



BROWNFIELDS

Converging Green, Community and Investment Concerns

BY MIRAL ALENA SIGURANI

Arizona is known for its broad expanse of desert landscape and its breathtaking views. Few other locations in the United States are able to provide their residents with both the stunning natural scenery and the wealth of business opportunities that can be found here. The dramatic backdrop, laidback atmosphere and bur-

geoning metropolis are natural draws for new residents. In fact, new residents are migrating from all over the world. Arizona is one of the fastest-growing states in the nation, its population is soaring and its cities are rapidly expanding.¹ Such growth provides both benefits and drawbacks. The influx of new residents provides a rich cul-

tural environment and a strong job market. However, this rapid growth also comes at a price: It is encroaching further and further into the desert landscape.² Arizona's land development and land use are largely following the pattern found throughout the United States: The population has been moving from urban centers to suburban

Miral Alena Sigurani is an Arizona Assistant Attorney General in the Tax, Bankruptcy & Collection Section.

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locations, and the number of citizens living in the suburbs now exceeds the number of citizens living in the cities.³ This phenomenon is known as urban sprawl, defined as low density, automobile-dependent development, beyond the edge of service and employment areas.⁴ Open space surrounding the urban centers is rapidly being converted

to residential and commercial use, and large tracts of urban housing and commercial property are now vacant, polluted or both.⁵

To prevent further destruction of the natural landscape, and to present businesses and investors with economically viable options for development, private investors, nonprofit organizations and government entities are

exploring more creative approaches to corporate expansion.

One such option is the development of abandoned and contaminated land found within the heart of most cities. These neglected properties are known as “brownfields.”

Idled by Past Use

The U.S. Environmental Protection Agency defines a brownfield as “abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.”⁶ The Small Business Liability Relief and Brownfield Revitalization Act of 2002 provides additional guidance as to which properties are considered brownfields.⁷ Brownfield properties can be small or large; urban or rural; or former factories or warehouses.⁸ They are simply properties that have been left idle due to concerns about cleanup costs and legal liability.

Reclaiming and redeveloping these properties that were previously overlooked, and making them once again useful and productive, is a realistic alternative to expanding into undeveloped areas. It has been said that for every acre of brownfield property that we are able to reclaim, we are able to save four-and-a-half acres of open space.⁹ Previously, due to the complexity of their development, many found brownfields far too daunting to develop.¹⁰ Now, due to changes in the laws governing their development, brownfield properties are becoming more desirable.¹¹

Negative Impact of Idle Brownfields

Idle brownfield properties cause numerous problems.

First, the urge to expand into untapped areas (greenfields) in order to avoid the potential environmental liability associated with the development of brownfields has contributed to urban sprawl. Urban sprawl results in increased traffic congestion, longer commutes, increased dependence on fossil fuels, crowded schools, infrastructure funding problems, lack of affordable housing, worsening air and water pollution, threatened surface and ground water supplies, lost open space and wetlands, increased flooding, destroyed wildlife habitat, higher taxes, and dying city centers.¹² Urban sprawl has caused problems for communities, companies and workers alike.



Brownfields and vacant properties are known for their pollution, unemployment, poverty, racial isolation, crime, drugs, declining public services and architectural eyesores.¹³ Idle brownfields are said to depress property values, discourage investment, foster blight and dampen tax revenues for local governments.¹⁴ Because of the dangers associated with idle brownfields, many communities are building programs to encourage their use. Brownfields are commonly found within the urban core, near public transportation and other conveniences, making them exceptional development sites for residential housing, commercial sites or sites for service-related industries.

Benefits of Redevelopment

The benefits to the community of reclaiming idle brownfields are widely recognized and are linked to public health, environmental protection, social benefits and economic redevelopment.¹⁵

■ Environmental Benefits

The environmental benefits are clear: Cleanup and use of brownfields reduce the development of greenfields and preserve open spaces. Greenfields are previously undeveloped rural or suburban sites that are attractive to developers because the risk of pre-existing contamination—and resulting liability—is low or nonexistent. Greenfields are almost always outside the urban core.¹⁶ By encouraging development of brownfields, these undeveloped areas will remain intact. In addition, brownfield cleanup eliminates the toxins and physical hazards brought on by idle and contaminated land.¹⁷

■ Social Benefits

The cleanup and reuse of contaminated property can also be an effective tool for community revitalization, providing myriad social benefits.¹⁸ Social commentators believe these benefits to include an increase in easily accessible services and improved transportation, affordable housing, improved city services and enhanced aesthetics.¹⁹ By establishing a cohesive plan for land use and development, cities can create more livable communities, with increased job opportunities, decreased crime rates and viable transportation options.²⁰

■ Economic Benefits

Reclaiming idle brownfields also yields economic benefits to the community.

First, by returning idle property to productive use, cities can generate increased tax revenues from property and sales taxes.²¹ Second, use of these previously idle properties can result in job creation, with the potential for higher-paying jobs and concurrent income tax revenues. Third, improvement of the brownfield properties typically has a “spillover” economic benefit: Businesses in the surrounding areas receive benefits in the form of increased property values and increased business. The city of Phoenix estimates that cleaning up several key brownfield sites has generated more than 3,000 jobs and \$244 million in private investment.²²

Obstacles for the Private Sector

Private sector participants in brownfield redevelopment include banks, consultants, engineering firms, private developers and local businesses. In the past, obstacles to the redevelopment of brownfields were perceived as too numerous and insurmountable for the private sector. Recent legislation and newly established programs have reduced many of these obstacles.

■ Liability Concerns

The primary deterrent to investment in brownfields was uncertainty regarding environmental liability. Liability for contaminated properties was largely regulated by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”).²³ The Act, in broad terms, held site owners and operators liable for the cost of a cleanup, regardless of whether they actually polluted the site.²⁴ Although at times this scheme could be harsh, it was highly successful in some ways, by forcing polluting parties to acknowledge and pay for their pollution.²⁵ However, a major side effect was that real estate transactions involving contaminated sites, whether the contamination was real or perceived, largely ground to a halt.²⁶

Potential sellers were often reluctant to sell contaminated properties, as their ongoing responsibility for cleanup could be unclear. Some owners found it cheaper and easier to fence off properties and pay property taxes in perpetuity, rather than paying the costs associated with site assessment and cleanup prior to sale. Similarly, potential purchasers were discouraged from purchasing brownfields for fear of incurring liability for cleanup of properties, which they had no

part in contaminating. Finally, lenders shied away from brownfields, realizing that by foreclosing on the property they could be held liable for cleanup costs, because their security agreements typically brought them into the chain of ownership.

In January 2002, the Small Business Liability Relief and Brownfields Revitalization Act was signed into law.²⁷ Some of the key provisions of the Act include:

- Liability protection from the federal government for prospective developers
- \$200 million per year to states for the assessment and cleanup of abandoned brownfield sites
- Assurances to states that the federal government will not override cleanup decisions
- Reform of liability to small businesses and small contributors of waste to Superfund sites.^{xxviii} The Act moderates the strict liability regime that exists under CERCLA and encourages the use of these idle properties.

In addition, many private tools, such as environmental insurance policies and indemnification provisions, have further reduced fears of potential liability. Some available types of environmental insurance include: pollution legal liability insurance, remediation legal liability insurance, defense coverage, remediation stop-loss insurance and contingent contractors insurance.²⁹ Investors also may use indemnification provisions to shield themselves from liability. Those provisions are private contractual mechanisms in which one party promises to shield another from liability.³⁰

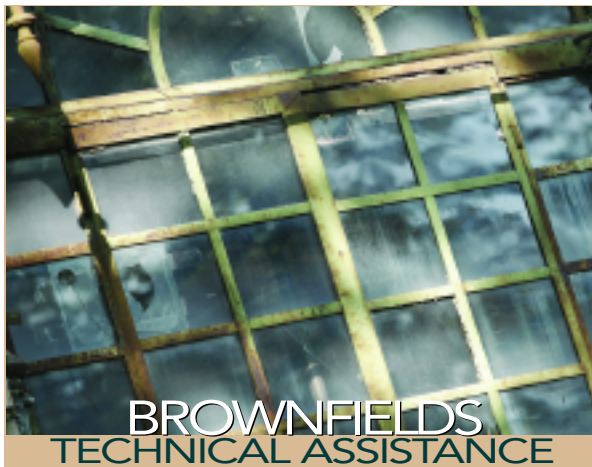
■ **Uncertainty as to the Amount of Cleanup Involved**

There is an inherent uncertainty as to the extent of the contamination of most brownfield sites and the cost of cleanup, prior to site assessment. This uncertainty can discourage potential developers, although, in many cases, when contamination is discovered, it can be cleaned up inexpensively and fairly quickly.³¹

■ **Financing Concerns**

Although in many cases contamination may be cleaned up fairly quickly and inexpensively, it is possible that the cost involved in cleaning up a brownfield and bringing it back to a useable state can be substantial. Sometimes the cleanup costs alone can exceed a property's market value.³²

Accordingly, developers historically



Targeted Brownfields Assessments

The U.S. Environmental Protection Agency provides environmental investigations designed to document environmental conditions at properties under consideration for redevelopment. This service is available to communities and nonprofit organizations through the federal government.

Consultation

The U.S. Environmental Protection Agency is also available for limited consultation on brownfields projects.¹

Voluntary Remediation Program

This is a state program available through the Arizona Department of Environmental Quality (ADEQ). The program assists property owners, prospective purchasers and other interested parties in their investigation and cleanup of contaminated sites. Through cooperation with ADEQ, program participants are given a single point of contact at ADEQ to address cross-program remediation efforts. At the end of the program ADEQ reviews the voluntary remedial actions undertaken and provides a closure document for successful site remediation. The document is accepted by all relevant ADEQ programs.²

Prospective Purchaser Agreement

A prospective purchaser agreement provides a written release and covenant not to sue for potential liability for existing contamination, if certain statutory conditions are met. These agreements are only available through the State of Arizona if the purchaser of the property did not contribute to the contamination of the site.³

Local Programs

Each city or locality has its own specific programs providing technical assistance to those wishing to reclaim brownfields. The City of Phoenix has a program called the Brownfields Land Recycling Program. The program involves coordinated activities of several city departments and provides assistance to private owners and developers in their brownfield development efforts. According to the City, "A single point of contact is available for technical assistance, brownfield information resources, access to regulatory contacts and serves as an advocate and liaison between city departments, other government agencies, and participating brownfield partners."⁴

found it difficult to find banks willing to make loans on environmentally impaired properties to cover site assessment and remediation costs because of this uncertainty.³³ Currently, however, more financing options are available to developers seeking to use brownfields. These include grants, loans, tax abatements and loan guarantees. And due to new limitations in liability and lenders' increased experience in liability prevention, many lenders are less hesitant to provide financing for brownfield development.

■ Confusing and Complicated Regulatory Environment

One major disadvantage to redeveloping a brownfield site is the amount of paperwork and number of approvals required.³⁴ Parties interested in a site often need to work with multiple state and federal agencies, as well as local authorities, to obtain permits and zoning approvals.³⁵ Because the process can be complicated, it could extend the timeframe required for the completion of the project, which could raise its cost.³⁶

■ Site Location Considerations

The fact that many brownfields are located in urban areas, with high crime rates and a shortage of skilled local workers, deters development of these properties. The interest in the redevelopment of a specific brownfield and the crime rate for the area in which it is located are frequently inversely related.³⁷ Developers fear vandalism and theft, and the additional costs these cause, forcing them to look elsewhere for their projects.

By encouraging community involvement, cooperation, cleanup of the neighborhoods and developing crime watch programs, neighborhoods can make themselves more attractive to developers looking for

opportunities in brownfield cleanup.³⁸

■ Concerns Over Community Opposition

Developers fear opposition to their proposed development projects by community members. Such opposition may cause additional delays and costs. Developers can avert this problem by seeking community approval and involving the community in the project at the outset.³⁹

■ Lack of Available Expertise

Developers might be concerned about a lack of available expertise in the area of brownfields, or a lack of qualified individuals with whom to consult when dealing with issues specific to brownfields. This concern is diminishing as communities, developers, government entities and financiers become more sophisticated in dealing with brownfield transactions and cleanup issues.⁴⁰

■ Difficulty Locating Brownfield Properties

In the past, private sector investors have cited difficulty in locating available brownfield properties as a hindrance. Currently, however, many local governments provide assistance in locating and marketing brownfield properties.

For example, the City of Phoenix allows site marketing through the city's brownfields Web site, newsletter and other outreach campaigns.⁴¹ Also, the City's Community and Economic Development Department assists program participants through ongoing efforts in offering available real estate to businesses looking to relocate or expand in Phoenix.⁴²

■ The Lure of Greenfields

Another impediment to brownfield re-use is the lure of rural and suburban greenfield locations. Intergovernmental competition often makes greenfields more desirable. Local governments in greenfield areas frequently offer financial inducements to encourage development of their greenfields.

Fortunately, many incentive programs are being introduced to promote brownfield development, making them more competitive with greenfields. In addition, private investors are attracted to brownfields' established infrastructures and prime locations.

Benefits to the Private Sector

Though the benefits to the community of brownfield reclamation are widely accepted and understood, private investors can also receive a multitude of benefits when they choose to invest in their redevelopment.⁴³

1. United States Environmental Protection Agency, *Voluntary Cleanups: Brownfield Assistance*, available at www.azdeq.gov/environ/waste/cleanup/brownfields.html#loan.
2. United States Environmental Protection Agency, *Cleanups: Voluntary Remediation Program*, available at <http://azdeq.gov/environ/waste/cleanup/vol.html>.
3. Brownfields Land Recycling Program, available at www.ci.phoenix.az.us/BROWNFLD/brownfld.html.
4. *Id.*

Changes in laws limiting liability and a better understanding of potential risks and avenues for obtaining financing are making brownfields a more popular and realistic investment. Businesses are beginning to recognize the growing array of regulatory and financial programs and tools that are available to pursue such redevelopment, making brownfields no longer seem so intimidating.⁴⁴

■ **Location and Price**

With many brownfields, one of the greatest advantages is their location. Brownfields are found in the heart of urban areas, which means that they are located in good transportation corridors.⁴⁵ In addition, due to the perceived risks associated with contamination and cleanup, these properties can often be purchased at prices lower than similar uncontaminated properties located in the same area.

Concisely stated, investors are able to purchase brownfield properties, in prime locations, for substantially less than similarly located, uncontaminated properties.

■ **Available Programs and Financing**

To encourage the development of brownfield sites, many programs providing either technical or financial assistance have been introduced at the federal, state and local levels. Some of these programs are discussed in a later section.

■ **Community Support**

This article previously discussed community involvement as an obstacle to the private sector development attempts; however, community involvement requirements can also be an advantage. Community support could benefit an investor by fostering goodwill and driving up sales when the time comes to market within the community.

■ **Attracting and Retaining Valuable Employees**

Redevelopment of brownfields may also help investors retain and attract employees by offering improved quality of life through reasonable commutes, vibrant social lives, good schools, environmental amenities and a variety of housing and transportation choices.⁴⁶ By improving idle properties, investors improve the community, making the area a more desirable location to work, thereby increasing their attractiveness to valuable employees.

■ **Benefits to Current Owners**

Through proper management and sale of brownfield properties, current owners benefit as well. Responsible management and divestiture can serve to clear the balance

sheet of environmental and other financial liabilities, including ongoing maintenance costs, as well as foster good public relations within the community.⁴⁷

Partnerships Between Multiple Parties

Frequently, brownfield projects require coordinated efforts on several levels. Property owners, developers, lenders, consultants, local government, and state and federal agencies often contribute to ensure that a redevelopment project is adequately funded and beneficial to both the environment and the community in which it is located.⁴⁸ Citizens are also able to take an active role in determining the future of their communities and are given the right to request that a brownfield site be considered for funding and redevelopment.⁴⁹ These partnerships between the various levels of government, the community and interested private parties are essential to the success of brownfield redevelopment.⁵⁰

Resources and Programs Available

Brownfield programs exist at the federal, state and local levels, and all are worthy of investigation. The programs vary from state to state and locality to locality; therefore, parties interested must contact their local and state governments in order to determine which programs are available. Some programs, which may otherwise provide assistance, are not specific to brownfield redevelopment. This section does not touch on every program, resource or incentive available. It is meant instead to provide a brief overview of the programs available, and, perhaps, to inspire investors to consider alternative assistance and funding approaches.

■ Funding Sources Specific to Brownfields

Most grant funds are only available to government and nonprofit entities, as the State of Arizona, and its counties, cities, towns, municipalities, and other subdivisions are prohibited from making gifts to private parties.⁵¹ However, a variety of financing options exists in the form of low- or no-interest loans or some grant sources.

□ **Site Assessment Grants.** These grants provide funding for inventorying, assessing, planning and community involvement activities related to brownfield sites.⁵² Site Assessment Grants are only available at the federal and state level

and currently, only tribal, state and local governments are eligible to apply for funding from these grants.

- **Cleanup Grants.** Grant funds are available for the cleanup of brownfield sites. These funds are provided at the federal and state levels. Only tribal, state and local governments, and nonprofit organizations are eligible to apply for these grants.
- **Job Training Grants.** Colleges, universities, nonprofit job training centers, local governments and tribes are eligible to apply for funding to train residents living near brownfield sites for future employment in the environmental field.⁵³
- **Grant Funds for Public Infrastructure Improvements and Development Fees.** Currently, the cities of Phoenix and Tucson are the only Arizona cities providing grant funds for public infrastructure improvements and development fees. Public infrastructure improvements include curbs, gutters, sidewalks, utilities and landscaping in city-owned easements and rights-of-way. Development fees include construction plan review and permit fees.⁵⁴ These are the only grants set aside for brownfield development at the local level available to the private investors.
- **Cleanup Revolving Loan Funds.** Low-interest loans are provided at the federal, state and local level. They are available to tribal, state and local governments, nonprofit corporations and private investors for cleaning up hazardous substances at eligible brownfield sites.
- **Property Tax Reduction.** Pursuant to Maricopa County's Contaminated Property Tax Reduction Program, properties in Maricopa County may be entitled to a property tax reduction if they are contaminated with hazardous waste or petroleum, and the amount of property taxes, interest, costs and penalties exceed the worth of the property.⁵⁵ The Maricopa County Board of Supervisors may now reduce, in a manner that coordinates with remediation costs, liens for delinquent tax, interest, costs or penalties for properties that are substantially contaminated.⁵⁶
- **Other Potential Funding.** Additional federal funding resources may be available that are not specifically dedicated

to brownfield projects. Anyone looking to use and redevelop a brownfield must be creative and look to all available resources when making development determinations. Possible sources of additional funding for similar types of activities within the federal government include: Department of Housing and Urban Development Empowerment Zone/Enterprise Community Program, Department of Transportation Livable Communities Program, Department of Commerce Economic Development Administration, Department of the Interior National Park Service, U.S. Department of Agriculture–Forest Service Urban and Community Forestry (UCF) Program, Department of Defense U.S. Army Corps of Engineers and Department of Energy Office of Energy Efficiency and Renewable Energy/Brightfields.⁵⁷ There are many funding options available to the creative financier.

Arizona cities also may have additional funding resources available, which are not specific to brownfields. The city of Phoenix Web site suggests looking to the city's Small Business Assistance Program, or Industrial Development Authority financing, Small Business Administration loans, Job Training Partnership Act benefits and Enterprise Zone tax credits.

Valley Metro Light Rail Project

At the heart of the City of Phoenix's vision for revitalization of its downtown is the recent Light Rail Project. Phoenix is directing its efforts at encouraging the use of mass transit systems and decreasing auto-dependency. The city is particularly encouraging development of land within a 5- to 10-minute walk from light rail stations to promote light rail usage. So far, Phoenix, Mesa, Tempe and Glendale will participate in the Light Rail Project, and the project has received federal, state and local funding.

Several sites set aside for future light rail stations are brownfields, which were previously used as dry cleaning establishments and gas stations. These brownfields were left idle due to the potential expense associated with their cleanup. Their assessment and redevelopment are a perfect example of how, through cooperation of multiple parties, brownfield redevelopment can take place to further the needs of afflicted communities.


The City of Phoenix was awarded a brownfields assessment grant through the U.S. Environmental Protection Agency's Brownfields Program. The funds were to be used to conduct Phase II environmental site assessments at selected properties within 100 feet of the Light Rail Corridor in Phoenix. The assessments will focus on sites that contain hazardous substances or petroleum. Once the cleanup of these sites is completed, the light rail project is expected to bring critical public transportation bene-

fits to the city and remove environmental and health hazards to abutting properties.⁵⁸ In addition, the Light Rail will bring many opportunities for development located along its established routes.

Conclusion

The rapid development of Arizona's green-spaces is harmful to communities, private investors, local governments and environmentalists. Together, these interest groups have been searching for development

options that will address the concerns of private investors and environmentalists.

Brownfields present a unique opportunity, in that they address environmental and community concerns, while providing private investors with a powerful investment tool. Accordingly, interest in brownfield redevelopment has been heightened. Potential brownfield projects exist throughout the state and can be explored through interactions with local government officials. 

endnotes

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3. Paul Skanton Kibel, *The Urban Nexus: Open Space, Brownfields and Justice*, 27 B.C. ENVTL. AFF. L. REV. 589 (1998).
4. United States Environmental Protection Agency, *Urban Sprawl*, available at www.epa.gov/maia/html/sprawl.html.
5. *Id.*
6. Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118 (H.R. 2869).
7. *Id.* A site is excluded from liability as a brownfield site if: the site is the subject of a planned or ongoing removal action, a unilateral administrative order, court order, or an administrative order under CERCLA; the site is the subject of a unilateral administrative order, closure notification, or a corrective action proceeding under the Solid Waste Disposal Act; the site is subject to the jurisdiction, custody or control of the U.S. government, except for land held in trust by the national government for an Indian tribe; the site is subject to remedial action under the Toxic Substances Control Act for polychlorinated biphenyls contamination; or the site has received assistance for remedial action through the Leaking Underground Storage Tank Trust Fund.
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38. Pepper, *supra* note 24.
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