
292. Id. at 28-29.
Air and Water), recently celebrated their community’s victory over a hazardous waste incinerator proposed for their 95% Latino farmworker town.\(^{293}\) The Kings County Board of Supervisors had previously approved Chemical Waste Management’s incinerator.\(^{294}\) However, in a suit brought by El Pueblo para el Aire y Agua Limpio, the superior court ruled that the county had wrongly failed to include the Spanish-speaking people of Kettleman City in the English-only environmental review process.\(^{295}\) Chemical Waste Management withdrew the incinerator project while the appeal awaited oral argument.\(^{296}\)

The power of the environmental justice movement is growing as grassroots community groups find ways to support each other across the miles that separate them. The Mothers of East Los Angeles (MELA) organized a march against a proposed hazardous waste incinerator designed to burn 125,000 pounds of toxic waste a day in a poor, largely Latino community.\(^{297}\) MELA was joined by residents, some of whom drove eight hours, from communities across California that also confront toxic neighborhoods.\(^{298}\) Similar marches along “Cancer Alley” in Louisiana,\(^{299}\) through “Toxicana,” Texas,\(^{300}\) and in Warren County, North Carolina,\(^{301}\) received national support from environmental justice activists and generated significant media attention.

In addition, activists are building networks to facilitate the flow of information so that communities can learn of each other's efforts and

\(^{293}\) Kettleman Wins the Big One, \textit{Race, Poverty \\& Env't} (California Rural Legal Assistance Found. \& Earth Island Inst. Urban Habitat Program, S.F., Cal.), Summer 1993, at 48, 47-48 [hereinafter \textit{Kettleman Wins}].

\(^{294}\) Id. at 47.


\(^{296}\) \textit{Kettleman Wins}, supra note 293, at 47.

\(^{297}\) Russell, \textit{Environmental Racism}, supra note 281, at 22.

\(^{298}\) Id. Supporters came from the communities of Richmond and Martinez as well as Kettleman City, El Centro, and Casmalia. All of these communities are bordered by either hazardous waste facilities or oil refineries.

\(^{299}\) “Cancer Alley” is an 80-mile stretch of the Mississippi River between New Orleans and Baton Rouge that is home to 136 petrochemical plants and other industrial pollution sources. Id. at 32.

\(^{300}\) “Toxicana” is the nickname given to Carver Terrace, a predominantly African-American community in Texarkana, Texas, which was built atop one of Kopper Chemical Company’s old waste disposal sites and is currently a Superfund site. \textit{See id.} An eight year struggle led by Patsy Ruth Oliver and the Carver Terrace Action Group culminated in an EPA buy out of the entire subdivision. Maria Ellen Garcia, \textit{Patsy Ruth Oliver: 1935-1993}, \textit{Friends of the Earth} (Friends of the Earth, Wash., D.C.), Jan. 1994, at 11, 11.

\(^{301}\) When a Black community in Warren County was targeted as the site of a PCB disposal facility in 1982, national civil rights leaders and Congressman Walter E. Fauntroy supported the local community’s opposition to the project and were among the 500 protesters arrested in a demonstration against the siting. Omar Saleem, \textit{Environmental Discrimination As Mainstream Legal Thought} 3-4 (unpublished manuscript, on file with the \textit{Ecology Law Quarterly}).
access technical and legal support services. The Citizen's Clearinghouse for Hazardous Wastes helps community members understand the risks posed by hazardous materials in their community and helps facilitate the sharing of resources among community groups working on related issues.302 The Environmental Support Center, started in 1990, provides more than 600 groups with nationwide organizational development assistance.303

Environmental organizations, responding to criticism that they ignore the environmental needs of low income and minority communities in favor of forests and endangered species, are providing resources to assist community environmental justice struggles.304 In a recent battle in Richmond, California over the expansion of a Chevron refinery, a coalition of lawyers from Citizens for a Better Environment, California Rural Legal Assistance, Natural Resources Defense Council, the Lawyer's Committee for Civil Rights, and two law school clinics,305 worked to assist the local community group, the West County Toxics Coalition, in its fight against increased toxic exposure.

Environmental justice issues are also attracting research grants from public and private sources to remedy the paucity of data on environmental health impacts. EPA is funding the National Human Exposure Assessment Program, a pilot study of a broad range of chemicals on a representative sample of the U.S. population.306 In addition, government agencies with technical resources are asking for the help

302. Some private consultants have also specialized in serving communities concerned about toxics. See Maria Ellen Garcia, Wilma Subra: Chemist Mixes up a Solution for Toxic Pollution, FRIENDS OF THE EARTH (Friends of the Earth, Wash., D.C.), Feb. 1994, at 11, 11. Subra Company is one of a few chemical consulting firms that provides analytical laboratory services and technical assistance to citizens seeking evaluation of proposed, operational, or abandoned hazardous waste sites.


304. Sierra Club Legal Defense Fund lawyers have worked in the poor, 98% Black community of Wallace, Louisiana to combat the siting of Formosa Plastics Corporation's $700 million rayon pulp processing plant on the last residential strip of "Cancer Alley," the stretch of the Mississippi River from Baton Rouge to New Orleans. Marcia Coyle, Saying 'No' to Cancer Alley, NAT'L L.J., Sept. 21, 1992, at S5, S5. Also involved in the fight were Greenpeace, the National Toxics Campaign, the Louisiana Environmental Action Network, and the Tulane Environmental Law Clinic. Lavelle & Coyle, supra note 263, at S2.

305. In 1994, Boalt Hall School of Law opened the Environmental Law Community Clinic in Berkeley, California and Golden Gate Law School opened the Golden Gate Environmental Law and Justice Center in San Francisco, California. Both clinics offer legal services to environmental justice organizations. Other law schools also have clinics that focus on environmental justice issues, including the Georgetown University Law Center and the Tulane Environmental Law Clinic. See RACE, POVERTY & ENV'T (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, S.F., Cal.), (forthcoming 1994) (focusing on the legal clinic's role in the environmental justice movement).

of environmental justice activists in identifying the data gaps in health research on environmental inequities. A planning meeting for a symposium on public health and environmental equity research needs, sponsored by federal agencies including the EPA, included a noted environmental justice author and University of Michigan professor, and a member of the United Church of Christ’s Commission for Racial Justice.307

The environmental justice movement has generated tremendous interest in a relatively short time and has attracted a flood of legal, technical, and organizational resources that are now available to help community groups wage their environmental justice battles.308 Community groups are becoming increasingly aware that they can effectively resist the siting of new facilities that pose environmental risks. Successes in Kettleman City, East Los Angeles, Texarkana, and Richmond have empowered communities and generated a movement around environmental issues. By catalyzing community empowerment, environmental problems have become a means to a political end: the mobilization of communities to effectively demand change that is instrumental to improving their urban environment.

Industrial redevelopment advocates are well advised to take notice of the unprecedented ability of urban communities to resist new development projects that increase environmental risks to neighborhoods. Even an industrial facility that handles or stores a small amount of hazardous materials may have a difficult time justifying to the community any increase in already elevated health and environmental risk. Similarly, any attempt to relax cleanup standards in industrial zones will face challenges from urban residents demanding cleanup standards comparable to those mandated for White suburban communities. Since most urban industrial redevelopment involves one or both of these scenarios, planners must address the power of the community to block redevelopment.

307. Pamela Johnson, Making Plans To Find Solutions, 101 ENVTL. HEALTH PERSP. 482, 482 (1993). The symposium, scheduled for February 1994, was expected to draw 500 to 700 participants. Other federal agencies and departments involved included the Agency for Toxic Substances and Disease Registry, the National Institute for Environmental Health Sciences, the National Institute for Occupational Safety and Health, and the Department of Energy. Id.

308. This influx has not been met with wholehearted acceptance. Many people in the grassroots movement look skeptically on the temporary influx of organizations that rise with the tide of a newly charged issue simply because funds become available. Initial resources are largely absorbed in organizational startup costs having little to do with the justice issues that motivate the grassroots activists. Further, legal and technical solutions can disempower a community by removing the struggle to an arena dominated by “experts.” See Cole, supra note 14, at 638 nn.60-70 and accompanying text.
D. The Principles of Environmental Justice

In October 1991, the first People of Color Environmental Leadership Summit convened in Washington D.C. "to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities."

The participants articulated a set of "Principles of Environmental Justice," which are intended to guide and strengthen grassroots action. Some of the Principles bear on the nature of the environmental justice movement's reaction to policies designed to remove obstacles to industrial redevelopment, as follows:

1. Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

2. Environmental justice demands the right to participate as equal partners at every level of decision making including needs assessment, planning, implementation, enforcement and evaluation.

3. Environmental justice requires all producers of toxins, hazardous wastes, radioactive substances and dangerous emissions be held strictly accountable for detoxification of the containment at the point of production.

4. Environmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources.

309. Preamble of the Principles of Environmental Justice, Toxic News (National Lawyers' Guild Toxics Comm., Portland, Or.), Dec. 1993, at 1, 2. The preamble also includes the following objective: "To promote economic alternatives which would contribute to the development of environmentally safe livelihoods." Id. at 2. The summit transcended national status due to the attendance of many indigenous peoples from North America and around the world.

310. This represents a change from the original version which reads, "Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification of the containment at the point of production." Principles of Environmental Justice, supra note 17, at 2. The softening of the original language may be due in part to the recognition that local minority communities reap some benefits from industries using hazardous materials that must be balanced against the risks of environmental harm.

311. The complete list of the Principles of Environmental Justice is paraphrased as follows:

1. Freedom from ecological destruction.
2. Mutual respect and freedom from discrimination.
3. Responsible use of land and renewable resources.
4. The fundamental right to clean air, land, water, and food.
5. Self-determination.
Under these Principles, communities that demand self-determination will rally against projects imposed on them without their consent; communities that hold the producers of waste accountable for detoxification will reject schemes to limit the liability of otherwise responsible parties; communities that demand the right to participate in every level of decisionmaking will resist efforts to streamline or privatize the cleanup process; communities that demand a safe and healthy environment will react negatively to redevelopment that increases the risk of environmental harm to the community; and communities that insist on redevelopment consistent with their neighborhood vision will demand participation in redevelopment decisions before a project is packaged for public review.

I believe the best way to balance environmental quality and economic development is to engage the local community early and often in the decisionmaking process. However, before redevelopment advocates and urban communities can forge partnerships, they must resolve these conflicts between their goals. By examining the conflicts, and identifying opportunities for compromise and collaboration, a basis emerges for establishing shared strategies and goals that serve the underlying consensual purpose: to improve the urban environment.

IV
COLLABORATIVE SOLUTIONS

This part attempts to reconcile the ultimate goals of redevelopment advocates and the environmental justice movement. Each of the four primary areas of change sought by industrial redevelopment advocates, including reduced cleanup standards, limited liability, streamlined government review, and increased government incentives, are intended to make recycling urban industrial property more cost effective for prospective purchasers. The Principles of Environmental Justice essentially call for self-determination and the protection of human health.

Two general parameters serve the primary purposes of both groups and can be used to guide the development of collaborative strategies. First, changes in the existing legal/regulatory system must reduce obstacles to redevelopment in a way that does not sacrifice

6. Accountability of hazardous waste producers.
7. Involvement in decisionmaking.
8. Worker safety.
10. Cleanup of cities.
11. Informed consent and education of social and environmental issues. See id.
312. Because the movement includes among its principles self-determination, the degree to which a given community will adhere to the Principles is hard to predict.
human health. Second, redevelopment planning must be structured to facilitate community control and a streamlined development process.

This part evaluates some of the existing redevelopment strategies in relation to these parameters and rejects those strategies for cost reduction that improperly shift risk onto the host community. It then presents the community land trust (CLT) as a structure for community-centered redevelopment planning. My goal is to provide an opportunity for collaboration that may have been overlooked by two vigorous, but separate, movements in their common pursuit of an improved urban environment.

A. Reducing the Costs of Industrial Redevelopment

Recycling industrial property can be encouraged either by reducing the actual cost of site remediation, or by shifting the costs from the prospective redevelopers (i.e., buyers and lenders) to other parties (i.e., other PRPs or the government). The preferred strategy under CERCLA is to impose cleanup costs on the polluters: owners, operators, transporters, and generators of hazardous substances. How- ever, at abandoned industrial sites the list of PRPs is obviously very limited. Further, if a site was abandoned it is likely that the limited number of PRPs is no longer sufficiently viable to fund a remediation of the site. Thus, cost shifting strategies must focus elsewhere.

1. Avoiding Unfair Cost Shifts to the Community

Relaxing urban cleanup standards may lower cleanup costs, but it also shifts health risks to the communities residing in close proximity to sites. Such a strategy may perpetuate environmental inequities by increasing the degree of risk the community is forced to bear.

Consider Ohio's strategy for reducing cleanup costs by lowering the risk standard for industrial cleanups to a one in 10,000 cancer incidence rate instead of the one in 1,000,000 rate required for residential areas. If the industrial zone is in a predominantly minority community, which it often is, these tiered cleanup standards allow more contamination in and around minority communities. Environmental justice activists can use this inequity in the media to mobilize community opposition to redevelopment projects that rely on inequitable standards for cheaper site rehabilitation. Tiered standards reduce cost at the expense of the urban community's health and thus should be excluded from the list of collaborative strategies.

314. See Urban Indus. Property Revitalization Task Force, supra note 1, at 16-17 (recommending a 3-tiered system for assessing Ohio's cleanup standards based on whether the postremediation land use is residential, commercial, or industrial).
As discussed previously, many redevelopment advocates argue that the current method for assessing risk at contaminated sites exaggerates the actual risk and that reductions in cleanup standards will not threaten public health. If this is true, then reform is more appropriately directed at revising the methods for risk assessment, not at reducing health-based standards.

While lowering standards at brownfields relative to greenfields may effectively encourage urban redevelopment, these differential standards perpetuate the disproportionate impact of environmental hazards on the urban poor. In fact, this may be in violation of the EPA Title VI regulations, which state that EPA "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." This prohibition also applies to any state or local agency receiving federal funds. With the legal resources that are currently mobilized in support of environmental justice issues, differential cleanup standards will probably not go unchallenged in court.

Risk is also shifted to the community when contaminated properties lie undetected and unsecured. Properties abandoned in bankruptcy or removed from the market and left vacant may contain hazards that put communities at risk. Unassessed properties could be leaching contaminants into the groundwater or surface water, or leaving contaminated soil accessible to neighborhood kids. The polluters have walked away from sites, thereby avoiding the costs of site assessment and cleanup and shifting the risk to the surrounding community.

318. 42 U.S.C. § 2000d (1988). Title VI is implemented through regulations adopted by most federal agencies and applied to any recipient of federal funds. State environmental agencies would certainly fall within its mandate.
319. See supra parts III.B, III.C. In addition, traditional legal services lawyers are engaging in environmental justice cases as impact litigation to help get to the root of their clients' problems. See Cole, supra note 14, at 655-59.
When the polluters are unavailable or inviable, the equitable solution is to use public funds to determine the extent of contamination at orphan sites, to remove imminent dangers, and to restrict access to the properties where appropriate. This will at least ensure that assessment costs alone do not discourage reuse. Moreover, current operators that use or store hazardous materials should be required to take responsibility for the hazards they may create by posting a bond or obtaining insurance that will pay for any needed site assessment.

The results of such assessments should be available at the deed recorder's office and in the local public library. The buyer can be more certain of the condition of the property he is considering, and the public can access reports for information on local hazards and past exposures. Those properties for which suspicions of contamination were unfounded would presumably be able to reenter the market immediately with a clean certificate. However, where a site assessment identifies contamination levels and projected cleanup costs that exceed the property value, additional resources will be needed to prepare the property for redevelopment.

2. Identifying Costs Appropriate for Government

To reduce developers' costs of recycling abandoned brownfields without risk to the community, the government should bear some development costs. For abandoned industrial sites with no viable PRPs, only the government and the prospective purchaser are available to share the cleanup costs. The federal and state governments are in a better position than the purchaser to absorb and spread this cost. With the average cost of a Superfund cleanup hovering around $25 million, companies seeking new sites have three choices: (1) seek a clean (greenfield) site; (2) acquire an urban site and use bankruptcy protection to abandon it if the costs of remediation get too high; or (3) tie up a significant amount of money to insure against the future risk. The first two choices perpetuate the problems associated with abandoned industrial property, and the third effectively precludes most startup companies and moderate size businesses from considering ur-

320. CERLCA requires these equitable solutions under 42 U.S.C. § 9604.
321. There is certainly sufficient public interest in having knowledge of contamination to justify such expenditures. Furthermore, assumptions of contamination may keep otherwise risk-free properties off the market. Site assessments could be funded by tax increment financing, supra part II.B.3.a, by state environmental penalties or hazardous waste surcharges, supra part II.B.3.d, or through federal or state general fund allocations.
322. See supra note 50 and accompanying text.
323. See discussion supra part II.B.2.a regarding clean certificates.
The dollars these companies could invest in site rehabilitation are lost unless government accepts the risk of future liability.

By assuming the future risk, the government clears an obstacle to recycling urban property. If the price of brownfields is discounted by the known cost of cleanup, then brownfields can compete equitably in the market with uncontaminated greenfields. Contamination alone will not impede a transaction if the known cost of remediation is less than the overall value of the property to the buyer. Further, even if remediation costs exceed the value of the property, a known cost can be more easily and efficiently offset by other incentives (e.g., tax breaks, low interest loans). Focusing government resources on reducing the uncertainty of cleanup costs can increase the number of properties that can be cleaned and returned to the market.

Several strategies discussed in part III can focus government resources on reducing uncertainty in cleanup costs. Using PPAs to fix the buyer’s share of remediation costs in exchange for a release from unknown future costs can successfully reduce the cost of remediation without sacrificing human health. State governments can also assume future risk by certifying property as clean after a PRP- or government-funded remediation has been completed. This strategy can remove the stigma of suspected contamination and increase community confidence in remediation efforts. Finally, cities can assume

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325. This effectively precludes those moderate-scale redevelopment projects most likely to be consistent with the community’s assessment of its redevelopment needs, including most minority-owned businesses.

326. See Boyd et al., supra note 24, at app. 1 (providing a model for property transactions where liability for site remediation is a factor in the transaction equation). Consider a brownfield site that is worth $2 million but has $1 million of remediation costs. A buyer who is confident about the $1 million estimate would have no price incentive to purchase a comparable greenfield site for $2 million, all other factors being equal. However, if the cost to remediate contamination was unknown, the buyer would need to include in his evaluation of price the value of the risk that cleanup will exceed his estimate. The uncertainty surrounding the cleanup cost estimate makes the buyer consider the greenfield a safer investment.

327. See id. at 18-19. If the cleanup costs were certain, the market would presumably discount the purchase price of a brownfield by the amount of the cleanup costs, making the relative value to a purchaser the same. “If pollution costs are capitalized into land prices, pollution itself would not reduce the desirability of brownfield properties, or increase the desirability of greenfield [properties].” Id. at 19.

328. The community would clearly benefit from this expedited cleanup; however, if a site is subsequently occupied by a polluting facility, the net impact on the community could be worse. Thus, community control of redevelopment as outlined below is essential to protect long term community interests. See infra part IV.B.

329. See supra part II.A.1, II.B.2 (discussing the use of PPAs to fix remediation costs).

330. See supra part II.B.2.a (discussing state clean site certification practices).
environmental liabilities at a site and use TIF or another funding scheme to pay for cleanup and site rehabilitation.\(^{331}\)

3. **Reducing the Total Cost of Remediation**

Another way to encourage industrial redevelopment is to reduce the total cost of remediation in a way that does not shift risk to other parties. Streamlining government oversight is one way to reap such a net benefit in cost reduction. However, while redevelopment advocates seek reduced regulatory oversight, environmental justice activists rally for increased opportunities for public participation.

Advocates for redevelopment have identified tactics that improve the predictability and efficiency of regulatory requirements to save both time and cost during the cleanup process. Where the effect of streamlining government oversight is to expedite response action and site remediation, the community also benefits from the more rapid reduction of environmental risk. However, community activists are adamant that streamlining should not come at the expense of public participation. In their view, participation opportunities are already insufficient to allow substantive local input.\(^{332}\) In addition, privatizing agency information collection responsibilities (e.g., using private site assessors) adds another filter through which the information flows before it reaches the community living around a site.\(^{333}\) Therefore, the collaborative strategy must seek to shorten the overall remediation process while increasing the quality of community involvement.\(^{334}\)

One example of a viable collaborative strategy for reducing regulatory burden is Ohio’s provision of an advocate (the Industrial Property Revitalization Board) to help investors and lenders navigate through the regulatory bureaucracy.\(^{335}\) However, the proposal does not mention host communities as one of its intended constituent groups.\(^{336}\) Without community participation the Board could become a regulatory “backroom” for cutting deals that shift risk to the excluded community.\(^{337}\)

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331. See supra part II.B.3.a (discussing the use of TIFs).


333. See infra part IV.B for a discussion of ways to increase community access to pertinent information about neighborhood sites.

334. See infra part IV.B.1 for a discussion of structural mechanisms that would increase community involvement in redevelopment outside the traditional regulatory process.

335. *See supra* notes 222-24 and accompanying text.


337. The Industrial Property Revitalization Board was created by the same task force that proposed tiered cleanup standards. *See id.* at 14, 18; *see also supra* notes 314-19 and accompanying text (discussing tiered cleanup standards).
Government oversight can also be streamlined by encouraging voluntary site cleanups.\textsuperscript{338} The Clinton proposal identifies a substantial backlog of low and medium risk sites that are prime candidates for state voluntary cleanup programs.\textsuperscript{339} The express goal of state voluntary cleanup programs is to reduce the involvement of the regulatory agency and its lengthy, time-consuming process.\textsuperscript{340} However, privatizing the cleanup process can leave those most impacted by the decision out of the decisionmaking loop entirely.

Such risks demonstrate that the reform process may neglect community interests. For community interests to be adequately represented in discussions with lenders, developers, and government officials, the community must have some leverage over redevelopment. A community group looking for opportunities to be involved can find itself forced into more polarizing tactics just to get invited to the table where decisions are being made.\textsuperscript{341} However, as the next part illustrates, community-based organizations can themselves exert control over voluntary site remediation efforts, thereby increasing community participation while reducing the government’s role.\textsuperscript{342}

\textbf{B. Community Responsive Redevelopment}

In addition to reducing costs without shifting risks to the community, redevelopment planning should be restructured to facilitate community control. This does not eliminate the need for enlisting the support of business and government, who hold resources necessary to realize the community’s redevelopment plans. The critical element for community responsive urban site reuse is structuring decisionmaking so that communities have the ability to shape redevelopment early in the planning process, and developers have the security they need to invest in a brownfield site.\textsuperscript{343}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., supra notes 184-85 and accompanying text (discussing Indiana’s voluntary remediation program).
\item Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 11.
\item URBAN INDUS. PROPERTY REVITALIZATION TASK FORCE, supra note 1, at 8.
\item For example, the West County Toxics Coalition was denied the opportunity to address Chevron’s shareholder meeting to raise concerns about the Chevron refinery’s impact on Richmond, California, the surrounding low income, predominantly minority community. Henry Clark, Director, West County Toxics Coalition, Remarks at the Environmental Justice Seminar at Boalt Hall School of Law at the University of California at Berkeley (Feb. 2, 1994) (transcript on file with the Ecology Law Quarterly). A substantial group of local residents took a bus ride to the home of one of Chevron’s corporate officers and proceeded to discuss the matter with his neighbors. Id.
\item See infra part IV.B (discussing mechanisms for effective community involvement in neighborhood site remediation efforts).
\item Clinton’s Superfund reform proposal ranks increased community involvement at response sites as a priority for reform. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 6. Affected community members note that presently,
\end{enumerate}
\end{footnotesize}
Community-centered redevelopment planning has many advantages. First, it provides an opportunity for pro-active community input. Second, it reduces the gap between perceived and actual risks among community members by providing them access to timely information and expertise. Third, it gives the community the opportunity to educate redevelopers, including repeat players like city planners and local politicians, about the community’s redevelopment goals and the impacts of cumulative unabated risks. Finally, it can ensure, by building on the working relationship established in the cleanup phase, that the redevelopment project, like the cleanup, is community responsive.344

The next sections discuss three critical components of community responsive redevelopment: (1) ensuring community participation; (2) overcoming obstacles to redevelopment; and (3) ensuring community control over redevelopment. Threaded into these discussions are three possible structures for ensuring community responsive development, all of which involve tradeoffs between the level of commitment and energy required from the community and the level of control the community retains. Community Work Groups (CWGs) ensure that communities can give input into planning, but not that the input is heeded. Nonprofit organizations have advantages in limiting liability risks and attracting site rehabilitation funds, but nothing in the nonprofit structure ensures community control. Finally, community land trusts (CLTs), in which communities actually own the land to be redeveloped, demand the greatest commitment from community members but afford them the greatest control over redevelopment.

1. Increasing Community Input

While government agencies conduct public hearings for most redevelopment projects, there is a fundamental flaw in the public hearing process. Opportunities for public involvement come so late in the process that the participants have little real impact on decisions.345 The lengthy process of attracting a new or expanding business to a site, obtaining financing, and passing initial permit reviews creates momentum that is hard to resist because a constituency with a vested interest has grown up around the project. Public “participation” at

“opportunities for [community] involvement in site activities come too late in the process and . . . [community] input has little impact on cleanup decisions.” Id.

344. Using community land trusts (CLTs) has the advantage of making this influence legally binding through ground leases. See infra part IV.B.3.

345. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 6. The Clinton proposal states that there is “a general consensus that opportunities for earlier, direct and regular community involvement would enhance the communities’ participation.” Id.
this point is a hoax. The only option for the community, besides passive acquiescence, is to entrench its opposition and use whatever tactics are available to derail a project. Development advocates have missed an opportunity for genuine public participation in shaping the project and have lost the chance to include the local community among the project's constituencies.

Rather, the community should be involved in the process of preparing a site for reuse and promoting the site to potential developers. The community is more likely to respond positively to a project when the decision has been considered and approved by legitimate representatives of neighborhood interests. In part this is because the project, when finished, will serve these interests. Also, if difficult tradeoffs that compromise community interests have been necessary along the way, residents are more likely to trust one of their own to make these decisions. Finally, a legitimate community representative is likely to inform her community of the hard choices made throughout the decisionmaking process so that the neighborhood is more prepared for and accepting of changes from the original project vision. In fact, the project may benefit in these times of crisis from the creative input of a well informed host community.

The quid pro quo of courting investors, however, usually leads to relinquishing a degree of control over the project. The neighborhood voice can be quickly limited to one or two seats on a committee dominated by professionals whose agendas may be at odds with the community's vision. The right decisionmaking structure is critical to retaining sufficient community control while attracting those redevelopers who possess resources necessary to implement the community's objectives.

The Clinton Administration has proposed community work groups (CWGs) to encourage early community involvement in the CERCLA process. This structure is designed to accommodate a community group or representative interested in serving an advisory role early and often throughout the CERCLA site remediation process. CWGs would be involved in establishing future land use expectations.

347. Community control also reduces the likelihood of bad publicity, delay, and potentially expensive legal proceedings. This should help attract investors and redevelopers back into the community.
348. See infra part IV.B.3 for a discussion of community land trusts as an example of a successful structure for decisionmaking where communities, tenants, and investors all need to be represented.
349. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 6.
350. Community Work Groups (CWGs) would be formed to promote "early, direct, and meaningful public participation throughout the Superfund process." Id.
tations for the site (i.e. residential, recreational, commercial, etc.) so that risk assessments can be based on the community's vision for the property.\textsuperscript{351} The CWG structure could also be used to involve the community early in soliciting a redevelopment project which would bring a site back to productive use.

There is no guarantee, however, developers would incorporate the advice of CWGs into decisions. While environmental justice issues are a significant part of the federal reform proposal coming out of Washington, the value of community involvement may be a harder sell in EPA's regional offices where public participation can potentially be considered synonymous with reactionary obstructionism and unreasonable demands that drain limited agency resources away from more constructive cleanup tasks. Increasing community input in hazardous waste cleanup and redevelopment is an even harder sell at the local government level where public participation is most time demanding. Further, local politicians prefer to balance sensitive environmental and economic issues without high profile proceedings. Thus, federal mandates to increase public participation may not be effective in altering local practice.

Nonetheless, a structure for unifying the community response has significant advantages. The CWG provides a forum for articulating the community's desires. While consensus is unlikely, this opportunity for a community meeting brings a neighborhood together with the intention of identifying common concerns and needs. This serves the environmental justice goal of organizing the community to assert its fundamental right to self-determination.\textsuperscript{352}

Having a voice, however, is not the same as having control. Local officials can still disregard the unified voice of the CWG. When a community wants greater control over site cleanup and redevelopment than CWGs will provide, nonprofit organizations offer a more enduring structure. Moreover, when combined with land ownership or land management in a community land trust, nonprofits can place significant control in the hands of the community membership.

2. Removing Obstacles with Community Assistance

Nonprofit organizations have become a popular structure for facilitating the remediation and rehabilitation of contaminated sites.\textsuperscript{353} Groups of PRPs, individual companies, local business communities,

\textsuperscript{351} Id.
\textsuperscript{352} Principles of Environmental Justice, supra note 17, at 2.
\textsuperscript{353} See Boyd et al., supra note 24, at app. 2 (showing that nearly one-half of the contaminated industrial sites surveyed are now under the control of a nonprofit development corporation).
and city planners have all created nonprofit entities to own or conduct the remediation of contaminated property.\footnote{354
See infra notes 355-60 and accompanying text, discussing nonprofit entities and their role in site remediation.}

Nonprofit organizations can solve two of the primary problems for redevelopment: liability and funding. A nonprofit organization with the contaminated property as its sole asset faces little risk of liability. EPA has no incentive to pursue response costs, and PRPs have no incentive to pursue a contribution action against a judgment proof nonprofit entity. Nonprofit organizations with other assets may find their nonprofit status helps them negotiate PPAs to limit liability and obtain larger government cost shares.\footnote{355
MacFarlane & Belk, supra note 90, at 2. Washington State's first PPA was entered into with a nonprofit organization. \textit{Id}.}

This is because nonprofits can better assure the agency that any increase in property value due to public cleanup funds will be retained for the public interest, not for private profit.\footnote{356
\textsc{REVISED MODEL NONPROFIT CORP. ACT} \S\S 13.01, 13.02 (1987). Nonprofit corporations are restricted from distributing profits or allowing them to inure to the benefit of individuals. \textit{Id}.}

Thus, EPA may choose not to attach a lien on the property to secure Fund reimbursement because it need not guard against unjust private enrichment. This removes the risk that a lien will discourage investment in the property development.\footnote{357
\textit{See Summaries of Clinton Administration Proposal for Superfund Reform}, supra note 8, at 12, for a discussion of Clinton's proposal to increase the use of federal liens to protect against the unjust enrichment of prospective purchasers. In one case, a $15 million EPA lien effectively prevented the property from being sold. \textit{Boyd et al.}, supra note 24, at 53.}

Perhaps less obvious are the ways that a nonprofit organization can help limit the liability for prospective purchasers. Most companies prefer to lease rather than own land in today's market, particularly in urban areas with a history of contamination.\footnote{358
\textit{Boyd et al.}, supra note 24, at 56 (noting that buyers and lenders are concerned that property values in the area will depreciate).}

Buyers and lenders are concerned that property values in these areas will depreciate\footnote{359
These concerns are illustrated by the experience of the Regional Industrial Development Corporation (RIDC) of southwestern Pennsylvania, a community-sponsored nonprofit organization that has undertaken to redevelop the site of an old U.S. Steel plant. \textit{Id}. RIDC originally planned to sell parcels of the property, but has been forced by unwilling lenders to consider lease arrangements so that lessees can be insulated from liability and depreciating land values. \textit{Id}.}

and that purchasing contaminated property makes them susceptible to environmental liability.\footnote{360
\textit{42 U.S.C. \S 9607}; \textit{see also supra} part II.A.1, II.A.2 (discussing CERCLA liability for property owners).} The nonprofit organization can provide businesses with an opportunity to lease industrial property without assuming these risks.
Under CERCLA, however, the lessee would still be liable as the current operator of the facility if its leasehold included contaminated portions of the property.\textsuperscript{361} However, since a ground lease can be limited to the area actually needed for the operation, many lessees can be insulated from liability by virtue of the fact that they are not operating the "site or area where a hazardous substance has been deposited . . . ."\textsuperscript{362} For example, on a large site with discrete areas of contamination, nonprofit development organizations could lease a clean parcel without exposing the lessee to liability for the entire site.\textsuperscript{363} In turn, the rental payments to the nonprofit for that parcel could be used to remediate the contamination on the remainder of the site.\textsuperscript{364} Thus, lease arrangements may encourage businesses to consider urban sites, while the community benefits from additional cleanup funds and the ability to exercise some control over the type of businesses that become tenants at the site.

The other benefit redevelopment derives from nonprofit organizations is their ability to attract both public and private funding sources. Many nonprofit redevelopment entities have quasi-public status as community development corporations (CDCs) that allow them access to a variety of guaranteed loans, grant funds, and creative tax and financing packages.\textsuperscript{365} CDCs are generally private, nonprofit organizations authorized by state and local legislation to promote redevelopment in their community.\textsuperscript{366} They have the authority to acquire and rehabilitate a site using packages of federal, state and local

\textsuperscript{361} 42 U.S.C. § 9607(a)(1).
\textsuperscript{362} Id. § 9601(9) (definition of "facility"). Contaminated groundwater could migrate beneath the clean parcel, raising the possibility of future liability. However, this would not affect upgradient parcels and the landowner could contractually agree to shield the operator from the costs of such future liability. Id. § 9607(e)(1); see also McSlarrow et al., supra note 85, at 10,404-05 (stating that the general rule seems to be that PRPs will be jointly and severally liable to the government but may contractually allocate liability costs among themselves).
\textsuperscript{363} See Boyd et al., supra note 24, at 56.
\textsuperscript{364} Id.; see also Donn Shelton, Environment or Development?, DETROITER, Sept. 1993, at 14, 14. The City of San Francisco and regional regulatory agencies permitted the developer of Mission Bay to assess risk and prepare remediation plans on a parcel-by-parcel basis, using income from each developed parcel to fund the next parcel's cleanup. Id.
\textsuperscript{365} See Haar & Wolf, supra note 231, at 968-71; see also supra part II.B.3 for a brief review of the financing incentives available to redevelopment entities. Nonprofit organizations need not be CDCs to benefit from resources available to CDCs. Alliances can be built so that a CDC acts as a conduit for funding to a neighborhood organization involved in site rehabilitation efforts. For example, the Partnership for Regional Investment and Development Enterprise (PRIDE) is a nonprofit group working with the Dauphin County Development Authority to coordinate the redevelopment of the Fruehauf site, which includes part of the Middletown Airfield Superfund site near Harrisburg, Pennsylvania. Boyd et al., supra note 24, at 52.
\textsuperscript{366} See Haar & Wolf, supra note 231, at 970-71.
assistance to attract private developers.\textsuperscript{367} State Public Development Corporations, established in several states, provide technical assistance that helps CDCs control and direct economic development within their neighborhoods.\textsuperscript{368} CDCs often coordinate funding for contaminated site remediation efforts, while they search for appropriate redevelopment opportunities.\textsuperscript{369}

Nonprofit entities that obtain tax-exempt status have the added advantage of being eligible for tax-deductible private contributions.\textsuperscript{370} For example, a private tax-exempt nonprofit redevelopment organization in Iowa, called "Rejuvenate Davenport," embarked on a mission to demolish abandoned industrial facilities and prepare sites for reuse as part of a strategy for revitalizing a rapidly deteriorating downtown.\textsuperscript{371} In the first year, this all-volunteer group of community leaders raised $1.8 million dollars from the private sector to reclaim an abandoned manufacturing plant and entice the local newspaper to site its new facility there.\textsuperscript{372} However, after the discovery of contamination on site, the cost for cleanup and site preparation escalated to $4 million.\textsuperscript{373} The city raised revenue for the extra cost of cleanup by expanding the boundaries of its tax increment financing district.\textsuperscript{374} In addition, the newspaper contributed the value of its old site to the cleanup costs.\textsuperscript{375} Rejuvenate Davenport's ability to get the coopera-

\textsuperscript{367} See id. at 926-27. While most of this assistance is financial in character, some comes in the form of reducing government obstacles. Id. If a site is within a designated enterprise zone, the city and state will encourage redevelopment by removing government obstacles, such as reducing tax rates, increasing services, and simplifying paperwork. See id.

\textsuperscript{368} Id. at 970; see also Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 6, wherein President Clinton proposes to create similar technical assistance organizations, the Citizen Information and Access Offices (CIAOs), in each state affected by a Superfund site. The CIAOs would disseminate information concerning Superfund locations. Summaries of Clinton Administration Proposal for Superfund Reform, supra note 8, at 6; see also Housing and Community Development Act of 1977, Pub. L. No. 95-128, § 104(a), 91 Stat. 1111, 1115 (1977) (amending Housing and Development Act of 1974) (requiring local grant recipients of federal community development funds to submit a plan for involving residents of blighted neighborhoods and low income citizens in evaluating development proposals).

\textsuperscript{369} See Boyd et al., supra note 24, at app. 2. CDCs active in site remediation include the Regional Industrial Development Corporation of southwestern Pennsylvania, the Southern Vermont Development Council, and the Shenango Valley Industrial Development Corporation. Id.

\textsuperscript{370} Tax-exempt status is allowed for charitable organizations defined in part as, "relief of the poor and distressed . . . [which] lessen[s] the burdens of Government; and promotion of social welfare . . . or to combat community deterioration . . . ." 26 C.F.R. § 1.501(c)(3)-1(d)(2).

\textsuperscript{371} Bartsch et al., supra note 21, at 72-74.

\textsuperscript{372} Id. at 72.

\textsuperscript{373} Id. at 73.

\textsuperscript{374} Id.

\textsuperscript{375} Id.
tion and support of the city, the state Department of Natural Resources, and the Governor's office was instrumental in raising the funds and clearing the obstacles necessary for the successful completion of a $23.8 million printing plant in downtown Davenport. The nonprofit organization benefitted from its ties to the local business community and from the positive working relationship it forged with government funding agencies.

Nonprofit organizations facilitate redevelopment by limiting liability and attracting funds for site rehabilitation. Thus, nonprofits can assist communities in attracting redevelopment projects to their neighborhoods. However, the nonprofit structure itself does nothing to assure community control over the character of that redevelopment. Thus, the next part examines ways to structure nonprofit entities to empower community organizations to exert control over redevelopment decisions.

3. Community Control Through Land Ownership

Community land trusts (CLTs) offer a distinctive approach to the ownership of land and improvements within an organizational structure that facilitates community control. Communities that control the land proposed for redevelopment ensure themselves a central place in redevelopment planning decisions. This section recommends that neighborhoods interested in controlling redevelopment be organized into CLTs, which can acquire abandoned properties in their neighborhood and control redevelopment via groundleases negotiated with prospective redevelopers or site-seeking businesses.

CLTs are a forum in which residents can discuss redevelopment issues and distill the community's interests into redevelopment plans. Nonprofit community land-ownership or land-management can also facilitate a more equitable balance between communities and redevelopers during cleanup and redevelopment planning sessions. CLTs also obviate the need for obstructionist community action by giving communities the opportunity to control the type of redevelopment solicited for their neighborhood.

CLTs have been successfully used to exert control over site redevelopment. For example, the Dudley Street Neighborhood Initiative (DSNI), originally formed a CLT as a vehicle for community control

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376. Id. at 73-74.
377. See The Institute for Community Economics, 1991 Community Land Trust Legal Manual: A Handbook for Community Land Trusts and Their Attorneys I-8 (1991) (on file with the Ecology Law Quarterly) [hereinafter CLT Legal Manual]. The primary application for CLTs has been in the area of affordable housing, although their structure does not preclude applying CLTs to foster other land uses. Id. CLTs have made land available for agricultural and commercial uses as well as community service providers. Id.
of development in a section of Roxbury, Massachusetts. DSNI has successfully developed affordable housing and its next project consists of a commercial/industrial center that will house a furniture company, a community center, and an industrial park. Residents in Roxbury have used the CLT structure to successfully influence the future character of their community's development.

The CLT is different from other nonprofit organizations currently involved in remediation efforts because it is structured as a membership organization. Legitimacy is a fluid commodity. In contrast to advisory groups with "token" community representation, the CLT model has the advantage of ensuring a more complete community perspective in project planning. The CLT's voting membership includes the local residents, workers, and business owners within the impact area who can be empowered to consider any critical decision concerning remediation of a site. To the extent feasible, the full membership makes decisions, with each member accorded a single vote. The membership may also delegate decisions to an elected Board of Directors. The CLT, through a voting membership and a representative Board of Directors, distills the will of the community and manifests that will in lease negotiations and other CLT actions.

CLTs can acquire control over the land either by receiving title from the city, or by acquiring the equivalent of a land management contract from the city that will allow it to negotiate ground leases and otherwise control development. Overburdened cities that acquire property involuntarily through abandonment or tax foreclosure would likely be willing to relinquish title to property for which they have no development plans. Certainly CLTs interested in acquiring an abandoned site to rehabilitate and redevelop would, in many cases,

379. See id. at 2-3. Environmental liabilities are impacting the planning for this new project. Id.
380. CLT Legal Manual, supra note 377, at V-9. Some CLTs limit membership to a particular geographic impact area that ideally is coextensive with the boundaries of any existing community organizations. See generally id. at V-8 to V-13.
381. Id. at V-12.
382. See id. at V-14 to V-21.
383. Relative to other options for redevelopment (i.e., participation in public hearings), this approach provides the best opportunity for the local community to assert its fundamental right to self-determination in shaping future redevelopment. See supra notes 309-12 and accompanying text.
384. Most abandoned property has either escheated title to the local government, or the government could acquire the property through tax foreclosure if it desired. CERCLA liability expressly excludes municipal liability for property that a municipality acquires by virtue of its role as a sovereign. 42 U.S.C. § 9601(35)(A)(ii).
find the city willing to transfer title or willing to enter into a land management contract to enable community control.

CLTs, like most prospective owners, have been counseled against acquiring contaminated property for fear of the costs of environmental liability.\(^{385}\) While a new CLT has no assets to lose except the contaminated property itself, the continuing shadow of liability may inhibit future projects.\(^{386}\) Thus, the CLT may need to negotiate a prospective purchaser agreement with the state and the EPA that includes a covenant not to sue as well as contribution protection to be adequately shielded from liability associated with the site.\(^{387}\)

While the ground lease allows the community to exercise control over development,\(^{388}\) community control is limited in practical effect. If the lease provisions are too restrictive, developers may not be interested. If the provisions are too lax, the community may be unable to assert its central interests. Thus, lease negotiations must balance the interests of the enterprise and the community.\(^{389}\)

The CLT's structure requires a significant commitment from the community. It may be difficult to generate this level of commitment around a site that has laid vacant or abandoned for years. Where the abandoned industrial site is merely viewed as an eyesore, the average individual may assign little significance to changing the status quo. In contrast, if the site is contaminated and is perceived as a health threat, or is slated for an unwanted development, community residents are more likely to organize. In such cases, a CLT provides a way to focus community interest and translate such interest into action.

Indeed, the best opportunity for organizing a pro-active redevelopment plan is that time when the community has come together to oppose some other threat to their urban environment. Whether the opposition effort was successful or not, the community is gathered and

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385. *See, e.g.*, STEINGLASS, *supra* note 378, at 3. The Dudley Street Neighborhood Initiative, a CLT with affordable housing holdings, has been warned against acquiring title to a contaminated parcel that is currently part of the property they hope to redevelop into a community-sensitive industrial park for small manufacturers. *Id.*

386. *Id.*

387. *See* BOYD ET AL., *supra* note 24, at 55 (discussing some reluctance at the state level to issue "hold harmless clauses" to enable redevelopment of contaminated sites).


389. The power balance in negotiations is heavily dependent upon the value of a site to the developer; however, the CLT can offer advantages that increase the relative site value. The CLT can offer reduced rents for favorable development projects, or can tie the rent to profitability. The CLT can also coordinate community services to improve the quality of the workplace (e.g., day care, food services, basic retail and health care). This has the ancillary benefit of creating jobs and business opportunities in the service sector for community members. Institute for Community Economics, Community-Controlled Industrial Development: Thoughts on the Application of Community Land Trust Approach to Industrial Development 2 (1993) (unpublished manuscript, on file with the Ecology Law Quarterly).
awareness of intrusions into the community is at a peak. This is the time to ask the questions, "If we could control development in this community, what would it look like? What would we change? What would we preserve?" Community land trusts can provide a structure for transforming these ideas into plans and those plans into site lease terms over which the CLT exerts long-term control.

While abandoned industrial sites present an obstacle to the economic well-being of a local community, these sites can also be an opportunity to empower the community. Communities in urban areas may have many sites within their neighborhoods which pose varying levels of health risks.\textsuperscript{390} Residents, due to their limited time and resources, can focus attention on a fraction of the contaminated sites, but the prioritizing process itself will lead communities to define what constitutes acceptable risks at contaminated sites. The long-term benefits of involving communities in decisions about their neighborhood should facilitate a more productive partnership between impacted urban communities and redevelopment advocates.

CONCLUSION

This is a critical time for urban redevelopment and revitalization. Two of the most influential forces in urban environmental policymaking are on a collision course. The challenge is how to bring two groups with very different tactics and focal points to the realization that cooperation is in their mutual best interest. This article provides a starting point for this collaboration.

Both groups will have to compromise to benefit from the collaboration. Urban redevelopment advocates should discard strategies that favor inequitable cleanup standards for urban areas, and strategies that exclude or reduce public participation in site remediation and redevelopment decisionmaking. Urban communities must accommodate the legitimate needs of developers and must make hard decisions about what environmental risks are acceptable.

Environmental justice and industrial redevelopment share a fleeting moment at the forefront of the national environmental policy agenda. There is a short window of opportunity to engage in collaborative strategy sessions to consider ways to work together on improving the urban environment consistent with the principles of the environmental justice movement.

At the local level, the success of the collaborative efforts will depend on whether the decisionmaking process is structured for substan-

\textsuperscript{390} \textsc{Boyd et al., supra} note 24, at 65. For instance, in Cuyahoga County, Ohio, 8000 to 10,000 potential cleanup sites exist on 40,000 acres of commercial and industrial lands. \textit{Id.}
tional community involvement. The CLT offers the most comprehensive structure for community control, but also exacts the most commitment from its community members. The nonprofit exemplified by the CDC can provide an opportunity for public/private partnerships directed toward redevelopment, but it has no formal structure to ensure meaningful community participation. CWGs provide another opportunity to institutionalize community input into the site cleanup process, but they are structured as an advisory group without substantial power to make decisions. The community must ultimately choose an option consistent with its level of commitment to asserting influence over a particular site.

In any event, redevelopment advocates should seek the community's input actively, early, and often. In an era when urban communities are increasingly organized and active, their involvement can be crucial to the success of industrial redevelopment. Further, redevelopment advocates that circumvent the impacted community miss an opportunity to invigorate the human resources in the urban environment. The process of planning the future development of one's neighborhood can be an opportunity for residents to refine their community identity. An organized neighborhood with a positive plan of action has a better chance of gaining the support needed to implement their redevelopment strategy. The redevelopment process is an opportunity to educate, empower, and build community organization.391

Attorneys can facilitate this collaboration in many ways. First, attorneys can help set up community organizations (nonprofit, tax-exempt, and/or CLTs) that will structure community decisionmaking and increase community control. Second, attorneys with experience in hazardous waste remediation can assist community groups in wading through the environmental obstacles that inevitably confront their redevelopment plans. Third, attorneys with legislative connections can lobby for changes in state and federal laws that make safe cleanup less costly, that streamline government oversight, and that help nonprofit community organizations acquire land without facing liability for past contamination. Finally, attorneys can help connect community organizations with the city planners, business leaders, and other redevelopment advocates that control the resources available for redevelopment projects. These meetings offer a forum in which economics and equity are balanced in the quest for urban revitalization.

391. See Cole, supra note 14, at 668 (suggesting that attorneys ask themselves three questions to assess whether their legal strategy is serving the community: (1) will it educate?; (2) will it address the root of the problem?; and (3) will it build the movement?).