

Sharing the Green: Reformatting Wisconsin's Forgotten Green Space Grant with a Public-Private Partnership Design

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**SHARING THE GREEN:
REFORMATTING WISCONSIN’S FORGOTTEN
GREEN SPACE GRANT WITH A PUBLIC-
PRIVATE PARTNERSHIP DESIGN**

Despite the vast amount of legal research available on brownfields redevelopment generally, little has been done on the value of brownfield-to-greenspace conversions. Brownfield-to-greenspace conversions that incorporate public-private partnership elements may trigger private investment in brownfields when the market alone fails to induce development of contaminated lands. Brownfield-to-greenspace partnerships are a flexible way to redevelop brownfields and maintain complete stakeholder involvement in the cleanup and ownership process. Currently, an unfunded Wisconsin program is set up to provide grants to municipalities for brownfield-to-greenspace conversions. Wisconsin municipalities have used this grant successfully in the past to improve local economic prospects simply by investing in small-scale brownfield-to-greenspace conversions.

This Comment breaks down why programs that encourage brownfield-to-greenspace conversions should continue to be funded. Investments in greenspace may be small, yet resulting economic prospects through property-value improvements and job creation can be large in some circumstances. This Comment assesses how the Wisconsin brownfield-to-greenspace program could be made more attractive and feasible if it allowed for public-private partnership; at the moment, the Wisconsin program is limited to municipalities and has a deed restriction whereby private entities are not allowed to use the land associated with the grant for a number of years. Ultimately, brownfield-to-greenspace redevelopments may be best performed through public-private partnerships where more stakeholders have access to funding and influence on project developments.

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I. INTRODUCTION

Consider the following scenarios:

- A waterway is restored and a public space is created with flowing water connected to the adjacent river. The surrounding office space becomes more desirable and the vacancy rate decreases. New developments are planned to take advantage of this new amenity.
- A park is built on a former landfill site with connections to a network of bike paths along the local river system. This in turn, attracts a company to relocate into the community because they feel it will reduce employee turnover.
- An old store with a parking lot on main street is

converted into a plaza with some small retail space, a café, and a public bathroom. The project creates an outdoor gathering place that initiates a revitalization of the area. Property owners reinvest in their buildings, more pedestrians wander the area and new commercial businesses move in to enjoy the scene or to capitalize on the retail potential.¹

Each example depicts a former contaminated or blighted property that is converted into public park space with resulting economic benefits to a community. The number of brownfields across America is estimated to be between 500,000 and 1 million.² And with that number continually rising, it is important for states to develop creative redevelopment programs. Brownfield-to-greenspace programs are one option.

From a development standpoint, the need for remediation exists because brownfields create blight and decrease property values.³ However, heavy liabilities and exorbitant costs limit the attractiveness of brownfields to private developers searching for development land on the open market.⁴ Incorporating public spaces into remediation efforts is a promising approach to redeveloping brownfields because brownfield-to-greenspace conversions can be done resourcefully through publicly driven efforts, and the added greenspace can provide communities with unique economic benefits.⁵ The economic benefits

1. USC CTR. FOR ECON. DEV., LEVERAGING PRIVATE INVESTMENT CAPITAL FOR BROWNFIELDS CLEANUP AND REDEVELOPMENT 3–4 (2003) [hereinafter LEVERAGING PRIVATE INVESTMENT].

2. *Brownfields: Lessons From the Field: Hearing Before the H. Subcomm. on Water Resources & Env't*, 107th Cong. 33 (2001) (statement of Rep. Earl Blumenauer); *id.* at 53 (testimony of R. Bruce Josten, Exec. Vice President, Gov't Affairs, U.S. Chamber of Commerce); *Brownfields to Biomass: Tapping EPA's Grant Programs*, BIOMASS HUB (Apr. 20, 2010), <http://www.biomasshub.com/brownfields-biomass-tapping-epa-grant-programs/>.

3. *See, e.g.*, Robert A. Simons & Jesse D. Saginor, *A Meta-Analysis of the Effect of Environmental Contamination and Positive Amenities on Residential Real Estate Values*, 28 J. REAL EST. RES. 71, 83, 97 (2006) (providing statistically significant findings that property values decrease with closer proximity to environmental contamination); Diana A. Silva, Note, *Land Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 610–11 (2011) (highlighting empirical data that showed property values in major American cities dipping as a result of abandoned properties).

4. *See infra* Part II.C. Remediation expenses are largely based upon the investigations, removals, and management of environmental cleanups. Deborah K. Tellier et al., *Turning Brown into Green: Practical Considerations for Lenders and Buyers of Contaminated Property in a Red Economy*, 27 CAL. REAL PROP. J. 20, 20 (2009).

5. CHRISTOPHER DE SOUSA, BROWNFIELDS REDEVELOPMENT AND THE QUEST FOR

include improved property values, added jobs, and enhanced tax bases that result from an area's increased attractiveness to business and residential development.

Some community leaders consider brownfields to be the “number-one obstacle to urban redevelopment.”⁶ Many others believe that redeveloping brownfields is one way for urban centers to achieve “economic self-sufficiency.”⁷ As a result, numerous state and local initiatives have tried to tackle brownfields issues.⁸ Still, brownfield-to-greenspace conversions and public-private partnership efforts may be underutilized.

Converting brownfields into greenspace and encouraging partnerships between public and private entities in redeveloping brownfields could rejuvenate residential and economic areas where “brownfields have accumulated and dragged down the quality of life.”⁹ It is important to further brownfields redevelopment because a brownfield project may “act as a catalyst for large-scale community revitalization efforts.”¹⁰ State laws must encourage creative and efficient ways of remediating properties, such as converting brownfields to greenspace—and states should be careful to not strip funding away from creative brownfields redevelopment programs proven successful in the past.

Part II of this Comment provides background on America's brownfields problem, highlights reasons why communities should cleanup and redevelop contaminated sites, and then describes the

SUSTAINABILITY 177 (2008) (highlighting that urban greenway developments “are usually tied to a broader economic development oriented strategy that sees residential and commercial development springing up along the greenway”).

6. Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 9 (Todd S. Davis ed., 2d ed. 2002) [hereinafter BROWNFIELDS] (noting that Cleveland's former mayor, Mike White, called contamination the “number-one obstacle to urban redevelopment”).

7. John C. Chambers, *Community Participation in Brownfields Redevelopment*, in BROWNFIELDS, *supra* note 6, at 243, 245.

8. See, e.g., Clifford Rechtschaffen, *Strategies for Implementing the Environmental Justice Vision*, 1 GOLDEN GATE U. ENVTL. L.J. 321, 327–28 (2007); Kris Wernstedt et al., *The Brownfields Phenomenon: Much Ado About Something or the Timing of the Shrewd?* 1 (Res. for the Future, Discussion Paper No. 04-46, 2004).

9. Juha Siikamäki & Kris Wernstedt, *Turning Brownfields into Greenspaces: Examining Incentives and Barriers to Revitalization*, 33 J. HEALTH POL. POL'Y & L. 559, 559–60 (2008).

10. For EPA's Brownfields Program, “Green” Refers to More than the Environment, BROWNFIELDS SUCCESS STORIES (U.S. EPA, Wash., D.C.), Oct. 2003 [hereinafter *More than the Environment*], available at http://epa.gov/brownfields/success/Green_Money.pdf.

disincentives that dissuade private entities and communities from investing in these lands. Part III first describes attempts taken by the federal government and states to cure the shortcomings of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹¹ and then identifies innovative remediation methods that are less often utilized. Part IV points out that municipalities have more options than private entities to be creative through brownfield cleanup efforts. Arguably, municipalities should use this advantage to incorporate greenspace in redevelopment efforts because converting brownfields to greenspace can boost economic prospects. Part V identifies two innovative Wisconsin remediation programs—most notably, the *Wisconsin Brownfield Green Space and Public Facilities Grant Program* (Green Space Grant), which presently lacks funding—and offers examples of two Wisconsin cities that successfully converted brownfields into greenspace with assistance from the Green Space Grant. Finally, Part VI argues that Wisconsin must not only maintain its brownfield-to-greenspace grant program, but also alter it to allow for use by private entities. Ultimately, this Comment advocates for a modified Green Space Grant that allows for public and private cooperation.

II. BACKGROUND

A. Defining “Brownfields” and Congress’s Initial Reaction to the Exposure of Problematic Contaminated Properties—the Creation of CERCLA

Brownfield properties are often characterized as “abandoned, idled, or under-used” sites.¹² The federal government’s definition of a brownfield is “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”¹³ Years of industrial

11. 42 U.S.C. §§ 9601–9675 (2006).

12. Sariah S. Buchanan, *Why Marginalized Communities Should Use Community Benefit Agreements as a Tool for Environmental Justice: Urban Renewal and Brownfield Redevelopment in Philadelphia, Pennsylvania*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 31, 36 (2010) (quoting Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1, 8 (2000)).

13. Brownfields Revitalization and Environmental Restoration Act of 2001 § 211(a)(39)(A), 42 U.S.C. § 9601(39)(A) (2006); see also *Revitalizing Contaminated Sites—Liability Protections for Owners and Prospective Purchasers*, 26 HAZARDOUS WASTE CONSULTANT, no. 5, 2008 at 4.2 [hereinafter *Revitalizing Contaminated Sites*]. Properties also

use and contamination created numerous lots that are no longer environmentally safe to use—and the abandonment of these properties occurred, in part, because business owners left areas due to either economic hardship (which caused them to close shop) or increased suburbanization (which made developing in less-expensive outlying areas more attractive than developing in older urban cores).¹⁴

America's initial worry about contaminated property started after the 1978 disaster in Love Canal, New York. A local company's unsafe chemical waste disposal resulted in a "toxic soup bubbling up into the basements" of Love Canal houses,¹⁵ creating a "public outcry."¹⁶ As a result of this misfortune, Congress enacted CERCLA to swiftly remediate hazardous waste sites and to ensure that responsible parties would be liable for costs:¹⁷ Congress intended CERCLA to clean up

may be referred to as brownfields due simply to "perceived" environmental contamination without regard to whether environmental contamination actually exists. John S. Applegate, *Risk Assessment, Redevelopment, and Environmental Justice: Evaluating the Brownfields Bargain*, 13 J. NAT. RESOURCES & ENVTL. L. 243, 246 (1997–1998). The State of Wisconsin tweaks the federal definition slightly, providing that brownfields means "abandoned, idle or underused *industrial or commercial facilities or sites*, the expansion or redevelopment of which is adversely affected by actual or perceived environmental contamination." WIS. STAT. § 560.13 (2009–2010) (emphasis added); see also Kris Wernstedt & Robert Hersh, *Brownfields Redevelopment in Wisconsin: Program, Citywide, and Site-Level Studies* 1 n.1 (Res. for the Future, Discussion Paper No. 03-53, 2003) (noting that the Wisconsin code varies somewhat from the federal wording). Thus, Wisconsin's definition unambiguously includes closed plants as brownfields; and the state has taken brownfields remediation efforts directed at curing a growing problem of closed manufacturing facilities. For a discussion of the Wisconsin Plant Recovery Initiative, see *infra* Part V.A.

14. Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies Are Losing*, 34 CONN. L. REV. 539, 553 (2002).

15. Michael J. Minkus, Comment, *Fighting Uncertainty: Municipal Partnerships with Redevelopment Agencies Can Mitigate Uncertainty to Encourage Brownfield Redevelopment*, 1 GOLDEN GATE ENVTL. L. REV. 267, 278 & n.68 (2007) (quoting ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 311 (5th ed. 2006)). The Hooker Chemical Company caused the Love Canal disaster. While in operation, Hooker continually disposed of hazardous chemicals by burying drums in an old canal, sealing chemicals with clay. Emilee Mooney Scott, Note, *Bona Fide Protection: Fulfilling CERCLA's Legislative Purpose by Applying Differing Definitions of 'Disposal'*, 42 CONN. L. REV. 957, 965 (2010); Mike Brown, 'Sealed Vault' Effort Failed at Canal Site, NIAGARA GAZETTE, Aug. 9, 1978, at 1A. Afterwards, the company filled the land and sold it to a school board, and a school and neighborhood were constructed on and around the property. Scott, *supra*, at 965. Some twenty years later, heavy rainfall caused the chemical soup to seep into the homes of neighborhood residents. *Id.*

16. Adam J. Sulkowski, *There's Gold in Them Thar Brownfields: The Legal Framework of Brownfield Redevelopment and Some Tips for Getting Started*, 39 REAL EST. L.J. 100, 102 (2010).

17. CAROLE STERN SWITZER & LYNN A. BULAN, CERCLA: COMPREHENSIVE

hazardous waste sites while making polluters pay for the damage.¹⁸

Congress's response was necessary to cure the severe problem exposed by Love Canal, but CERCLA's benefits are not without drawbacks.¹⁹ Most notably, individuals unintentionally acquiring contaminated properties may incur liability when purchasing industrial and commercial lots and, subsequently, must spend significant funds cleaning the properties to avoid penalties.²⁰ This is because the liability scheme under CERCLA is generally interpreted by courts to be joint and several, strict, and retroactive,²¹ creating liability potential for most of the parties involved in a property.²² CERCLA's existence has scared away not only *potentially responsible parties* (PRPs) explicitly liable under its provisions, but also banks and investors typically willing to finance developments with loans.²³ Despite the disincentives to

ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (SUPERFUND) 3-4 (2002); Minkus, *supra* note 15, at 278.

18. Scott, *supra* note 15, at 966-67 (describing the aim of CERCLA). Under CERCLA, there are four "parties" that may incur penalties or be responsible for cleanup:

- (1) the current owner or operator of the facility; (2) the owner or operator of the facility at the time that any hazardous substances were disposed of; (3) any person who arranged for disposal, treatment, or transportation of hazardous substances; and (4) any person who transported hazardous substances to the facility.

Id. at 967 (citing 42 U.S.C. § 9607(a) (2006)). Essentially, past, present, and future parties are potentially liable even if they are not at fault. Linda McCarthy, *The Brownfield Dual Land-Use Policy Challenge: Reducing Barriers to Private Redevelopment While Connecting Reuse to Broader Community Goals*, 19 LAND USE POL'Y 287, 289 (2002).

19. See, e.g., Kris Wernstedt & Robert Hersh, *Brownfield Policy Reform in Wisconsin: A New Regulatory Culture*, RESOURCES, Spring 2004, at 14.

20. Emily A. Green, *The Rustbelt and the Revitalization of Detroit: A Commentary and Criticism of Michigan Brownfield Legislation*, 5 J.L. SOC'Y 571, 577 (2004); see also 42 U.S.C. § 9607(a)(1) (2006) (indicating that current owners are subject to liability under CERCLA). Penalties for failing to comply with contaminated property regulations or cleanup orders can be large. For example, in Wisconsin, for any violation of its Spill Statute—the statute that governs contaminated property liability—a party will be fined up to \$5000. WIS. STAT. § 292.99(1) (2009-2010). And each day that the property is not cleaned up is an individual offense. *Id.*; Arthur J. Harrington, *Wisconsin*, in BROWNFIELDS, *supra* note 6, at 985, 986.

21. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878, 1881 (2009) (noting that an exception to joint and several liability exists if a CERCLA defendant proves "that a reasonable basis for apportionment exists"); *United States v. Monsanto Co.*, 858 F.2d 160, 167, 171, 173-74 (4th Cir. 1988); *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶¶ 114-15, 264 Wis. 2d 60, 665 N.W.2d 257; *Revitalizing Contaminated Sites*, *supra* note 13, at 4.2.

22. *Revitalizing Contaminated Sites*, *supra* note 13, at 4.2.

23. Todd S. Davis, *Brownfields Sites: Removing Lenders Concerns as a Barrier to Redevelopment*, in BROWNFIELDS, *supra* note 6, at 116, 117, 128; see also Telephone

redevelopment,²⁴ which will be elaborated on in Part II.C., it is vital that communities understand the general reasons why brownfields remediation is important, including what features of urban brownfields may work to lure in private developers.

B. Why Communities Should Redevelop Brownfield Properties

Reasons for localities and community stakeholders to redevelop contaminated properties go beyond environmental justice and public health. Moreover, despite strong financial and liability disincentives posed to private parties, brownfield properties can attract private developers through location because many brownfields are in urban areas and maintain a close proximity to population centers, transportation, resources, and other networks.²⁵ Redevelopment reasons include removing blight and its negative effects; eliminating eyesores; gentrifying neighborhoods; creating jobs and increasing tax revenue; decontaminating land; creating recreational options; and reversing the present insistence of industrial and commercial entities to develop on greenfields in outlying areas rather than land poised for redevelopment in urban cores.²⁶

Interview with Mark Wendorf, Dir. of Pub. Works, City of Delavan, Wis. (Jan. 10, 2011) (mentioning that brownfield projects “scare” banks).

24. “Redevelopment” . . . means restoring the presumed future use of the site to an industrial or commercial use.” Applegate, *supra* note 13, at 272. Thus, by “brownfields redevelopment,” I am referring to the future use of brownfield properties.

25. Walter E. Mugdan, *Environmental Considerations in Real Estate Transactions*, in THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE TRANSACTIONS: BROWNFIELDS AND BEYOND 1665, 1667 (ALI-ABA, Course of Study, 2010) (defining location as “the relationship of the property to population centers, transportation, and other infrastructure, its proximity to necessary natural resources or materials, and to markets, etc.”). Location is arguably the most important factor in real estate purchasing decisions. *Id.*

26. See Kris Wernstedt, Lisa Crooks & Robert Hersh, *Brownfields Redevelopment in Wisconsin: A Survey of the Field* 12–13 & tbl.4 (Res. for the Future, Discussion Paper No. 03-54, 2003); EPA *Brownfields Grants of \$71 Million Will Help Address Petroleum and Other Hazards*, UNDERGROUND STORAGE TANK GUIDE NEWSL. (Thompson Publ’g Group, Tampa, Fla.), June 2008, at 1, available at 20 No. 9 USTGUIDE-NWL 5 (Westlaw) (quoting Stephen L. Johnson, EPA Admin., Statement (Apr. 7, 2008)) (noting that redeveloping brownfields may help the removal of eyesores); *More than the Environment*, *supra* note 10 (noting crime reduction, commercial opportunities, jobs, and property tax revenue increases). When I refer to “greenfields,” I am referring to undeveloped property, never used for commercial or economic activity. See, e.g., Green, *supra* note 20, at 571–72. This is in contrast to “greenspace,” which I ultimately suggest brownfields should be redeveloped into. Greenspace includes manufactured parks, recreational trails, civic plazas, seating areas, among others, but does not include undeveloped “greenfield” sites. See, e.g., *Choosing “Greenspace” as a Brownfields Reuse*, BROWNFIELDS SUCCESS STORIES (U.S. EPA, Wash.,

The most commonly considered and documented of these reasons is blight.²⁷ Brownfield properties that are vacant or underused hamper surrounding areas with urban decay and despair²⁸ and declining property values,²⁹ potentially resulting in increased crime.³⁰ As a whole, the negative consequences of blight are detrimental to the community health of areas where brownfields are prevalent.³¹

From a financial perspective, municipalities should be especially concerned about blight-related declines in property values that could result in decreased tax revenues.³² Redeveloping brownfields into more attractive or more productive land could halt plummeting property values, which could lead to improved tax bases.³³ Plus, those

D.C.), Oct. 2003 [hereinafter *Choosing Greenspace*], available at http://epa.gov/brownfields/success/Green_Space.pdf.

27. “Blight” is a very broad term. This is demonstrated by the description of “blighted properties” according to the State of Michigan, which includes the following array of properties:

- (1) declared a public nuisance in accordance with a municipality’s code or ordinance, (2) an attractive nuisance to children, (3) are a fire hazard or otherwise dangerous to public safety, (4) have had the utilities, plumbing, heating, or sewerage permanently disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use, (5) are tax reverted, (6) are owned by a land bank fast track authority, or (7) have substantial subsurface debris rendering the site unfit for its intended use.

Richard A. Barr & Megan C. McCulloch, *Challenging Times Call for Layered Incentives for Distressed Properties*, 36 MICH. REAL PROP. REV. 125, 128 (2009) (citing and quoting MICH. COMP. LAWS ANN. § 125.2652(e) (West 2006)).

28. Anne Marie Pippin, *Community Involvement in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 GA. J. INT’L & COMP. L. 589, 596 (2009); see also Applegate, *supra* note 13, at 247 (mentioning that abandoned brownfields “symbolize the hazards and hopelessness of the inner city”).

29. Pippin, *supra* note 28, at 592.

30. See Buchanan, *supra* note 12, at 32, 38 n.40; Jasleen K. Anand & Naeem Mia, *Brownfields Development: New Tools May Be Available in Your Own Backyard*, PROB. & PROP., Mar./Apr. 2010, at 43, 43 (suggesting that brownfield sites that are owned but abandoned can pose a threat to public safety).

31. Laura L. Hunt, *Reclaiming the Valley*, UWM TODAY, Fall 2004, at 10–12; see also Wernstedt & Hersh, *supra* note 19, at 14 (“[U]nattended contaminated sites may threaten public health and the environment . . .”).

32. Buchanan, *supra* note 12, at 37; Catherine J. LaCroix, *Urban Agriculture & Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225, 229–30, 247 (2010) (indicating that vacant lots and buildings litter blighted areas and that these abandoned parcels contribute to decreased property values in surrounding areas).

33. Dennis A. Kaufman & Norman R. Cloutier, *The Impact of Small Brownfields and Greenspaces on Residential Property Values*, 33 J. REAL EST. FIN. ECON. 19, 27–29 (2006);

redevelopments may stimulate development in surrounding areas.³⁴ In fact, urban planning professionals insist that increasing tax revenue and creating jobs are two key reasons to redevelop brownfields.³⁵ And, developing brownfields for financial gain—seen through job creation, private economic development, increased property values, or increased tax base and tax revenue³⁶—is especially relevant during poor economic times, as the case is today. In 2000, estimates suggested that brownfields redevelopment could create over 500,000 new jobs and generate approximately \$2 million in annual tax revenue, nationwide.³⁷

Arguably, job and revenue-creation estimates overshadow a potential diverted-investment problem.³⁸ A similar concept has been discussed in the context of new sports facilities, where some question the extent of revenue generated when a city builds a new sports facility to

Heidi Gorovitz Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Businesses to the Urban Cores without Finding the Missing Pieces*, 51 RUT. L. REV. 1075, 1079 (1999); *How Does Your Garden Grow? Brownfields Redevelopment and Local Agriculture*, BROWNFIELDS SUCCESS STORIES (U.S. EPA, Wash., D.C.), Mar. 2009, at 3, available at http://www.epa.gov/brownfields/success/local_ag.pdf (“A Philadelphia area study estimated that vacant land improvements result in a 30% increase in surrounding property values.”).

34. See ELIZABETH GLASS GELTMAN, *RECYCLING LAND: UNDERSTANDING THE LEGAL LANDSCAPE OF BROWNFIELD DEVELOPMENT* 356 (2000).

35. Wernstedt, Crooks & Hersh, *supra* note 26, at 13 tbl.4 (reporting results from a survey of professionals in the field). To be sure, urban planning professionals may be biased in their views on the reasons to redevelop brownfields in that they may not share the same goals as private-practice developers. For comparison, see DE SOUSA, *supra* note 5, at 35, where the author presents a study of the reasons private-sector stakeholders think brownfields redevelopment is important. According to that study, profit maximization was the largest motivating factor, whereas job creation and tax restoration were on the low end of economic reasons. *Id.* at 35 tbl.2.3.

36. See Espinosa, *supra* note 12, at 3.

37. McCarthy, *supra* note 18, at 287 (detailing that the U.S. Conference of Mayors estimated in 2000 that brownfields redevelopment would create 550,000 jobs and \$2.4 million in annual tax revenue); *Brownfields Redevelopment Could Generate 575,000 Jobs, \$1.9 Billion in Annual Revenue, Report Says*, HDR CURRENT DEVS. (West, Eagan, Minn.), July 7, 2003, at 1, available at 31 No. CD-14 HDRCURDEV 20 (Westlaw).

38. By diverted investment, I am referring to money that existing private entities use to relocate and pay taxes and salaries at a separate location within the same city—that is, money that was already being spent on taxes and salaries at an existing site in a city that might be used by the same private entity upon relocating to a newly-cleaned, more attractive space that was once a brownfield. Cf. Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI BUS. L. REV. 483, 512–13 (2002) (explaining “diverted entertainment spending,” which refers to money that citizens once spent on existing entertainment options within a city, but would shift to a different entertainment option if a new sports facility is built).

replace an old one.³⁹ If redevelopment efforts fail to attract *additional* investment, and instead merely prompt local entities to move from one side of town to the other, then no *new* money is directly created because the “investments” made into the city are just being diverted across town. However, cities should balance this potential pitfall with the potential for local reinvestment and new outside investment that could result when blighted properties become more attractive.⁴⁰ Moreover, quality of life improvements, through added park space and sprawl-reduction measures, could help some previously-decaying cities lure developers in from outlying areas.⁴¹

In addition, dual benefits are possible through greenspace redevelopment projects that focus on recreation and public health.⁴² Greenspaces, such as parks, watersheds, and forested areas, meet “clean property” standards and public health goals for two reasons: (1) greenspaces do not further contaminate land because greenspaces lack chemical or residue output that might seep into the ground, and (2) people spend “less time” on greenspaces than on other properties and,

39. Parlow, *supra* note 38, at 512 (explaining that new sports facilities might not generate “any ‘new’ revenue”). It has been argued that replacement sports facilities simply “maintain[] economic activity at or near its former level.” *Id.*

40. See Sara C. Galvan, Note, *Rehabilitating Rehab Through State Building Codes*, 115 YALE L.J. 1744, 1757 (2006). For comparison, in the context of new sports facilities, a city creates new jobs and tax revenue if the replaced arena was in a neighboring city. See Parlow, *supra* note 38, at 541 & n.308.

41. Pulling in companies from other, neighboring cities would create “new” jobs and tax revenue. See Parlow, *supra* note 38, at 541 & n.308 (suggesting that the City of Los Angeles created “new” jobs and tax revenue by building the Staples Center because “arena-related events” shifted from Inglewood to Los Angeles).

42. One example is through the production of bioswells or storm-water retention spaces. Adrienne Lyles-Chockley, *Building Livable Places: The Importance of Landscape in Urban Land Use, Planning, and Development*, 16 BUFF. ENVTL. L.J. 95, 108–09 (2008–2009). Milwaukee’s Stormwater Park is a prime example. The City of Milwaukee used grant money to develop a park in the Menomonee Valley that works as a water cleansing facility by gradually cleaning storm-water run off of nearby industrial facilities before it hits the city’s Menomonee River. *Menomonee Valley—Stormwater Park*, REMEDIATION & REDEV. PROGRAM (Wis. DNR, Madison, Wis.), Jan. 2009, available at <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR827.pdf>; Telephone Interview with David Misky, Assistant Exec. Dir.—Sec’y, Redev. Auth. of the City of Milwaukee (Dec. 28, 2010). Stormwater Park sits on land that was once home to the CMC Milwaukee Road Shops. *Menomonee Valley—Stormwater Park*, *supra*; Telephone Interview with David Misky, *supra*. Approximately 133 acres were severely contaminated, but, through numerous grants, seventy acres were converted to greenspace that naturally cleanses storm-water and adds to the beautification of the area. *Menomonee Valley—Stormwater Park*, *supra*; Telephone Interview with David Misky, *supra*.

thus, are less exposed to environmental harms.⁴³ Consequently, brownfield-to-greenspace conversions provide recreational options for neighborhoods, improved community health and lifestyle,⁴⁴ and overall benefits that traditional redevelopment methods lack.⁴⁵

Economic gain is also possible⁴⁶ if developers recognize that areas enhanced by attractive features are better suited for bringing in business;⁴⁷ and the added greenspace will make surroundings environmentally safe.⁴⁸ If adequate grants and tax incentives are available to offset cleanup costs, then municipally-driven greenspace redevelopment could enhance the prospects of local job growth and economic activity by removing vacant eyesores.⁴⁹ Even further, development indirectly triggered by added greenspaces may add to the tax base and create jobs,⁵⁰ with the new park space potentially increasing property values of adjacent lots as well.⁵¹ “[P]arks can be presented as

43. See Applegate, *supra* note 13, at 271.

44. Siikamäki & Wernstedt, *supra* note 9, at 559–60.

45. See Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and Its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier and More Active Communities*, 29 VA. ENVTL. L.J. 63, 79–80 (2011) (noting that “adding attractive green spaces [may] . . . increase recreational activity”); *Greenspace Uses for Brownfields Properties: It Is Easy Being Green*, BROWNFIELDS SUCCESS STORIES (U.S. EPA, Wash., D.C.), July 2010, at 1 [hereinafter *Greenspace Uses*], available at http://134.67.99.207/brownfields/success/greenspace_ss_071310.pdf (highlighting “aesthetic appeal, restored natural habitat, and outdoor recreational options,” as examples).

46. See, e.g., DE SOUSA, *supra* note 5, at 177, 181; Lyles-Chockley, *supra* note 42, at 96, 115 (arguing that park development is a tool for urban economic health because urban parks create increased property values and improved consumer behavior). Economic benefits of increased property values due to park proximity are likely less apparent on their face than more visible economic benefits from real estate projects.

47. See Lyles-Chockley, *supra* note 42, at 115.

48. Siikamäki & Wernstedt, *supra* note 9, at 569–70.

49. *Id.* at 588. However, some will caution that greenspace in urban or blighted areas must not go unused or misused because this could bring adverse effects, such as criminal activity, and could actually advance many of the problems that greenspace initiatives often intend to fix. See Lyles-Chockley, *supra* note 42, at 103–04.

50. Siikamäki & Wernstedt, *supra* note 9, at 560. This, of course, is a benefit that could take years to surface.

51. It has long been recognized that adding park space will increase the value of adjacent properties. Federal courts established this principle in condemnation and land use debates in the 1800s. See, e.g., *Wilson v. Lambert*, 168 U.S. 611, 617 (1898) (“Whatever tends to increase the attractiveness of the city . . . will operate to enhance the value of the private property situated therein or adjacent thereto.”); *Kerr v. South Park Comm’rs*, 117 U.S. 379, 385–87 (1886) (recognizing that lands adjacent to a proposed park likely received special benefits and increased in value as a consequence of that park prospectively being established). Park developments may impact the value of property up to 2000 feet away. DE SOUSA, *supra* note

catalysts for urban revitalization and[,] . . . [u]ltimately, America's urban parks are increasingly viewed as essential for many cities in their drive to market their quality of life, whether for urban neighborhoods, commercial developments, or the city as a whole."⁵²

Redeveloping brownfields may also reduce sprawl, or "low-density, land-consuming, automobile-dependent, haphazard, non-contiguous (or 'leapfrog') development on the fringe of settled areas, often near a deteriorating central city or town, that intrudes into rural or other undeveloped areas."⁵³ Many suggest that the "sprawling" of America's metropolitan areas is a growing problem because sprawl reduces the efficiency of cities and causes pollution.⁵⁴ In fact, sprawl reduction is part of a wider community interest in curbing the brownfields problem.⁵⁵

Brownfields redevelopment and "smart-growth" principles coexist as ways to balance environmental protection with economic progress.⁵⁶

5, at 165. In fact, one study showed that the property value of lots located near park developments rose roughly 80%–100% on average. *Id.* at 167 (citing a 2001 study by the International Economic Development Council).

52. DE SOUSA, *supra* note 5, at 158.

53. Timothy J. Dowling, Point/Counterpoint, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (2000); *see also* DE SOUSA, *supra* note 5, at 26 (highlighting the characteristics of sprawl); Edward T. Canuel, *Supporting Smart Growth Legislation and Audits: An Analysis of U.S. and Canadian Land Planning Theories and Tools*, 13 MICH. ST. J. INT'L L. 309, 310 (2005).

54. *See* John Sarkis Reshwan, *Crossing the Threshold of Urban Mobility and Redevelopment: Using Tax Allocation Districts to Develop the Atlanta Beltline*, 23 GA. ST. U. L. REV. 681, 684–85 (2007) (noting that brownfields redevelopment could alleviate traffic congestion); Russell-Evans & Hacker, *supra*, note 45, at 64–65, 95–97 (noting sprawl's impact on public health and community-wide amenities). Further effects of sprawl include "real estate price stagnation, tax rate increases, escalating shopping center vacancy rates, and schools falling into disrepair." Canuel, *supra* note 53, at 312. The idea of "school disrepair" strikes home with the City of Milwaukee, a brownfields haven whose public school system continually brandishes intolerable graduation rates and declining attendance. *See, e.g.*, Erin Richards, *MPS, Voucher Students Boost Graduation Rates*, JSONLINE (Jan. 10, 2011), <http://www.jsonline.com/news/education/113253444.html> (highlighting that the high school graduation rate in the Milwaukee public school system is between 60% and 70%). Further research should be done to consider the effect that brownfields redevelopments and the coinciding fixes to local neighborhoods could have on the attractiveness and effectiveness of struggling urban school systems. Indeed, a recent article suggests that school systems could improve if neighborhood remediation efforts attract more residents. Julie A. Tappendorf & Brent O. Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 URB. LAW. 801, 801–02 (2011) ("[L]ocal schools benefit because they receive more funding when there is an increase in property owners in their school districts.").

55. McCarthy, *supra* note 18, at 288.

56. Canuel, *supra* note 53, at 313–14.

“Sustainable development”⁵⁷ ensures quality of life and opportunity for present and future generations.⁵⁸ Communities interested in sustainable development and smart-growth initiatives—and, likewise, the reduction of sprawl—could consider redeveloping brownfields⁵⁹ as a way to keep urban development attractive.⁶⁰ Indeed, brownfields redevelopment is designed to meet sustainable goals if (1) the public is involved;⁶¹ (2) decisions are integrated with social, health, economic, and environmental issues; and (3) outcomes are measured in terms of smart-growth.⁶²

Finally, states should not ignore the attractive features that brownfield properties may present to private developers. The focus here is on location.⁶³ Urban properties often have access to comprehensive transportation networks⁶⁴ and the larger populations and

57. John C. Dernbach & Scott Bernstein, *Pursuing Sustainable Communities: Looking Back, Looking Forward*, 35 URB. LAW. 495, 497 (2003) (“[S]ustainable communities are ‘cities and towns that prosper because people work together to produce a high quality of life that they want to sustain and constantly improve. They are communities that flourish because they build a mutually supportive, dynamic balance between social well-being, economic opportunity, and environmental quality.’” (quoting PRESIDENT’S COUNCIL ON SUSTAINABLE DEV., SUSTAINABLE COMMUNITIES TASK FORCE REP. 2 (1997), available at http://clinton4.nara.gov/PCSD/Publications/suscomm/ind_suscom.html)). Sustainable property reuse is a main objective of the EPA’s Brownfields Program. *Greenspace Uses*, *supra* note 45, at 3.

58. Dernbach & Bernstein, *supra* note 57, at 496, 528. Building “quality of life” is one of the principle objectives of sustainable development. *Id.* at 496.

59. *Id.* at 509. It is also seen as a way to preserve outlying greenfield and rural areas where development is cheaper and becoming increasingly popular. See *Choosing Greenspace*, *supra* note 26 (“An estimated 4.5 acres of greenfields are preserved for every one acre of brownfields redeveloped.”).

60. See Wernstedt & Hersh, *supra* note 19, at 14 (suggesting that not developing vacant brownfields may “push new development to rural or greenfield sites”).

61. For discussions on the importance of public involvement in brownfields redevelopment, see *infra* Parts IV & VI.A.

62. Joel B. Eisen, *Brownfields Development: From Individual Sites to Smart Growth*, ENVTL. L. REP. NEWS & ANALYSIS, Apr. 2009, at 10287–88. It is arguable that states underutilize their policy powers in forming regimes designed to trigger urban development rather than greenfield development in sprawled-out areas. See Lavea Brachman, *Legislating Sustainable Design: The Challenge of Local Control and Political Will*, ENVTL. L. REP. NEWS & ANALYSIS, Aug. 2010, at 10740, 10740 (“As the result of either state inaction or proactive statutory regimes, an uneven playing field has emerged that encourages unsustainable development in several ways beyond the construction and design context, including encouraging greenfields development and sprawl over adaptive reuse, urban infill or brownfield redevelopment . . .”).

63. Applegate, *supra* note 13, at 248.

64. Paul Syms, *Redeveloping Brownfield Land: The Decision-Making Process*, 17 J.

“customer bases” that exist in denser areas.⁶⁵ It is likely that the environmental liability and cleanup costs could outweigh the “savings” established by obtaining an urban property. Still, the location of urban brownfields could be a selling point to certain developers that desire attributes of denser cities.

The reasons for communities to redevelop brownfields are plentiful. If financial incentives are properly in place, brownfields redevelopment could substantially increase jobs, tax bases, and public health, while also reducing crime and removing blight. Unfortunately, strong disincentives dissuade development by both communities and private developers, which can result in neither public nor private entities realizing the positive benefits to redeveloping brownfield properties.

C. Disincentives for Private Entities and Municipalities to Redevelop Brownfields

Many of the reasons for redeveloping brownfields, and the subsequent benefits, are never realized because extreme disincentives crush potential developments. Brownfields redevelopment is expensive for municipalities⁶⁶ and private developers.⁶⁷ Private firms continually show concern for environmental status and even greater concern about potential liability.⁶⁸ Notably, a 2003 survey showed that Wisconsin professionals involved in the field think that the high cost of cleanup is the primary constraint to redeveloping brownfields.⁶⁹

PROP. INV. & FIN. 481, 482 (1999).

65. *Id.*; DE SOUSA, *supra* note 5, at 224.

66. *Brownfields Redevelopment Could Generate 575,000 Jobs, \$1.9 Billion in Annual Revenue, Report Says*, *supra* note 37 (indicating that a majority of cities cite limited cleanup funds as the leading impediment to brownfields redevelopment).

67. *See* DE SOUSA, *supra* note 5, at 53–61; *see also* Wernstedt, Crooks & Hersh, *supra* note 26, at 15–16 & tbl.5 (highlighting a survey result that showed “high cost of clean-up” to be the most selected “important” or “very important” constraint to brownfields redevelopment).

68. Robertson, *supra* note 33, at 1108, 1118; *see also* Buchanan, *supra* note 12, at 37–38; Sulkowski, *supra* note 16, at 101 (“Three factors that have discouraged [brownfields] redevelopment...are a lack of clean-up funds, liability concerns, and a need for environmental assessments.”).

69. Wernstedt, Crooks & Hersh, *supra* note 26, at 16 tbl.5. *But see* Larry Schnapf, *How the CERCLA Notification Requirements Facilitate the Creation of Brownfields and What EPA Can Do to Address This Problem*, 11 SUSTAINABLE DEV. L. & POL’Y 19, 23 (2010) (indicating that some empirical evidence has suggested that cleanup costs are a non-factor because those costs represent a small fraction of a property’s redevelopment value). Interestingly, in the 2003 Wisconsin survey, very few respondents indicated that a lack of

Without environmental regulations, the disincentives might not be so high. To be sure, I am not suggesting that regulations and liabilities should be completely ignored—but the regulations may be the main reason for financial burdens because of the heavy liabilities and penalties they impose.⁷⁰ Presently, protection from liability (through measures like insurance), cleanup requirements, and the unavoidable delay in production by attempting to satisfy current law create burdensome costs.⁷¹ Arguably, loosening the present requirements and liabilities could facilitate redevelopment through reduced expenses.⁷²

Recall that liability under CERCLA is joint and several, strict, and retroactive.⁷³ CERCLA's overall severity was eased when the Superfund Amendment and Reauthorization Act of 1986 created the PRP right to contribution,⁷⁴ but many developers are still frightened away by the heavy standards and potential litigation costs.⁷⁵ Certain

cooperation between the public and private sector was an issue. Wernstedt, Crooks & Hersh, *supra*, at 16 tbl.5. This suggests that public-private cooperation may be feasible.

70. Applegate, *supra* note 13, at 243–44 (mentioning that environmental regulation has a lot to do with the unattractiveness of developing brownfield properties); Larry Schnapf, *Playing Poker with Pollution: Why It Is Time to Change the CERCLA Reporting Obligations*, NAT. RESOURCES & ENV'T, Winter 2011, at 8, 9 (“The conventional narrative has been that CERCLA liability has led to the creation of brownfields because purchasers and lenders were concerned about remediation costs.”). The reason for high costs associated with brownfields cleanup likely stems far beyond the CERCLA regulations though. See Schnapf, *supra*, at 9. Some even argue that a lack of reporting requirements may have as much to do with the high costs and concerns as the regulations. See *id.* (suggesting that limited reporting requirements allow property owners to abandon sites without contributing to remediation).

71. Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 283 (1997).

72. Applegate, *supra* note 13, at 247. *But see* Buchanan, *supra* note 12, at 41 (arguing that one risk of relaxed liability standards is taking away the ability of adversely affected parties to achieve recourse against wrongdoing developers). Some even believe that legal barriers to implementing *green infrastructure* should be removed. Alexandra Dapolito Dunn, *Siting Green Infrastructure: Legal and Policy Solutions to Alleviate Urban Poverty and Promote Healthy Communities*, 37 B.C. ENVTL. AFF. L. REV. 41, 66 (2010) (“[I]t is essential for our legal systems to remove barriers to green infrastructure implementation, for regulators and enforcers to promote its acceptance, and for public advocates and policy makers to embrace its incorporation into urban design and planning, particularly in distressed communities.”).

73. See, e.g., cases cited *supra* note 21; *Revitalizing Contaminated Sites*, *supra* note 13, at 4.2.

74. See Superfund Amendments and Reauthorization Act of 1986 § 113(b), 42 U.S.C. § 9613(f) (2006); Pippin, *supra* note 28, at 595 (recognizing that The Superfund Amendment & Reauthorization Act of 1986 eased the liability prevalence and severity imposed by CERCLA).

75. See Pippin, *supra* note 28, at 595.

purchasers may be shielded from liability, but any protection from CERCLA is hard to come by.⁷⁶ State-specific mini-Superfund laws create CERCLA-like liability and financing detriments;⁷⁷ thus, financial disincentives can be a product of both state laws and federal regulations.

Creditors are hesitant to fund brownfield projects as well. Because of the risks associated with brownfields, it may be difficult to secure outside financing for a project.⁷⁸ Lenders are affected by environmental regulations because of the potential responsibility for cleanup or toxic tort costs,⁷⁹ the harm that association with poor properties could bring to their reputations as creditors, and the risk of losing payments because a debtor-developer's need to fund liability debts may restrict their ability to meet the lender's loan obligations.⁸⁰ Even further, because of their

76. See generally Larry Schnapf, *Counseling the Client on the CERCLA Windfall Lien*, PRAC. REAL EST. LAW., Sept. 2004. CERCLA traditionally provided defenses only upon acts of God, acts of war, or third-party acts or omissions. 42 U.S.C. § 9607(b) (2006). CERCLA amendments created a few new defenses for the following entities: (1) bona fide prospective purchasers (BFPP), (2) contiguous property owners, and (3) innocent landowners. Tellier et al., *supra* note 4, at 21. For example, the BFPP defense allows certain landowners that were aware of contamination to be free of liability if they meet certain criteria, such as if they took appropriate contamination inquiries and were not affiliated with parties that were responsible for the contamination. 42 U.S.C. § 9601(40) (2006); see also Schnapf, *supra*, at 39–40 (arguing that it is appropriate for BFPP's that conduct adequate inquiries to avoid responsibility for response costs). However, even with BFPP status, the EPA will capture any increase in property value gained due to EPA-funded cleanup actions. Schnapf, *supra*, at 48.

77. Abrams, *supra* note 71, at 284, 287.

78. See Telephone Interview with Mark Wendorf, *supra* note 23, during which the interviewee insisted that banks are simply frightened by brownfields redevelopment projects and suggested that many redevelopment projects, especially during the recession, cannot get off the ground because private investors cannot secure bank financing.

79. Lenders risk liability for costs associated with environmental cleanup if they participate in the managerial operations of a “vessel or facility” causing contamination or by exercising decisionmaking control over a vessel or facility's environmental matters. See 42 U.S.C. §§ 9601(20)(E)–(F), 9607(a)(1) (2006); Tellier et al., *supra* note 4, at 23. However, a lender not participating in management will not be held out as a PRP. 42 U.S.C. § 9601(2)(E); Matthew H. Ahrens & David S. Langer, *Lender Liability Under CERCLA: Environmental Risks for Lenders Under Superfund: A Refresher for the Economic Downturn*, 3 BLOOMBERG CORP. L.J. 482, 483, 484 (2008). See Ahrens & Langer, *supra*, at 485–88, for a breakdown of what it means to “participate in management.”

80. Lawrence P. Schnapf, *Lender Liability Today Under Environmental Laws*, 60 CONSUMER FIN. L.Q. REP. 147, 147 (2006); Alexander Maro, Note, *Outsourcing the Filth: Privatizing Brownfield Remediation in New Jersey*, 38 B.C. ENVTL. AFF. L. REV. 159, 168 (2011) (“[L]enders are less likely to lend money to developers for two distinct reasons: the inability for a lender to foreclose on a polluted property used as collateral in a secured transaction, and the general disinterest in lending to developers that have the potential to be driven into bankruptcy during a forced [transaction].”). In 2003, one out of every ten banks

fear of working with contaminated properties, banks will exercise greater caution with properties that are simply *near* brownfields.⁸¹

Location may also be a disincentive—even in light of the benefits that were described in Part II.B. Many developers might rather use a greenfield site in the outskirts. Higher urban tax rates and property values push private investment to the fringe of older industrial cities, so developing on a brownfield rather than a greenfield likely requires a very high return on profit to be worthwhile.⁸² One study shows that greenfield developments incur higher maintenance and operating costs than brownfield developments in just two areas: transportation and infrastructure.⁸³ However, overall cleanup can push brownfields redevelopment costs to \$100,000 more than greenfield development costs for the same project.⁸⁴ The urban infrastructure or transportation

experienced losses due to environmental issues with almost 75% occurring because of contaminated properties. Schnapf, *supra*, at 147–48. Lenders are not automatically PRPs and CERCLA affords liability protection to lenders, *id.* at 148, but this does not protect lenders from their own risky investments and money lost because debtors failed to meet obligations, *see* Robertson, *supra* note 33, at 1085–86, 1088 (“Lenders worry about the potential devaluation of a contaminated property, as well as the impact that property may have on the borrower’s financial stability. . . . [While b]rownfields are ‘uncontrollable’ because the associated risks are imposed and controlled by ‘others’ . . .”).

81. Davis, *supra* note 23, at 117. “As lending institutions learned more about Superfund in the late 1980’s and early 1990’s they stayed away in droves from association with any brownfields property.” Mugdan, *supra* note 25, at 1675.

82. Richmond, *supra* note 14, at 556; *see also* B. Robert Amjad & Adam Fishman, *Acquisition Considerations for Brownfields Properties*, in BROWNFIELDS, *supra* note 6, at 68, 72 (suggesting that the need for riskier brownfields redevelopments to have higher rates of return than greenfield developments is comparable to how corporate bonds require higher rates of return than government bonds).

83. Abrams, *supra* note 71, at 278 tbl.1, 284 (indicating that transportation and infrastructure costs generally could be less with brownfields redevelopment than with greenfield development, but mentioning that a “brownfields redevelopment will almost invariably be more costly” despite this). Abrams comes to this conclusion without recognizing that existing infrastructure will likely be dilapidated and potentially must be torn down at an expensive price.

84. *See* LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 9:33 (2010) (noting that on average it takes \$250,000 to clean up a brownfield site); Abrams, *supra* note 71, at 280 (noting that “the cost differential for large projects is beyond the ‘several thousand dollar per acre’ range”); Christopher De Sousa, *Brownfield Redevelopment Versus Greenfield Development: A Private Sector Perspective on the Costs and Risks Associated with Brownfield Redevelopment in the Greater Toronto Area*, 43 J. ENVTL. PLAN. & MGMT. 831, 841–43 & tbls.5–6 (2000) (finding, in a hypothetical cost-comparison of industrial and residential developments on equally sized brownfield and greenfield properties, that development costs were always higher with brownfields); Robertson, *supra* note 33, at 1089–90 (highlighting one developer that spent \$225,000 for site preparation for a project that would have only cost \$40,000 in site prep at a greenfield location).

savings are often trumped by impending liability and cleanup costs, so, given the number of other categories to consider, it is unlikely that these two categories could persuade a developer to use a brownfield rather than a greenfield.⁸⁵

Even further, the procedural considerations for remediating brownfields can be overbearing. Procedural considerations include the end use of the property; the information on past uses and potential contamination; the availability of liability protections, such as the BFPP protection; the level of government to consult about cleanup; the state tools, incentives, programs, or grants that may be needed or could be used; and the level of involvement by the United States Environmental Protection Agency (EPA) or relevant state agency.⁸⁶

With a plethora of disincentives, it is important to consider ways to make brownfields redevelopment more attractive. Doing so first requires an understanding of what CERCLA-fixes have already been implemented or contemplated.

III. FEDERAL AND STATE ATTEMPTS TO RELIEVE DISINCENTIVES AND THE IMPORTANCE OF PUBLIC-PRIVATE COOPERATION

Creative and innovative ways to spur brownfields redevelopment are required to combat the present financial disincentives. This Part first addresses the primary federal fixes to redevelopment problems that relate to CERCLA. It then briefly discusses some common methods to cure brownfields issues that states have implemented or contemplated and ultimately points out some innovative methods that are less established.

A. Federal Involvement Through the Brownfields Act and the EPA

One of the first federal maneuvers to redirect the brownfields problem was the 1994 Brownfield Economic Redevelopment Initiative (BERI).⁸⁷ This initiative offered certain developers grant money and attempted to lure industrial developers away from rural development sites and back to the urban core.⁸⁸ However, BERI, while still existing,

85. Abrams, *supra* note 71, at 278 tbl.1 (mentioning other categories, including land cost, debris removal, taxes, insurance, and zoning).

86. See *Revitalizing Contaminated Sites*, *supra* note 13, at 4.1.

87. Pippin, *supra* note 28, at 597.

88. Press Release, U.S. EPA, NTC Brownfields Economic Redevelopment Initiative (Nov. 9, 1994), <http://yosemite.epa.gov/opa/admpress.nsf/ee765cb97fbff562852572a000651fdf>

never provided enough to effectively move redevelopment forward in light of CERCLA.⁸⁹

Far more successful was The Small Business Liability Relief and Brownfields Revitalization Act (Small Business Act), enacted by Congress in 2001, which includes the Brownfields Revitalization and Environmental Restoration Act (Brownfields Act).⁹⁰ These Acts focused on fixing certain CERCLA shortcomings that prevented successful brownfields redevelopment.⁹¹ The Brownfields Act provided more financing and liability relief to parties involved in cleanup,⁹² with financing occurring in three ways: (1) grants for environmental assessments, (2) grants to establish a revolving loan-fund at the state or local level, and (3) cleanup awards.⁹³

Administratively, the EPA maintains grants for those seeking site assessment and cleanup support.⁹⁴ However, obtaining an EPA grant is very competitive.⁹⁵ The EPA also maintains a National Priorities List (NPL) through which it facilitates cleanup efforts and assesses liability

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89. *Id.* BERI's ineffectiveness could be because of its strict requirements. Proposed projects had to present the following:

[A] demonstrated commitment of public and private leadership to brownfields redevelopment; plans for effective community involvement; a clear delineation of how federal support will make a significant difference; a potential for national replication; local government support and technical, legal and political capacity to complete goals; clearly outlined potential sources of cleanup funding; contributions to environmental justice goals; and a well-defined approach to environmental assessment.

Id.

90. See Pub. L. No. 107-118, §§ 201–231, 115 Stat. 2360, 2360–81 (2002).

91. See *id.*; Minkus, *supra* note 15, at 279–80; Pippin, *supra* note 28, at 599.

92. See Wernstedt & Hersh, *supra* note 19, at 15 (explaining that the Brownfields Act provided \$200 million annually for site assessment and cleanup grants and \$50 million for state programs). However, the Brownfields Act deflected much of the remediation control to state voluntary cleanup programs. Maro, *supra* note 80, at 170.

93. Pippin, *supra* note 28, at 599. Private entities could receive up to \$200,000, whereas municipalities could be awarded up to \$1 million. *Id.*

94. *Revitalizing Contaminated Sites*, *supra* note 13, at 4.9 tbl.2.

95. LEVERAGING PRIVATE INVESTMENT, *supra* note 1, at 2. Brownfields redevelopment funding is also obtainable through the Department of Housing and Urban Development (HUD). *Id.* In fact, \$17.5 million in funding was available for 2010 through HUD's Brownfield Economic Development Initiative. *BEDI Quick Facts*, U.S. DEP'T OF HOUSING AND URB. DEV., <http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bedifacts.cfm> (last visited Oct. 16, 2011).

for the most problematic properties.⁹⁶ However, an abundance of “less contaminated” properties are still liable under CERCLA despite not being on the NPL.⁹⁷ As a whole, state initiatives are necessary to service the hundreds of thousands of less contaminated sites.

B. State and Local Measures

The majority of brownfields initiatives, provisions, and supports are state specific.⁹⁸ States have adopted their own “Superfund” plans,⁹⁹ and have become increasingly creative in finding ways to cure brownfield problems.

The most popular state-created support systems are voluntary cleanup programs (VCP).¹⁰⁰ These are state-funded programs that work to limit developer liability and provide incentives for private development, such as loans and grants.¹⁰¹ VCPs often have secondary objectives, such as curtailing sprawl,¹⁰² and are directed at sites with lower contamination or risk levels that are not Superfund-eligible.¹⁰³

96. For basic information on the NPL, see *National Priorities List (NPL)*, U.S. EPA, <http://www.epa.gov/superfund/sites/npl/> (last visited Oct. 16, 2011).

97. Pippin, *supra* note 28, at 591, 595 (indicating that there are roughly 500,000 brownfield properties throughout the country and very few reach the contamination levels necessary for inclusion on the National Priorities List for subsequent Superfund support). The NPL’s “Superfund” list contains only the most contaminated brownfields and in 2002 contained between 1000 and 1500 of the estimated over 500,000 brownfield sites existing at that time. McCarthy, *supra* note 18, at 287.

98. See Wernstedt & Hersh, *supra* note 19, at 14; Tellier et al., *supra* note 4, at 21 (indicating that a “tenet” of brownfields amendments has been that states should spearhead brownfields remediation efforts).

99. Abrams, *supra* note 71, at 287 (indicating though that state-specific Superfund plans can be just as burdensome and difficult to work with as CERCLA).

100. See, e.g., DE SOUSA, *supra* note 5, at 11 (mentioning that over forty-five states have implemented voluntary cleanup programs, up from thirty in 1997); McCarthy, *supra* note 18, at 290 (mentioning that by 2002 more than forty-five states had “voluntary action programs”); Daniel Schlesinger, Comment, *Revisiting New York’s Brownfield Cleanup Program: An Analysis of a Voluntary Cleanup Program that Lost Its Way*, 3 ALB. GOV’T L. REV. 403, 408 (2010) (noting most states have created their own voluntary cleanup programs); Wernstedt & Hersh, *supra* note 19, at 15 (“All but a handful [of states] have developed formal voluntary cleanup or brownfield programs that operate in a less burdensome and more voluntary fashion to proactively encourage redevelopment.”).

101. Canuel, *supra* note 53, at 342–43.

102. See, e.g., *id.* (noting that one objective of a Maryland act that contained a voluntary cleanup program was to reduce sprawl).

103. *Revitalizing Contaminated Sites*, *supra* note 13, at 4.3–4.4; Maro, *supra* note 80, at 171 (noting that New Jersey’s voluntary cleanup program is designed for sites not on Superfund’s priority list).

Another popular method is tax incremental financing (TIF).¹⁰⁴ Through TIF plans, subsequent tax revenue increases that are triggered by private developments are sent to developers to help pay off any debt incurred by their projects.¹⁰⁵ The local government would designate an area for development while using subsequent rises in property taxes to pay off its own previous investments or pay back private investors.¹⁰⁶ However, TIF plans fail unless area property values increase or adjacent development is triggered because, without property values moving up or new investment moving in, the municipality funding the TIF never increases its ability to generate tax revenue at a higher rate.¹⁰⁷

An additional, fairly routine form of assistance is environmental insurance.¹⁰⁸ Using environmental insurance relieves uncertainty over cleanup costs,¹⁰⁹ and environmental-specific insurance policies, called Contamination Legal Liability policies, have reduced remediation costs.¹¹⁰ However, the insurance method is still less utilized than TIFs and VCPs, and often is an expensive protection. Further, many factors

104. Minkus, *supra* note 15, at 301; *see also* Barr & McCulloch, *supra* note 27, at 128 (noting that TIF districts are the main brownfields weapon in Michigan).

105. Canuel, *supra* note 53, at 316 & n.40. “A TIF plan allows a local unit of government to freeze the amount of assessed property values in an underdeveloped or distressed area that is retained by that local unit, and apply any increases in property tax revenues due to increases in value to finance [area] improvement projects . . .” Laura M. Bassett, *Tax Increment Financing as a Tool for Redevelopment: Attracting Private Investment to Serve a Public Purpose—The Example of Michigan*, 41 URB. LAW. 755, 757 (2009). TIF plans used to be limited to blighted areas, but now are more widely available. *See* WIS. STAT. § 66.1105(4)(gm)(4)(bm) (2009–2010) (indicating that in Wisconsin, “the project costs [must] relate directly to eliminating blight, directly serve to rehabilitate or conserve the area or directly serve to promote industrial development”). Now, TIFs are generally intended for areas that have been unable to attract private development. Bassett, *supra*, at 763. Even further, TIF plans have been recognized as promoting a public purpose. *Id.* at 757, 769–70, 774–76 (“The use of TIF funds to finance these improvements . . . arguably promotes the prosperity and general welfare of the municipality under the generally recognized definition of public purpose.”). Michigan courts previously held that preparing land for economic development and working to enhance tax bases are community actions that have public purposes. *See* *City of Mt. Pleasant v. State Tax Comm’n*, 729 N.W.2d 833, 835–36, 38 (Mich. 2007).

106. *See* Wernstedt & Hersh, *supra* note 19, at 17.

107. *See* Bassett, *supra* note 105, at 759 (highlighting that TIF plans rely on increases in property values).

108. Minkus, *supra* note 15, at 291–93; Arthur J. Harrington, *Environmental Insurance: A Business Lawyer’s Guide*, WIS. LAW., May 2007, at 14, 14, 16.

109. William McElroy & Todd S. Davis, *Environmental Insurance in the Brownfields Transaction*, in BROWNFIELDS, *supra* note 6, at 155, 157.

110. Harrington, *supra* note 108, at 14, 16–17, 58–60.

affect the “utility” of environmental insurance, “including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and costs for available products.”¹¹¹ While environmental insurance is encouraged, the procedure to obtain it can be complex.¹¹²

Lastly, a simple inventory of brownfield sites accelerates the cleanup process by making brownfields easier to identify.¹¹³ Milwaukee maintains a directory of tax-delinquent brownfields on the city’s website, but lacks a complete inventory of the many contaminated properties it hosts.¹¹⁴ A legislative mandate that requires municipalities to maintain brownfields inventories could improve risk communication and reduce delays in decisionmaking.¹¹⁵ Inventories could be particularly helpful for less contaminated sites where environmental issues may be less recognizable¹¹⁶ and for providing the public with better access to information.¹¹⁷

Many insist that the key to successful brownfields redevelopment is balancing the state and environmentalist interests with developer interests.¹¹⁸ This entails balancing environmental health interests, including cleaner commerce and industry, with developer interests in cost-conscious and efficient development. To meet this balance, a growing number of state-specific initiatives attempt to incorporate all or

111. *Revitalizing Contaminated Sites*, *supra* note 13, at 4.8. *But see* McElroy & Davis, *supra* note 109, at 161 (mentioning that environmental insurance has become more affordable since the late 1990s); Tellier et al., *supra* note 4, at 26 (“The role of insurance in [b]rownfields development has increased significantly in recent years . . .”).

112. Wisconsin has statutorily created an environmental insurance option for developers. WIS. STAT. § 292.53 (2009–2010). The Wisconsin Department of Natural Resources (WDNR) provides a walk-through of the complex application and qualification process, which requires costly phase one and phase two environmental assessments as prerequisites. *Wisconsin Brownfields Insurance Program*, WIS. DNR, <http://dnr.wi.gov/org/aw/rr/rbrownfields/wbip.htm> (last visited Oct. 16, 2011).

113. Seth Schofield, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 and the Need for Federal Legislation*, 12 N.Y.U. ENVTL. L.J. 946, 1015–16 (2005).

114. *Brownfields Redevelopment Site Inventory*, CITY OF MILWAUKEE: DEP’T OF CITY DEV., <http://www.mkedcd.org/brownfields/bfsites.html> (last visited Oct. 16, 2011).

115. Schofield, *supra* note 113, at 1016; Schnapf, *supra* note 69, at 19. Some suggest that CERCLA could require reporting by placing a “mandatory obligation on property owners to investigate suspected releases and disclose the existence of contamination that exceeds unrestricted cleanup standards.” Schnapf, *supra*, at 22.

116. *See* McCarthy, *supra* note 18, at 289–90.

117. *See generally* Schnapf, *supra* note 69.

118. Minkus, *supra* note 15, at 272–73.

some of the methods described above.¹¹⁹ If brownfield properties could be more attractive with subsidized costs or more information,¹²⁰ then it is important for state initiatives to take creative and broad-based approaches that support public and private, community-specific, cooperation.

C. Creative Use of Public–Private Partnerships

The best way to facilitate brownfields redevelopment may be for public and private entities to work together through public–private partnerships (PPPs). Municipalities with available resources often opt to cleanup brownfield sites,¹²¹ so they could use these resources to find ways to work with private developers to create coordination.¹²² One contemplated measure has been for municipalities and private developers to share liability or profits.¹²³ Others insist on a PPP whereby a municipality provides funds for public-use developments coordinated with outside parties who construct infill projects at *adjacent* properties.¹²⁴

119. See, e.g., Lawrence D. Brown & M. Katherine Kraft, Editor's Note, *Active Living, the Built Environment, and the Policy Agenda*, 33 J. HEALTH POL. POL'Y & L. 371, 379 (2008) (describing Boston's "Boston Schoolyard Initiative," which is meant to transform old and unused Boston area schoolyards into usable greenspace); Laura Carstens, *Defining, Inspiring, and Implementing Sustainability*, NAT'L CIVIC REV., Fall 2010, at 12–15 (describing Dubuque, Iowa's "Sustainable Dubuque Initiative"); *More than the Environment*, *supra* note 10 (describing Omaha, Nebraska's "Back to the River" initiative," which seeks to transform Omaha's riverfront into a sustainable area that includes common spaces, an office park, and a corporate headquarters); *infra* Part V.A.

120. Wernstedt & Hersh, *supra* note 19, at 17 ("[T]ens of thousands of properties around the country would be substantially more attractive if cleanup costs were subsidized or, in some cases, just known with greater certainty.").

121. Schofield, *supra* note 113, at 1013–14.

122. D. Evan van Hook et al., *The Challenge of Brownfield Clusters: Implementing a Multi-Site Approach for Brownfield Remediation and Reuse*, 12 N.Y.U. ENVTL. L.J. 111, 142–43 (2003) (arguing that synergies between stakeholders are important to the success of brownfields redevelopment and coordination between public and private financing is encouraged). Moreover, from a private financing standpoint, when "private parties work in a partnership with the public sector" it may also be easier to purchase insurance. *Id.* at 151.

123. Minkus, *supra* note 15, at 269, 315–16; see also Letter from Barry Trilling, Partner, Wiggin & Dana LLP, to Peter Meyer, Dir., Ctr. for Env'tl. Policy & Mgmt., Univ. of Louisville (Oct. 27, 2006), available at <http://www.cpeo.org/lists/brownfields/2006/msg00473.html> (suggesting both public and private sectors should participate in brownfields redevelopment through publicly funded incentive programs that would encourage private developer involvement).

124. LEVERAGING PRIVATE INVESTMENT, *supra* note 1, at 2. Local circumstances are often as important to brownfields redevelopment as environmental or cost elements. Espinosa, *supra* note 12, at 30. Moreover, the idea of "public approval" of brownfields redevelopment has already been contemplated and is encouraged for the master planning of

Whether a PPP could aid in the ownership process is less understood, but two less-used redevelopment tactics, explained below, make public-private cooperation a focus throughout the remediation process.

The first is the multi-site approach. Typically, brownfields redevelopment is done on a parcel-by-parcel basis.¹²⁵ This may be because states require tight regulation and encourage parcel-specific cleanups due to the varied chemicals and waste existing at different, even adjacent, properties.¹²⁶ But, redeveloping brownfields in clusters could add efficiency to the process, pull in more stakeholders, and provide greater public value if the properties were coordinated during cleanup.¹²⁷ Could states implement programs where municipalities and private entities share in development and use grants not otherwise available to private parties, while ensuring an ongoing, coordinated,

cities and general public awareness. Pippin, *supra* note 28, at 604–05. *See generally* Daniel S. Wilson & Tara A. Butler, *The New Market Frontier: Unlocking Community Capitalism Through Brownfields Redevelopment*, in BROWNFIELDS, *supra* note 6, at 229–30. Thus, any brownfields redevelopment effort by a private entity would be better accomplished by cooperation between private developers, local authorities, and the public at large. Though not related to public-private partnerships, those researching brownfields in Milwaukee have suggested using public funding for “market-driven” brownfields redevelopment in locations that will generate the greatest property tax benefit per unit of public investment. *See* Christopher A. De Sousa et al., *Assessing the Effect of Publicly Assisted Brownfield Redevelopment on Surrounding Property Values*, 23 ECON. DEV. Q. 95, 95, 108 (2009) (speculating that such an approach could lead to property tax increases through large and small-scale brownfields redevelopment efforts).

125. Eisen, *supra* note 62, at 10285. Not only can this be tenuous for prospective developers and communities, but it is not in line with smart-growth principles. *See id.*

126. For example, David Misky of the Redevelopment Authority of the City of Milwaukee (RACM) mentions that it may be easier for the City of Milwaukee to assess, test, and clean adjacent brownfield properties together, but because of varied environmental issues at each site, the WDNR generally ensures that cleanup is done on a parcel-by-parcel basis. Telephone Interview with David Misky, *supra* note 42. The City of Delavan, Wisconsin, tried to test and clean on a multi-site basis, but it was unable to do so because, due to varied environmental issues and ownership problems at each site, a multi-site approach was not feasible under Wisconsin’s standards. *See* Telephone Interview with Mark Wendorf, *supra* note 23. Site-investigations in Wisconsin require the submission of a detailed work plan that requires specific data for each site. *See* WIS. ADMIN. CODE NR § 716.09 (current through 669 Wis. Admin. Reg. (Oct., 1 2011)).

127. Van Hook et al., *supra* note 122, at 114; *see also* Sulkowski, *supra* note 16, at 110–11 (arguing that “holistic” approaches are best for all stakeholders because brownfields redevelopments often fail for non-environmental reasons and local issues). Moreover, parcel-by-parcel approaches lack the ability to attack the social and aesthetic problems in areas that contain large swaths of open land because, with individual-site remediation focuses, developers are often too fixated on the financials of an individual property rather than the rejuvenation of an entire blighted community. Maro, *supra* note 80, at 173–74.

cross-property focus through the life of the redeveloped parcels?¹²⁸ Successful brownfields redevelopment requires flexibility,¹²⁹ so if multi-site coordination can reduce cleanup costs by such measures as sharing mobile testing labs and simultaneous land investigations, Wisconsin and other states should consider using a multi-site approach to better facilitate cleanup.¹³⁰

Second, northwestern European countries are experimenting with public involvement in ways that are unique to many American redevelopment attempts.¹³¹ According to some, the “western” model to brownfields redevelopment involves public participation,¹³² but it seems that Europe is in reality being more innovative with this concept. Recognizing that public–private models are “creative way[s] to realize public projects with private involvement in developing, building, financing, maintaining and/or operating in order to add value to the benefit of the whole project,”¹³³ some northwestern European countries have placed creative spins on PPPs. One such cooperative measure is the “alliance,” where mutual operation of brownfields redevelopment sites is maintained in the long-term and not just the cleanup process.¹³⁴

128. See van Hook et al., *supra* note 122, at 118.

129. *Id.*

130. *Id.* at 134–35; Wernstedt & Hersh, *supra* note 19, at 17 (“[A]n areawide approach could promise a high enough increase in property values to make it attractive for property owners, prospective purchasers, and developers to invest in remediation and redevelopment . . .”).

131. See generally M.B. GLASER, PPP AND BROWNFIELD REVITALISATION SITES IN NORTH-WEST EUROPE (2005), available at http://www.revitinweurope.org/selfguidingtrail/20_PPP_and_Brownfield_Revitalisation_Sites_in_NorthWest_Europe.pdf.

132. Pippin, *supra* note 28, at 593.

133. GLASER, *supra* note 131, at 10.

134. *Id.* at 15; see also WORLD BANK, EUR. AND CENTRAL ASIA REGION SUSTAINABLE DEV. DEP’T, THE MANAGEMENT OF BROWNFIELDS REDEVELOPMENT: A GUIDANCE NOTE 39 (2010) (“A PPP alliance, ideally, fosters a close cooperation between the public and private side through all stages of the redevelopment process, including risk sharing and financing.”). In Nantes, France, the redevelopment of contaminated land included an alliance approach. See GLASER, *supra* note 131, at 15, 35 & fig.19. The City of Nantes and private investors are sharing in the development of part of the Ile de Nantes in the form of a PPP alliance. *Id.* at 35 fig.19. The PPP is owned 61% by the City of Nantes and 39% by private investors and has a life span of twenty years. *Id.* After completion of the redevelopment, maintenance is shared. *Id.* As a whole, the public areas remain public whereas PPP designated areas are controlled by the PPP. *Id.* The PPP purchases the land, designates public spaces, and may designate land to sell; but these decisions are all made based on the 61% to 39% public–private ownership split. See *id.* at 66–68. Ultimately, the city believes that by taking on more risk in cleanup efforts it can better attract economic development; but the city is comfortable with this because part of the PPP model involves

Through an alliance, private entities might find brownfields projects more feasible because they would be able to get guidance from municipalities by way of funding otherwise available only if municipalities owned and operated the redeveloped property. That is, an alliance method allows private entities to take advantage of funding mechanisms not ordinarily at their disposal.

Despite the creative methods available to remediate brownfields, the number of contaminated properties across the country continues to rise. In Wisconsin, the number of closed plants has increased in recent years.¹³⁵ The economy is likely a large factor for the increase, but the fact that these properties will sit vacant for a long time, in large part because of their contaminated state, is startling. Relaxing brownfields regulations and redevelopment standards could promote economic development while still preventing environmental problems—the two primary cleanup objectives.¹³⁶ Standards should not only be read as “liability invoking,” but also as the rules that guide funding and procedural mechanisms of designated ways to actually obtain assistance to properly cleanup and put to productive use contaminated properties.¹³⁷

What each method described above shows is that when communities and private parties redevelop brownfields in conjunction, more options are created. Community involvement ensures that environmental justice goals are met,¹³⁸ which is important because applicants from less

added public space and greenspace. *Id.* at 68. Thus far, rejuvenation efforts include the development of civic buildings, university additions, and commercial offices. See ANDREW GRAY, ILE DE NANTES: FESTIVAL ON INDUSTRIAL HERITAGE (2007), available at http://www.revit-nweurope.org/selfguidingtrail/13_Ile_de_Nantes_festival_on_industrial_heritage.pdf.

135. See Michael Prager, Land Recycling Team Leader, Wis. DNR, Presentation at 2010 Wis. Am. Planning Conf. 14 (May 5, 2010) [hereinafter Presentation at 2010 Wis. Planning Conf.], available at <http://www.wisconsinplanners.org/attachments/presentations2010/ConqueringBrownfieldsDNR.pdf>; Michael Prager, Land Recycling Team Leader, Wis. DNR, Redevelopment and Reuse: Conquering Brownfields, Presentation 19 [hereinafter Redevelopment and Reuse] (on file with author).

136. See Applegate, *supra* note 13, at 284–85. *But see* McCarthy, *supra* note 18, at 290 (warning us of the risks of relaxed brownfields regulatory standards by highlighting 27,200 contaminated sites that may have been “archived” without “adequate environmental site assessments” after more leeway was given for the assessment of those sites).

137. See Applegate, *supra* note 13, at 284–85.

138. Lincoln L. Davies, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 288, 316 (1999).

wealthy communities are often ignored.¹³⁹ Yet, partnership approaches could alleviate risk to less experienced developers, who are reluctant to dive into the brownfields market.¹⁴⁰ Thus, forming a team of public and private influence that is willing to be innovative is imperative.

IV. MUNICIPAL-PRIVATE COOPERATION TO PROMOTE GREENSPACE DEVELOPMENT

Municipality-based brownfields redevelopment options are superior to those for private entities because municipalities have better access to federal and state funding awards.¹⁴¹ Furthermore, municipalities incur less liability and fewer penalties for owning contaminated property, are exempt in more ways than private entities from incurring liability after acquiring a contaminated property, and often incur far less cost than private entities during redevelopment.¹⁴² Perhaps then, municipalities can use these advantages to aid private redevelopment efforts through a partnership setting.

The cost of brownfields redevelopment makes the conversion process contingent on help from the government.¹⁴³ Brownfields grant programs that encourage and fund greenspace conversions are more widely available to municipalities than private entities—yet, greenspace redevelopment projects are often passed over.¹⁴⁴ In fact, among remediation “success stories” highlighted by the Wisconsin Department of Natural Resources (WDNR), only four projects received funding through Wisconsin’s Green Space Grant—a program that I will describe

139. Matthew Dull & Kris Wernstedt, *Land Recycling, Community Revitalization, and Distributive Politics: An Analysis of EPA Brownfields Program Support*, 38 POL’Y STUD. J. 119, 134, 136 (2010).

140. Redevelopment and Reuse, *supra* note 135, at 22 (“The more experienced developers consider brownfields management as just another aspect of development. . . . While those with less tend to react more cautiously, but are willing to do it again.” (quoting Chris De Sousa)).

141. *See, e.g.*, Dull & Wernstedt, *supra* note 139, at 134 (noting local governments are more likely to receive brownfields redevelopment support); Telephone Interview with Michael Prager, Land Recycling Team Leader, Wis. DNR (Jan. 6, 2011).

142. *See* Minkus, *supra* note 15, at 301.

143. Brown & Kraft, *supra* note 119, at 381.

144. Siikamäki & Wernstedt, *supra* note 9, at 562 & n.3 (noting that brownfield-to-greenspace conversions account for 5% of all brownfield redevelopment projects). This is despite recognition by the EPA that brownfield programs should not just be created for facilitating taxable development, but also for adding greenspace. *See EPA Brownfields Grants of \$71 Million Will Help Address Petroleum and Other Hazards*, *supra* note 26.

thoroughly in Part V.¹⁴⁵

Greenspace redevelopment should not be an afterthought. Because transforming brownfields into greenspace takes taxable land off of the market, thus removing land that could potentially increase a municipality's tax base,¹⁴⁶ brownfield-to-greenspace conversions may be looked at as development that restricts rather than encourages economic activity (and that would be especially difficult in today's economic climate).¹⁴⁷ However, for numerous reasons, the benefits of mixing greenspace redevelopment efforts into community redevelopment are not only plentiful on the public health front,¹⁴⁸ but significant from an economic standpoint as well.

Greenspace developments can be tools for economic urban health¹⁴⁹ that provide the "positive economic impacts [of] increasing property values and bringing people to local businesses."¹⁵⁰ Property values increase with proximity to parks, while parks can increase tourism, which can expand local economies in size and scope.¹⁵¹ Further, the high cost of financing parks is potentially offset by the sale of adjacent land

145. *Remediation and Redevelopment Program Success Stories*, WIS. DNR, <http://dnr.wi.gov/org/aw/rr/cleanup/sstories.htm> (last visited Oct. 16, 2011) [hereinafter *Remediation & Redevelopment Success Stories*]. Though brownfield-to-greenspace projects are becoming more popular, as recent as 2008, this form of redevelopment compromised less than 5% of U.S. brownfield projects. DE SOUSA, *supra* note 5, at 155.

146. Siikamäki & Wernstedt, *supra* note 9, at 565. Further, greenspace can be a fiscal drain because municipalities and their taxpayers ultimately fund park spaces. William W. Buzbee, *Sprawl's Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367, 386 (2000).

147. See McCarthy, *supra* note 18, at 293 (suggesting that any requirement concerning future use of property could restrict profit opportunities that a community might otherwise have available).

148. Applegate, *supra* note 13, at 271 (suggesting that greenspaces pose less risk to individuals because people spend less time on greenspaces than elsewhere); Timothy Beatley, *Biophilic Urbanism: Inviting Nature Back to Our Communities and into Our Lives*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 209, 212 (2009) (recognizing that greenspace added to communities can boost individual mood, health, and performance).

149. See Lyles-Chockley, *supra* note 42, at 96.

150. Anna Read & Isabel Fernandez, *Integrated Greenspace Networks a Smart Option*, PUB. MGMT., Nov. 1, 2010, at 16, 16 (discussing how the greening of land can offer economic benefits ranging from increased property values to business development at adjacent locations); see also Buzbee, *supra* note 146, at 384 ("[S]ome of the most valuable real estate in the country is near to substantial park spaces."); EPA *Brownfields Grants of \$71 Million Will Help Address Petroleum and Other Hazards*, *supra* note 26. Indeed, a 2006 study found that property values of nearby homes increased when brownfields were redeveloped as greenspaces. Kaufman & Cloutier, *supra* note 33, at 27-29.

151. Read & Fernandez, *supra* note 150, at 17.

or taxes realized from nearby entities.¹⁵² Even more, developing community greenspace could revitalize blighted neighborhoods by enhancing street life, boosting community aesthetics, and providing additional free-recreation options.¹⁵³ By generally enhancing the attractiveness of communities, greenspace puts urban cores in better positions to attract jobs and private investment.¹⁵⁴

Investment in the greening of urban lands is a potential economic “boon” that could be sparked by public funding.¹⁵⁵ But is more public funding for greenspace development worth it? Wisconsin’s main brownfield-to-greenspace funding package is designed to provide no more than \$200,000 for cleanup and site assessment.¹⁵⁶ In some situations, a \$200,000 grant would comprise just two or three percent of total development costs.¹⁵⁷ However, winning a grant can generate local interest and knowledge of brownfields reuse issues.¹⁵⁸ Plus, one award may provide leverage toward obtaining further funding,¹⁵⁹ and the ability

152. *Id.*; see also Telephone Interview with Michael Prager, *supra* note 141 (suggesting that communities might not be aware of some benefits that developing park space provide and, further, that communities could and should develop park space but may be taking caution in doing so because they are having difficulty financing their present park systems). Possibly, smaller park parcels that require minimal maintenance are better suited as economically viable ways to grow interest in adjacent properties.

153. Dunn, *supra* note 72, at 48 (“Green space helps to increase property values, revitalize blighted neighborhoods, enhance street life and community aesthetics, and provide free recreation. Open, active green space, draws people out of their homes and with more individuals present in the community, crime can be reduced.”).

154. See Buzbee, *supra* note 146, at 379. In fact, when Wisconsin’s Green Space Grant was created, many that recommended it did so because of the benefit they believed converting brownfields to greenspace would have on the economic outlooks of those areas. See Telephone Interview with Michael Prager, *supra* note 141. A greenspace initiative could also reduce sprawl, which some argue is a way to bring jobs and economic activity back to the urban core. Buzbee, *supra* note 146, at 379.

155. Dunn, *supra* note 72, at 60.

156. *Brownfield Green Space and Public Facilities Grants*, WIS. DNR, http://dnr.wi.gov/org/aw/rr/rbrownfields/greenspace_grant.htm (last visited Oct. 16, 2011).

157. Dull & Wernstedt, *supra* note 139, at 121. *But see* Telephone Interview with David Misky, *supra* note 42 (mentioning that a small award could go a long way toward facilitating smaller-scale greenspace conversions).

158. McCarthy, *supra* note 18, at 293 (referring to how progress and successful brownfield remediation efforts can lead to more revitalization, calling this the “domino effect”).

159. Telephone Interview with Michael Prager, *supra* note 141; see also Telephone Interview with Mark Wendorf, *supra* note 23 (mentioning that receiving a few brownfields redevelopment grants made it easier to obtain and implement other available funding options, notably, a \$200,000 award through Wisconsin’s Green Space Grant).

to package funds may lead to redevelopment success.¹⁶⁰ Arguably, the low dollar amount suggests that such funding would be best utilized in smaller-scale developments of lower overall costs.¹⁶¹

Municipalities are best-suited to quarterback brownfield-to-greenspace conversions because of better funding options and because public involvement would generate greater stakeholder input.¹⁶² Still, an argument exists that any private development should be left to the market forces without government interference. Arguably, allowing municipalities to quarterback a brownfield-to-greenspace development that involves private entities, and allowing those private entities to take advantage of public funding designed for municipalities, increases government's influence on private development.¹⁶³ Although, when there is no market, government—or government in conjunction with private entities—may have a role in providing avenues to overcome development deadlocks.¹⁶⁴ PPPs have been proposed to combat market failure in the research and development field as a way to alleviate risks

160. See Brown & Kraft, *supra* note 119, at 381 (“[B]rownfield conversions may prosper in suitable conditions—for example, when the public sector owns the land in question, local leaders support both the conversion itself and allocation of the converted land to greenspace, environmental groups get mobilized, estimates of the costs of maintenance of greenspace are not overestimated, and the federal or state government lends support.”); Dull & Wernstedt, *supra* note 139, at 121.

161. See *supra* note 152 and accompanying text.

162. See van Hook et al., *supra* note 122, at 114 (adding that more stakeholder involvement may increase efficiency).

163. Any approach that allows the government to influence the competitive aspect of private enterprise has been cautioned. See, e.g., Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 1–2 (1964); James S. Burling, *Public Private Partnerships—A Brave New World or a Return to Serfdom?*, in EMINENT DOMAIN AND LAND VALUE LITIGATION 563, 565 (ALI-ABA, Course of Study, 2009) (“And those who self-identify as libertarians would prefer as much absence of government as possible from the design and revitalization of American cities, thinking that government interference will at best merely delay inevitable economic forces.”).

164. See Gerry Stoker, *Public-Private Partnerships and Urban Governance*, in PARTNERSHIPS IN URBAN GOVERNANCE: EUROPEAN AND AMERICAN EXPERIENCE 34, 34–35 (Jon Pierre ed., 1997) (“[Governance’s] focus is on the interdependence of governmental and non-governmental forces in meeting economic and social challenges. Governance is about governmental and non-governmental organizations working together. Its concern is with how the challenge of collective action is met and the issues and tensions associated with this shift in the pattern of governing.”); Graeme Hodge & Carsten Greve, *Theorizing Public-Private Partnership Success: A Market-Based Alternative to Government?* 17–20 (Syracuse Univ., Pub. Mgmt. Res. Conf., 2011), available at http://www.maxwell.syr.edu/uploadedFiles/conferences/pmrc/Files/PMRC_Hodge_and_Greve_2011.pdf.

associated with investing in certain technologies.¹⁶⁵ Likewise, because brownfields have created development roadblocks, PPPs may have a proper place in brownfields redevelopment, providing assistance in some areas, such as information, funding, and clarification—thereby addressing financial and uncertainty problems faced by developers.¹⁶⁶

The next Part discusses the recent measures taken by Wisconsin to promote efficient brownfields redevelopment—namely, the Wisconsin Plant Recovery Initiative (WPRI). I will then highlight Wisconsin's existing-but-faltering brownfield-to-greenspace grant and two “success stories” of that grant's application.

V. WPRI AND THE WISCONSIN GREEN SPACE GRANT

A. Wisconsin Plant Recovery Initiative

Wisconsin was hit hard in the 2000s by manufacturers leaving its urban centers for the outskirts of its own cities and cities of other states.¹⁶⁷ Not surprisingly, given the state's industrial heritage and progressive environmental focus, Wisconsin has been fairly active on the brownfields redevelopment front.¹⁶⁸ It adopted numerous reforms through its 1994 Land Recycling Act, such as cleanup requirements and liability exemptions upon acquiring tax-delinquent property.¹⁶⁹

165. Albert N. Link & John T. Scott, *Public/Private Partnerships: Stimulating Competition in a Dynamic Market*, 19 INT'L J. INDUS. ORG. 763, 766–75 (2001). Link and Scott defined “market failure” as “a condition under which the market, including both the R&D-investing producers of a technology and the users of the technology, underinvests from society's standpoint in a particular technology.” *Id.* at 767. They suggested fixing underinvestments in the R&D field, in part, by mixing “partial public funding [with] privately-performed research.” *Id.* at 764.

166. Mugdan, *supra* note 25, at 1676 (highlighting that government can provide information, money, and clarification or liquidation of liability). Information might include how the site was previously used, what cleanup has been attempted, or what programs are available to plant seed money. *Id.* at 1776–77. Money could include Superfund dollars or direct and indirect federal grants. *Id.* at 1678–80. Clarification or liquidation of liability would include liability relief. *Id.* at 1681, 1684. The government's purpose might be as simple as “managing time-related costs and attenuating developer frustration.” DE SOUSA, *supra* note 5, at 115.

167. Presentation at 2010 Wis. Planning Conf., *supra* note 135, at 3.

168. See Wernstedt & Hersh, *supra* note 19, at 14 (“[Wisconsin] offers not only an extensive track record of redeveloping different types of brownfield sites but also a wide range of program incentives and tools to promote contaminated site cleanup and encourage public and private parties to talk about the program.”).

169. See *id.* at 15. Voluntary parties, lenders, and fiduciaries that take title to tax-delinquent sites are also exempt from cleanup liability. Harrington, *supra* note 20, at 985.

Wisconsin also received a disproportionately large number of EPA brownfields grant awards between 2003 and 2007 when compared to other states.¹⁷⁰ And Milwaukee, its largest city and industrial center, is regarded as having a leading brownfields redevelopment program.¹⁷¹ As an example, Milwaukee's Menomonee River Valley, previously a swath of vacant, contaminated lots, has been restored to the industrial mecca that it once was because new facilities and outside investors have flooded the area in response to a community-wide cleanup and reuse plan.¹⁷²

Still, the economic downturn created new brownfields,¹⁷³ and currently there are an estimated 8000 in Wisconsin.¹⁷⁴ From 2007 to 2009 the number of yearly plant closings increased by seventy-five percent,¹⁷⁵ while some estimate that from 2008 to 2009 the raw number of closed plants existing in Wisconsin increased by over one hundred.¹⁷⁶ The recent plant closures—which include two major automobile plants¹⁷⁷—have frustrated Wisconsin's economy, which has suffered approximately 170,000 job losses since 2008.¹⁷⁸

Wisconsin's Land Recycling Act encourages the use of TIF districts as well. *Id.* at 986. *See generally* 1993 Wis. Act 453.

170. Dull & Wernstedt, *supra* note 139, at 123 fig.2.

171. Hunt, *supra* note 31, at 12.

172. *See, e.g.*, Eric Decker, *Made in Milwaukee: Pizza from the Valley*, MILWAUKEE BIZTIMES, (Jan. 7, 2011), <http://www.biztimes.com/news/2011/1/7/made-in-milwaukee-pizza-from-the-valley> (recognizing that the Menomonee Valley has been Milwaukee's industrial center for more than 100 years); William D'Urso, *A Sweet Move: Suzy's Plans Expansion in Valley*, MILWAUKEE J. SENTINEL, Aug. 9, 2011, at 1D; E-mail from David Misky, Assistant Executive Dir.—Sec'y, Redev. Auth. of the City of Milwaukee, to author (May 31, 2011, 10:30 CST) (highlighting that a brownfield-to-greenspace conversion was instrumental in attracting seven firms to the Valley) (on file with author). *See generally* LOCKWOOD GREENE CONSULTING ET AL., MARKET STUDY, ENGINEERING, AND LAND USE PLAN FOR THE MENOMONEE VALLEY (1998); DE SOUSA, *supra* note 5, at 249–62.

173. Presentation at 2010 Wis. Planning Conf., *supra* note 135, at 10.

174. *Id.* at 8.

175. *Id.* at 15.

176. Redevelopment and Reuse, *supra* note 135, at 19.

177. Thomas Content, *Chrysler Won't Keep Kenosha Engine Plant*, JSONLINE (May 1, 2009), <http://www.jsonline.com/business/44162607.html> (highlighting that a Chrysler engine plant in Kenosha, Wisconsin, will close, resulting in approximately 800 job losses); *WisBusiness: Janesville Deals with Fallout from GM Plant Closure*, WISBUSINESS.COM (June 4, 2008), <http://wisbusiness.com/index.lml?Article=127877> (highlighting the closure of a longstanding GM facility in Janesville, Wisconsin, that will result in the loss of over 2000 jobs).

178. John Schmid, *State Reports a Gain of 12,900 Private-Sector Jobs*, JSONLINE (July 21, 2011), <http://www.jsonline.com/business/125961833.html> (noting that approximately

The pattern of plant closures triggered the WDNR to form the Wisconsin Plant Recovery Initiative (WPRI) in March 2010.¹⁷⁹ WPRI—which targets non-NPL properties—is designed to address environmental issues during plant closings, reach out to local governments and private businesses, and, ultimately, expedite the cleanup and reuse process of Wisconsin’s closed plants by providing financial assistance and regulatory guidance.¹⁸⁰

By “speed[ing] up the clean-up and revitalization of plants,” WPRI should help municipalities attract private enterprise.¹⁸¹ Under the initiative, \$1 million in WDNR assessment monies are available,¹⁸² with

171,000 jobs were lost during the 2008–2009 recession); 2010 Wisconsin Plant Recovery Initiative (WPRI) and WPRI Assessment Monies Webinar, Presentation 2 (Mar. 23, 2010) [hereinafter *WPRI Webinar*], available at http://dnr.wi.gov/org/aw/rr/training/wpri_wam.pdf. Over 40% of the lost jobs were in the manufacturing sector. *Id.* During the drafting of this Comment, Wisconsin Governor Scott Walker took office under a promise to drastically increase private-sector jobs. Summer 2011 estimates suggest that Wisconsin’s steady decline of manufacturing jobs is turning around. See Schmid, *supra*; Press Release, Wis. Dep’t Workforce Dev., May Jobs, Unemployment Numbers Announced for State (June 16, 2011), available at http://dwd.wisconsin.gov/dwd/newsreleases/2011/unemployment/110616_june_state.pdf (highlighting the addition of 13,100 manufacturing jobs between January and May, 2011). This footnote is meant solely to acknowledge that Wisconsin’s manufacturing sector may be finding a way to reverse the downward spiral it was in for much of the past decade. Surely, there are other, better ways to increase jobs than simply to cleanup brownfields; however, these statistics should not diminish any understanding that the many closed plants in Wisconsin increased its brownfields problem, nor diminish the fact that Wisconsin’s job losses before Governor Walker took office were far greater than the estimated 50,000 to have been created since then. See Schmid, *supra*.

179. See, e.g., *WPRI Webinar*, *supra* note 178, at 2; George Marek & Alexander Gore, *Wisconsin DNR Launches Industrial and Commercial Facilities Recovery Initiative: Benefits for Wisconsin Municipalities*, PUB. FIN. L. UPDATE (Quarles & Brady LLP, Milwaukee, Wis.), Mar. 2010, available at <http://www.quarles.com/files/Publication/c9bd9bf8-1e99-47dd-9ec2-5f05cfab5fd3/Presentation/PublicationAttachment/13c90d72-1f30-43fb-b64912321c3215d/Wisconsin%20DNR%20Update.pdf>; Telephone Interview with David Misky, *supra* note 42.

180. *Wisconsin Plant Recovery Initiative*, WIS. DNR, <http://dnr.wi.gov/org/aw/rr/rbrownfields/wpri.htm> (last visited Oct. 16, 2011).

181. Marek & Gore, *supra* note 179; see also WIS. DNR, WISCONSIN DNR PLANT RECOVERY INITIATIVE (2010), available at <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR862.pdf> (noting that the initiative assists both businesses and communities in prompt clean-up).

182. George Marek & Alexander Gore, *Wisconsin Plant Recovery Initiative: Grant and Technical Services Opportunities Expand as Program Matures*, PUB. FIN. L. UPDATE (Quarles & Brady LLP, Milwaukee, Wis.), Oct. 2010, available at http://www.quarles.com/wisconsin_plant_recovery_initiative_oct_2010/ (“[A] total of \$1 million is available to local governments and other eligible applicants to hire environmental consultants to investigate environmental contamination, including Phase I and/or Phase II site assessments, NR 716 site investigations and underground storage tank . . . removals.”).

\$200,000 allowed per project.¹⁸³ For a property to be eligible for funding, a municipality does not need to own the parcel but must have access to it.¹⁸⁴ The “top goal” is “to assess environmentally contaminated sites where important community jobs have been lost—with the hope of attracting new manufacturing plants or other businesses.”¹⁸⁵

B. The Wisconsin Green Space Grant

WPRI evidences Wisconsin’s continued push for creative ways to solve its brownfields problem. I question, then, the failed maintenance of one creative program, which implements greenspace and has previously helped Wisconsin communities revitalize contaminated properties in blighted areas.

Wisconsin’s Green Space Grant helped twenty-one projects acquire funding in the past decade.¹⁸⁶ At its inception, the Green Space Grant was one of the first of its kind.¹⁸⁷ This grant focuses on helping local governments redevelop brownfields for long-term public use.¹⁸⁸ It is available only to public entities,¹⁸⁹ but non-profit organizations are

183. *Wisconsin Plant Recovery Initiative Assessment Monies (WAM)*, WIS. DNR, <http://dnr.wi.gov/org/aw/rr/financial/wam/index.htm> (last visited Oct. 16, 2011).

184. *Id.*

185. *WPRI Webinar*, *supra* note 178, at 47. Further goals include increasing the number of communities that clean up contaminated properties, encouraging community and public awareness, and leveraging public resources. *Id.* at 6–7.

186. DNR GREEN SPACE & PUBLIC FACILITIES GRANTS: ROUND ONE GRANT AWARDS, 2004 [hereinafter DNR ROUND ONE], *available at* <http://dnr.wi.gov/org/aw/rr/rbrownfields/greenspace/round1.pdf> (highlighting that round one provided eleven total awards); DNR GREEN SPACE & PUBLIC FACILITIES GRANTS: ROUND TWO GRANT AWARDS, 2006 [hereinafter DNR ROUND TWO], *available at* <http://dnr.wi.gov/org/aw/rr/rbrownfields/greenspace/round2.pdf> (round two provided eight awards); DNR GREEN SPACE & PUBLIC FACILITIES GRANTS: ROUND THREE GRANT AWARDS, 2008–2009 [hereinafter DNR ROUND THREE], *available at* <http://dnr.wi.gov/org/aw/rr/rbrownfields/greenspace/round3.pdf> (round three provided two awards).

187. Press Release, Wis. DNR, Hassett Announces New DNR Grants to Help Clean Up Brownfields for Public Use (Apr. 13, 2004), *available at* <http://www.wnrmag.com/org/aw/rr/rbrownfields/greenspace/gs-04-04.pdf>.

188. *Brownfield Green Space and Public Facilities Grants*, *supra* note 156.

189. For example, “[e]ligible applicants include tribes, cities, villages, towns, counties, redevelopment authorities, community development authorities and housing authorities.” *Id.* Recipients must match up to 50% of the award amount, depending on the size of the grant. WIS. ADMIN. CODE NR § 173.15(1)(a)–(c) (current through 669 Wis. Admin. Reg. (Oct. 1, 2011)).

allowed to partner-up with participating municipalities.¹⁹⁰ Upon receiving funding and redeveloping a plot into greenspace or public facilities, the municipality must hold the property to that public use for at least twenty years.¹⁹¹

The Green Space Grant previously had available \$1 million in grant money during 2001–2003 and 2005–2007.¹⁹² Presently though, the program has no available funds.¹⁹³ With previous awards of up to \$200,000 for site assessment and cleanup,¹⁹⁴ this grant program could be helpful to municipalities looking to incorporate greenspace as a part of redevelopment efforts—particularly for smaller-scale infill projects with lower total cleanup costs.

Below I highlight two examples of how the Green Space Grant and brownfield-to-greenspace conversions improved the environmental health and economic viability of blighted areas in two Wisconsin cities.

C. Successful Green Space Grant Application in Oshkosh and Delavan, Wisconsin

The Wisconsin cities of Oshkosh¹⁹⁵ and Delavan¹⁹⁶ each received

190. See WIS. ADMIN. CODE NR §§ 173.15(2), .17(1)(a) (current through 669 Wis. Admin. Reg. (Oct. 1, 2011)).

191. *Id.* §§ 173.05, .17(1)(b).

192. Siikamäki & Wernstedt, *supra* note 9, at 568.

193. The 2011–2013 Wisconsin biennial budget does not fund the Grant. See E-mail from Michael Prager, Land Recycling Team Leader, Wis. DNR, to author (June 20, 2011 02:44 CST) (on file with author); *Brownfield Green Space and Public Facilities Grants*, *supra* note 156. See generally 2011 Wis. Act 32.

194. WIS. ADMIN. CODE NR § 173.15.

195. The City of Oshkosh has approximately 64,000 residents. *Oshkosh (city)*, Wisconsin, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/55/5560500.html> (last visited Oct. 16, 2011). It is located in the middle of Wisconsin's Fox River Valley, the state's third largest metropolitan area, and once prospered with a strong lumber industry. *Historical Summary of the City of Oshkosh*, CITY OF OSHKOSH, http://www.ci.oshkosh.wi.us/landmarks_commission/City_History.htm (last visited Oct. 16, 2011). Its present fame rests, generally, on two things: the Oshkosh B'Gosh children's clothing company (which originated in the city) and the annual Experimental Aircraft Association convention (which draws over 750,000 visitors to the city each year). CITY OF OSHKOSH, COMMUNITY RELATIONS PLAN, U.S. EPA BROWNFIELD CLEANUP GRANT 3, http://www.ci.oshkosh.wi.us/Community_Development/Planning_Services/assets/pdf/brownfield_grants/Community_Relations_Plan_Parcel%20H_Redevelopment%20_2_.pdf (last visited Oct. 16, 2011).

196. The City of Delavan, located approximately one hour southwest of Milwaukee, maintains nearly 8000 residents according to 2000 census estimates and has a surrounding town of about 4500. U.S. CENSUS BUREAU, DELAVAN CITY, WISCONSIN 1 (2000), available at <http://censtats.census.gov/data/WI/1605519450.pdf>; U.S. CENSUS BUREAU, DELAVAN

\$200,000 in 2004 as part of the first round of awards administered by the Green Space Grant.¹⁹⁷ Each city's project—funded in part by this grant—is a documented success story by the WDNR.¹⁹⁸

1. Oshkosh—Riverside Park & Leach Amphitheater

Oshkosh's Riverside Park is located where downtown Oshkosh meets the Fox River.¹⁹⁹ In 2002, debris, contaminated soil, and underground gas holders were removed from the riverside location that once housed a manufactured gas plant.²⁰⁰ The city purchased the property in 2003, and, with a \$200,000 Green Space Grant award and other funding, the community developed a recreational space, which includes a riverwalk and a music venue (Leach Amphitheater).²⁰¹ The project's success has led to continued development efforts.²⁰²

The Leach Amphitheater, which opened in 2005, is an outdoor riverfront music venue that can accommodate up to 7500 visitors per event.²⁰³ The venue, which is operated by the Oshkosh Parks Department,²⁰⁴ has sparked Oshkosh's entertainment scene and continues to generate revenue for the city through events: notably, three festivals, Waterfest, Irishfest, and Oktoberfest, use the facility (the latter

TOWN, WALWORTH COUNTY, WISCONSIN 1 (2000), *available at* <http://censtats.census.gov/data/WI/0605512719475.pdf>. Delavan's industrial history dates back to the mid-1800s; currently, it sits on a freight-rail corridor and Interstate Highway 43. *History of Delavan, Wisconsin*, CITY OF DELAVAN, <http://ci.delavan.wi.us/history.cfm> (last visited Oct. 16, 2011).

197. *See* DNR ROUND ONE, *supra* note 186.

198. *Remediation & Redevelopment Success Stories*, *supra* note 145.

199. *See* CITY OF OSHKOSH, DOWNTOWN ACTION PLAN 18–19 (2000), *available at* http://www.ci.oshkosh.wi.us/Community_Development/Planning_Services/downtown_action_plan.asp.

200. *Riverside Park/Leach Amphitheater*, REMEDIATION & REDEV. PROGRAM (Wis. DNR, Madison, Wis.), Nov. 2007, *available at* <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR777.pdf>.

201. *Id.* The city's plans to expand the park date back to the early 1990s. E-mail from Darryn Burich, Planning Dir., City of Oshkosh, to author (Jan. 13, 2011, 10:26:00 CST) (on file with author).

202. *See* A. NELESSEN ASSOCS., VISION REPORT: CITY OF OSHKOSH 54 (2009) (highlighting that Leach Amphitheater has been a success and contemplating other entertainment avenues that would further redevelopment efforts).

203. LEACH AMPHITHEATER, <http://www.leachamphitheater.com/index.asp> (last visited Nov. 3, 2011).

204. *Parks Department*, CITY OF OSHKOSH, <http://www.ci.oshkosh.wi.us/Parks/> (last visited Nov. 3, 2011).

two being non-existent before the Leach's creation).²⁰⁵

Waterfest is an Oshkosh institution and was a music destination for the area long before the Leach was developed; however, the Leach has enhanced its success. The weekly summer festival series used to have free admission, but with the increase in attendance and the attraction of more popular music acts, it now charges up to \$20 for individual admission on a given night with season passes available that are worth \$200.²⁰⁶ The city estimates that Waterfest has entertained 60,000 to 70,000 guests annually since it moved to the Leach.²⁰⁷

Lost among Oshkosh's entertainment upgrades can be how it got there. Recall that before the Leach Amphitheater became a reality, that portion of Riverside Park was simply a brownfield.²⁰⁸ A little greenspace, a portion of a riverwalk, and one band-shell created a boost in visitors and future development prospects for a mid-sized city.

The present city planner insists that the \$200,000 Green Space Grant "very effectively" guided the project forward by helping pay for cleanup costs.²⁰⁹ Without it, the city would have had to scramble for other funding—funding that Oshkosh is currently having trouble finding to complete the riverwalk that begins at Riverside Park.²¹⁰

The Riverside Park expansion demonstrates the potential benefits of incorporating greenspaces and park-based public facilities into brownfields remediation efforts, and how important a mere \$200,000 can be to moving a project forward. Quite possibly, if Green Space Grant funding was available, such funding could give an extra boost to the currently stalled Oshkosh riverwalk expansion—an expansion that is integral to a Downtown Plan expected to result in nearly 200 created

205. See Erin Crowley, *Top Eleven Events to See in 2011*, THE NORTHWESTERN.COM (Dec. 30, 2010) (on file with the Oshkosh Public Library) (mentioning that 2010 will be the third year for Irishfest and second year for Oktoberfest); OSHKOSH IRISH FEST, <http://www.oshkoshirishfest.com/> (last visited Oct. 16, 2011); *Admission*, OSHKOSH OKTOBERFEST, <http://www.oshkoshoktoberfest.com/admission.htm> (last visited Oct. 16, 2011).

206. *About Waterfest*, WATERFEST.ORG, <http://www.waterfest.org/about.html> (last visited Oct. 16, 2011). For acts that have previously performed at Waterfest, see *Waterfest Distinguished Alumni*, WATERFEST.ORG, <http://waterfest.org/alumni.html> (last visited Oct. 16, 2011).

207. *About Waterfest*, *supra* note 206.

208. See *Riverside Park/Leach Amphitheater*, *supra* note 200.

209. E-mail from Darryn Burich, *supra* note 201.

210. *Id.*

jobs and \$800,000 in property tax value increases.²¹¹

2. Delavan—Borg Instruments Greenspace and Retention Area

Delavan developed a greenspace and storm-water retention area (Borg greenspace) with a \$200,000 Green Space Grant that it received in 2004.²¹² The Borg greenspace is part of the larger Ann Street Rail Corridor brownfields project that is ongoing and part of a community plan to revamp a blighted area.²¹³ The Borg greenspace sits on the former site of Borg Instruments, a local timing device and clock manufacturer.²¹⁴ This brownfield-to-greenspace conversion demonstrates potential success, as opposed to the actual success of Oshkosh's amphitheater.

Overall, the Ann Street Rail Corridor Project received \$329,170 in total brownfield WDNR Site Assessment Grants and \$200,000 through the Green Space Grant program.²¹⁵ The project also received \$625,000 from the Wisconsin Department of Commerce for “blight elimination,”²¹⁶ while the City of Delavan received over \$2 million in general funds from the EPA.²¹⁷

Delavan residents indicated in a survey that the Ann Street Corridor was especially “unpleasant or unattractive,” so it was important for Delavan to alter the perception of that area of town.²¹⁸ Presently,

211. CITY OF OSHKOSH, APPLICATION FOR EPA COMMUNITY-WIDE BROWNFIELDS ASSESSMENT GRANTS: HAZARDOUS SUBSTANCES AND PETROLEUM 18 (2010), available at http://www.ci.oshkosh.wi.us/Community_Development/Planning_Services/assets/pdf/EPA_Assessment_Grant_Petro_Haz_10_1.pdf.

212. *Delavan Borg Instruments*, REMEDIATION & REDEV. PROGRAM (Wis. DNR, Madison, Wis.), Jan. 2009, available at <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR815.pdf>.

213. Telephone Interview with Mark Wendorf, *supra* note 23. The city wanted to redevelop the former Borg site to reduce crime and safety threats in that neighborhood. *Delavan Redevelopment Authority, WI*, BROWNFIELDS 2004 REVOLVING LOAN FUND GRANT FACT SHEET (U.S. EPA, Wash., D.C.), June 2004, available at http://cfpub.epa.gov/bf_factsheets/gfs/index.cfm?event=factsheet.display&display_type=PDF&xpg_id=3665. The redevelopment was also designed to attract commercial development and increase new jobs, in addition to simply adding greenspace. *Id.*

214. *Delavan Borg Instruments*, *supra* note 212.

215. AYRES ASSOCS., FINDING FUNDING FOR YOUR PROJECTS 3 (2009), available at http://www.ayresassociates.com/images/services/general_civil/grant%20brochure%20pdf%20version%202%202009.pdf.

216. *Id.* at 2.

217. *Id.* at 6.

218. VANDEWALLE & ASSOCS., CITY OF DELAVAN, WISCONSIN, COMPREHENSIVE PLAN 14–15 (Common Council Adoption, Nov. 10, 2009).

Delavan wishes to relocate its fire station to the Borg greenspace area, as well as change that area's industrial zone to light manufacturing, commercial, and medium-density housing.²¹⁹ These changes could shift the blighted condition of the Ann Street Rail Corridor to make it a more appealing neighborhood.

Though there has been some development interest around the property, a poor economy halted progress.²²⁰ As it stands, a new car-wash is the only commercial development to spring up adjacent to the property containing the greenspace;²²¹ however, the car-wash development needed funding support for environmental cleanup from the community and State of Wisconsin.²²² We will have to wait for a better economy to truly see what kind of development could prosper near the Borg greenspace.²²³

The Delavan Director of Public Works, who oversees the Ann Street project, insists that the \$200,000 was very helpful to moving the project forward.²²⁴ In an interview, he was adamant that the Borg site significantly cleaned up a blighted area and made the surrounding properties better suited for residential development—which he said the City wants to include in that area's plan through some form of apartment housing.²²⁵ He mentioned that the City planned the retention area before realizing that the Green Space Grant existed.²²⁶ But, upon applying for the Green Space Grant and receiving the award, the project came to fruition much quicker than it would have had the City not obtained an extra \$200,000 in funding.²²⁷

219. *Id.* at 66, 85.

220. Telephone Interview with Mark Wendorf, *supra* note 23.

221. *Id.*

222. *Id.* According to Mark Wendorf, Delavan's Director of Public Works, the car wash needed public and state support primarily because its bank refused to provide funding unless other avenues provided cleanup assistance. *Id.* However, Mr. Wendorf could not say whether the Borg greenspace had anything to do with the car wash developing where it did. *Id.*

223. *See id.* (during which the interviewee insisted that the unfortunate dawn of a recession has restricted the city's ability to attract development more quickly). Mr. Wendorf mentioned that developers were interested in 2003 and 2004, but that by the time the Ann Street cleanup neared completion the economy began to suffer and prospective developers became disinterested. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

The Delavan project was not as instantly and substantially successful as the Oshkosh amphitheater, but it has potential: the Green Space Grant helped Delavan realize what should be done with a blighted property and helped it realize how to incorporate the Borg parcel into the overall plans of the Ann Street Corridor.²²⁸ Moreover, the interviewee said that Delavan will look to the Green Space Grant if there are plans to develop public spaces in the future because the \$200,000 award was helpful in terms of funding and efficiency.²²⁹

D. Maintaining the Green Space Grant

The Oshkosh and Delavan cases demonstrate how powerful greenspace or park space oriented projects can be to facilitating community-wide brownfields redevelopment efforts. Each project made blighted areas of two Wisconsin cities more marketable and improved the quality of life (even if the Delavan project's full impact is yet to be seen).

Unfortunately, not all Green Space Grant awards have resulted in such glowing outcomes. For example, a condominium and lakefront project in Racine, Wisconsin, that had a market value of roughly \$200 million, was put to rest two years ago.²³⁰ The money Racine won through the Green Space Grant—which the city was going to use to develop public space near the condos—was returned by the city.²³¹ Due to the large size of the Racine project, its failure suggests that the Green Space Grant award had very little to do with it actually moving forward. This suggests that a Green Space Grant award has less impact in furthering larger-scale brownfield projects than smaller projects like the Delavan and Oshkosh examples.

Still, in some circumstances, \$200,000 can go a long way. The Oshkosh and Delavan projects suggest that creative funding provisions directed at brownfield-to-greenspace conversions may result in quality of life and economic gains that are well worth the marginal WDNR spending that might be required to push forward smaller projects.

228. *See id.*

229. *Id.*

230. Michael Burke, *The Point Blues: Lakefront Development Plan Collapses*, J. TIMES (Racine, Wis.), Jan. 12, 2008, at 1A; Tom Daykin, *Racine Lakefront Project Canceled*, MILWAUKEE J. SENTINEL, Jan. 12, 2008, at 2D.

231. *City Returned West Racine Grant to Preserve Development Options*, RACINE POST (June 9, 2010), <http://news.racinepost.com/2010/06/city-returned-west-racine-grant-to.html>.

VI. A GREEN SPACE GRANT WITH A PUBLIC-PRIVATE PARTNERSHIP OPTION

The Delavan and Oshkosh examples demonstrate why greater priority should be placed on implementing greenspace redevelopment incentives into brownfields programs. States should build off of programs like the Green Space Grant, not strip away the future use of those grants. Funding for the Green Space Grant may have halted because it was a less attractive option on its face.²³² So, because developments related to the Grant's use have shown economic progress, making the Grant more attractive could increase awareness; and this could be done by loosening the private-use restrictions (such as the twenty-year deed restriction that the Grant imposes).²³³ Increased flexibility may lead to better funding prospects,²³⁴ so relaxing some of the arguably-strict conditions and eligibility rules of the Green Space Grant²³⁵ may be appropriate—though this would have to be done with the definition of “public use” in mind.²³⁶

After phase I and II cleanup occurs in conjunction with Green Space Grant awards, one condition is that “[t]he end use will have a long-term public benefit, including preservation of green space, development of recreational areas or use by a local government.”²³⁷ This seems fair because creating a *public benefit* was a founding reason for this Grant's existence.²³⁸ But, to be reimbursed, a municipality must agree to maintain that end use and own the property for at least twenty years.²³⁹ This ownership and use restriction prevents private entities from reaping cleanup assistance and benefits because private entities, even if developing greenspace themselves, do not have access to this Grant. In

232. See Telephone Interview with Michael Prager, *supra* note 141.

233. Loosening the restrictions responds to the call of some proponents of brownfields regulatory reform who insist on greater flexibility and innovation. See, e.g., Wernstedt & Hersh, *supra* note 13, at 16.

234. See *id.* at 51, 57–58.

235. See WIS. ADMIN. CODE NR § 173.05(1) (current through 669 Wis. Admin. Reg. (Oct. 1, 2011)).

236. Moreover, to make alterations, all statutory provisions guiding NR Chapter 173 may need to be altered because any administrative authority expressed by the WDNR must adhere to the statutory provisions that govern that agency's actions. See Wis. Builders Assoc. v. Wis. Dep't Trans., 2005 WI App 160, ¶ 9, 285 Wis. 2d 472, 702 N.W.2d 433.

237. WIS. ADMIN. CODE NR § 173.05(2)(a).

238. Telephone Interview with Michael Prager, *supra* note 141 (mentioning that creating a “public benefit” is one of the grant's purposes).

239. WIS. ADMIN. CODE NR § 173.17(1)(b).

this way, the twenty-year clause restricts municipalities from attracting economic development in creative ways.²⁴⁰ Moreover, municipalities may shy away from its use because it restricts their ability to alter the property's function for twenty years—in fact, one reason the City of Racine returned its award was because it discovered the deed restriction.²⁴¹

Arguably, allowing private entities to take ownership of and utilize the newly cleaned up land *is* “having a long-term public benefit” because private development could spur job creation or taxable contributions.²⁴² This conception of public benefit is similar to public benefit as defined in the eminent domain context, where plans to revitalize economic areas through economic development have met the public use requirement of the U.S. and state constitutions.²⁴³ For another comparison, a “public improvement,” as it relates to subdivision development in Wisconsin, is something that “improves the value or utility of the subdivision and is made available for use by the public.”²⁴⁴ Added economic development improves the value to the public at large because it brings in jobs and tax revenue, so it is not such a far stretch to consider private uses of land to be public benefits in the brownfields

240. See McCarthy, *supra* note 18, at 293 (arguing that government requirements concerning the future use of a redeveloped plot of land can restrict opportunities for communities to profit off of that land).

241. *City Returned West Racine Grant to Preserve Development Options*, *supra* note 231.

242. See discussion *supra* Part II.B.

243. The Court in *Kelo v. City of New London* held that a city's plan to acquire properties through eminent domain and dispose of them to private developers “to revitalize an economically distressed city,” was in line with the “public use” requirement of the Takings Clause of the Fifth Amendment. 545 U.S. 469, 472, 485, 489 (2005). States may impose stricter “public use” requirements than this, and “public benefit” in the context of chapter 173 of Wisconsin's Natural Resources Code may have a different meaning than “public use” in the context of the Takings Clause, but *Kelo* nevertheless suggests that stimulating an area's economy may logically be thought of as a “public benefit.” See *id.* at 189. Some argue that “the power of eminent domain is needed . . . where recalcitrant slumlords or commercial property owners are sitting on brownfields or underutilized properties that are hurting a community.” Robert S. Goldsmith & Robert Beckelman, *What Will Happen to Redevelopment in New Jersey When the Economy Recovers?*, 36 RUTGERS L. REC. 314, 327 (2009). In New Jersey, the redevelopment of blighted properties falls under the public purpose requirement of eminent domain, consistent with New Jersey's constitution. See N.J. CONST. art. VIII, § 3, ¶ 1 (“The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired.”); Goldsmith & Beckelman, *supra*, at 317.

244. *Rogers Dev., Inc. v. Rock Cnty. Planning & Dev. Comm.*, 2003 WI App 13, ¶ 13, 265 Wis. 2d 214, 666 N.W.2d 504 (defining public improvement and, moreover, holding that the term “public improvement” should not be narrowly construed).

redevelopment framework.²⁴⁵ Moreover, the public at large has access to many private developments, particularly retail establishments and developments that maintain park spaces.²⁴⁶ Thus, if “access” was regarded as a “public benefit,” then even more private developments could satisfy that overall goal.

Greater institutional controls²⁴⁷ for how a municipality or private investor can redevelop a brownfield may hinder economic development in areas tarnished by vacant lots and unappealing job prospects. The twenty-year deed restriction in chapter 173, as is, is an unnecessary control that *could* hinder economic activity because, for twenty years, municipalities using the Green Space Grant cannot sell the greened land or allow private entities to control it. Considering the economy and Wisconsin’s job situation, these restrictions should contemplate cities possibly wanting to sell already *cleaned* land for much-needed private development. Also, the restrictions should contemplate that private entities might be interested in a location if they had rights to the use of adjacent greened land. If one of the goals of allowing the grant is to promote greenspace, whether the greenspace is controlled publicly or privately should not matter—a PPP model is a step toward ensuring community involvement alongside private investment.

A. *A Public–Private Partnership that Encourages Broad-Based Community Support*

PPPs ensure that communities are involved—and when communities are involved, brownfields redevelopment is more likely to meet environmental justice goals or standards.²⁴⁸ Moreover, if the Green

245. Unfortunately, there is no case in Wisconsin that describes what “public benefit” means in the context of chapter 173.

246. The definition of “public” in Wisconsin, adopted from *Black’s Law Dictionary*, is “[o]pen or available for all to use, share, or enjoy.” *Rogers Dev.*, 2003 WI App 13, ¶ 13, 265 Wis. 2d 214, 666 N.W.2d 504 (quoting BLACK’S LAW DICTIONARY 1242 (7th ed. 1999)).

247. “Institutional controls” may be defined as “legal or physical restrictions or limitations on the use of, or access to, a site or facility . . . to prevent activities that could interfere with the effectiveness of a response action.” Amy L. Edwards, *Institutional Controls*, in BROWNFIELDS, *supra* note 6, at 192, 193 (defining activity and use limitation and identifying that “institutional controls are a type of [a]ctivity and [u]se [l]imitation” (quoting ASTM International, *Standard Guide for the Use of Activity and Use Limitations*, 11 ANNUAL BOOK OF ASTM STANDARDS 1282, 1283 (2000))). A deed restriction is a type of institutional control. *Id.* at 196.

248. Davies, *supra* note 138, at 288, 316. Sustainable development is also better facilitated through public–private partnerships. Dernbach & Bernstein, *supra* note 57, at 519.

Space Grant allowed for such partnerships for ownership purposes, then communities might be even more interested than they presently are because the grant would maintain flexibility in the long run for communities using the Grant to do with the property what is best without handcuffing those using it from, essentially, ever changing the property's nature.

A PPP that encourages the swapping of land and its designated purposes is not unforeseen in practice.²⁴⁹ The New Jersey Brownfield Development Area program (BDA program) attempts to develop blighted areas in clusters under the watch of community steering committees and case managers.²⁵⁰ Through the BDA program, private developers and contractors have access to a more diverse array of funding sources and will receive preliminary environmental assessments; all the while, the public steering committee and other community stakeholders are involved in directing a large-scale remediation effort.²⁵¹

In similar form, Sheboygan, Wisconsin's South Pier and Blue Harbor Resort brownfields project is an example of an indirect PPP: the project was not officially designed as a PPP, but the results are similar. The

249. In Elizabeth, New Jersey, a publicly held property "destined for park development" was next to a marina resting in a location primed for commercial activity. Van Hook et al., *supra* note 122, at 151. The "Elizabethport Brownfield Development Area" worked on swapping the public land for land held by private developers so they could develop on the potential park space, which was ready to use and better suited for economic activity. *See id.* The end result of the Elizabethport brownfields project was a massive mixed-use commercial and residential development that is estimated to include over 6000 created jobs. N.J. REDEV. AUTH., 2005 ANNUAL REPORT: CREATIVE COMMUNITY INVESTMENTS 12, available at http://www.njra.us/njra/lib/njra/njra_2005_annual_report.pdf; *see also BDA Sites at a Glance*, N.J. DEP'T ENVTL. PROT. (Dec. 6, 2009), <http://www.nj.gov/dep/srp/brownfields/bda/sites/> (providing specific results from the Elizabethport brownfields project, including commercial and residential end use). It is unclear how much the contemplated land swap had to do with the final project, but, at the very least, the fact that such innovative measures were strongly considered in a successful brownfields redevelopment project is thought provoking.

250. Maro, *supra* note 80, at 174–75. The goal of the BDA program is to "design, coordinate and implement remediation and reuse plans affecting multiple sites in close proximity." David B. Farer, *Brownfields Redevelopment Initiatives: Federal and Selected State Developments*, in *THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE AND BUSINESS TRANSACTIONS: BROWNFIELDS AND BEYOND* 1055, 1151–52 (ALI-ABA, Course of Study, 2010).

251. Maro, *supra* note 80, at 176 (citing van Hook et al., *supra* note 122, at 124–25) (noting that steering committees design and implement informal plans and that the state "make[s] sure assessments are completed"). Because of the collective approach, resources and grants from multiple organizations become available to BDA program developments. *Id.* With all community stakeholders involved, "a for-profit site proposal [could] coincide with the addition of a green space or community-desired site." *Id.* at 178–79.

Sheboygan project used extensive public funding—including over \$3 million in WDNR land recycling and commerce grants—which resulted in part public (beach access, boardwalk, eco-park) and part private (resort, restaurant) property.²⁵² Ultimately, redeveloping brownfields in clusters that involve public and private entities in cooperation could add efficiency to the process, pull in more stakeholders, and provide greater public value.²⁵³

If a land-sharing model through the Green Space Grant ever moves forward, then public approval of such development will likely gain importance. The idea of public approval in brownfields redevelopment has already been contemplated.²⁵⁴ A similar approach would be to have private entities and municipalities partnering to maintain “public relations” teams to form consensus among all stakeholders.²⁵⁵ It is also wise for city planning to involve local residents and the general public because, while public brownfields promotion could spark political action and public approval for redevelopment,²⁵⁶ a lack of communication could discourage community support.²⁵⁷

The “EPA’s Brownfields Program empowers states, communities, and other stakeholders to work together to prevent, assess, safely clean up, and sustainably reuse brownfields.”²⁵⁸ In light of the present

252. 2006 Phoenix Award Community Impact Winner: Sheboygan Harbor Center, REMEDIATION & REDEV. PROGRAM (Wis. DNR, Madison, Wis.), July 2006, available at <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR759.pdf>; see also Redevelopment and Reuse, *supra* note 135, at 45–54 (providing the South Pier’s mixed-use plan details and financing breakdown).

253. Van Hook et al., *supra* note 122, at 114.

254. Pippin, *supra* note 28, at 604–05; see also Davies, *supra* note 138, at 298 (highlighting that in Michigan some grants require “local support” for a project).

255. See generally Howard C. Landau, *Building Consensus for the Project*, in BROWNFIELDS, *supra* note 6, at 149, 149–54. Others have suggested “public dialogues,” where community residents can voice concerns about a project, and “working groups,” where a smaller number of community leaders sit down with redevelopment officials and strategize community remediation efforts. Chambers, *supra* note 7, at 250–51.

256. Robertson, *supra* note 33, at 1090.

257. See, e.g., Janice Christensen, *Garden Park: A Catalytic Project*, RIVERWEST CURRENTS (May 3, 2009), <http://www.riverwestcurrents.org/20090503169/News/Articles/Garden-Park-A-Catalytic-Project.html> (highlighting resident backlash over the Redevelopment Authority of Milwaukee’s failure to communicate a brownfields redevelopment plan).

258. *Delavan Redevelopment Authority, WI*, *supra* note 213; see also *Sustainable Reuse—Ensuring that a Brownfield’s Reuse Offers the Greatest Social, Economic, and Environmental Benefit to the Community*, BROWNFIELDS SUCCESS STORIES (U.S. EPA, Wash., D.C.), Oct. 2003, available at http://epa.gov/brownfields/success/Green_Sust_Dev.pdf (explaining the

economy, partnership efforts are a logical way to spur economic revitalization through brownfields redevelopment. Thus, states should not ignore the positives of implementing PPPs that take advantage of economic benefits directly or indirectly related to brownfield-to-greenspace conversions.²⁵⁹ Using partnership initiatives with greenspace redevelopment is consistent with environmental cleanup, job creation, and local taxability improvements—three key components to successful brownfields redevelopment.²⁶⁰

B. *The Public–Private Green Space Grant*

Present and future provisions must not restrict or dissuade municipalities with available funding from working with private entities or facilitating brownfields redevelopment in creative fashions. In fact, any provision should encourage creativity, innovation, and partnership. If “brownfield conversions may prosper . . . when the *public sector owns the land in question, local leaders support both the conversion itself and allocation of the converted land to greenspace*, environmental groups get mobilized, estimates of the costs of maintenance of greenspace are not overestimated, and the federal or state government lends support,”²⁶¹ then the public should obtain an ownership stake in the process and greenspace should be involved. This Part explains how adjustments to Wisconsin’s Green Space Grant that would allow for use by PPPs could

program’s intent to encourage cooperation and efficiency throughout the redevelopment process).

259. *Greenspace Uses*, *supra* note 45, at 2. For example, in Fitchburg, Massachusetts, a \$200,000 site assessment grant from the EPA was used to help develop a formerly blighted industrial site into Riverfront Park. *Id.* at 1–2. Fitchburg’s Riverfront Park triggered the development of a major street, parking, a riverwalk, and additional nearby brownfields cleanup. *Id.* at 2. Similarly, Jordan Valley Park in Springfield, Missouri, bolstered the economy of that city. *More than the Environment*, *supra* note 10, at 1–2. The Jordan Valley space was formerly a car dealership and factories, but now houses a public park, civic building, and an amphitheater, among other features. *Id.*

260. Telephone Interview with David Misky, *supra* note 42. States have also used land banking. “Land banking is the process through which local governments acquire and assemble properties to ‘bank’ land for short or long-term strategic public purposes.” Silva, *supra* note 3, at 614. See generally Tappendorf & Denzin, *supra* note 54. Through land banking, communities have turned swaths of blighted land into affordable housing. Silva, *supra*, at 619–21 (identifying land banks in St. Louis, Louisville, and Atlanta that developed low-income and public housing). Similar to brownfields redevelopment, land banking is hampered by funding restrictions and tax foreclosure laws. *Id.* at 628. Arguably, these restrictions prevent economic redevelopment in those areas—especially considering the vast land segments that land banks are designed for. *Id.* at 621–22.

261. Brown & Kraft, *supra* note 119, at 381 (emphasis added).

better facilitate brownfield-to-greenspace conversions and, generally, improve opportunities for communities to remediate contaminated properties.

Projects receiving Green Space Grant funding were supposed to attract businesses and increase property values.²⁶² Thus, it seems that the Grant's motive was to balance environmental and economic progress. Some believe that private investments stimulated by brownfield-to-greenspace conversions could trigger millions of dollars worth of other improvements,²⁶³ so it seems odd that greenspace-specific programs would not be taken seriously by the state for future funding purposes.²⁶⁴ Further, when made available, the demand for the Green Space Grant was almost twice what the Grant was able to meet,²⁶⁵ and municipalities continue to request money for it despite the present lack of funding.²⁶⁶

While awarding additional money through the Grant in 2007, former Wisconsin Governor Jim Doyle recognized that brownfield-to-greenspace conversions are vital to restoring jobs and increasing property values.²⁶⁷ Delavan's Ann Street Corridor and Oshkosh's Leach Amphitheater have done just that. Therefore, it seems misguided to not continue funding the Grant.

Section 173.05(2)(a) of Wisconsin's Natural Resources Code maintains that the end use must have a long-term *public benefit* for parties to receive grant money under that section.²⁶⁸ If this is the real goal of the grants allowable under chapter 173, then, arguably, the

262. *Hassett Announces New DNR Grants to Help Clean Up Brownfields for Public Use*, *supra* note 187. At the Green Space Grant's inception, former WDNR Secretary Scott Hassett said that "[t]urning urban brownfields into parks, libraries and soccer fields is as critical to growing Wisconsin's economy as other factors," and acknowledged that the Green Space Grant "helps communities rid themselves of environmental threats and blighted structures and replace them with new green spaces and public facilities." *Id.*

263. *Id.*

264. *See supra* notes 192–93 and accompanying text.

265. *Hassett Announces New DNR Grants to Help Clean Up Brownfields for Public Use*, *supra* note 187.

266. E-mail from Shelley Fox, NR Grant Specialist, Wis. DNR, to author (Jan. 10, 2011, 11:44:00 CST) (providing a list of four Wisconsin cities that have applied for at least \$50,000 in funding through the grant, but since no funds are available each city has received nothing).

267. Press Release, Office of the Governor, Governor Doyle Announces \$850,000 to Clean Up Brownfields and Create Public Spaces, Jan. 17, 2007, *available at* <http://dnr.wi.gov/ORG/aw/tr/rbrownfields/greenspace/gs-01-17-07.pdf>.

268. WIS. ADMIN. CODE NR § 173.05(2)(a) (current through 669 Wis. Admin. Reg. (Oct. 1, 2011)).

twenty-year provision could impede that goal by being, in fact, too strict.²⁶⁹ This is especially so if “public benefit” is meant to be broadly construed, similar to “public improvement” in the subdivision development context described earlier,²⁷⁰ or if economic activity is actually a public benefit similar to those activities that have satisfied the public use doctrine in eminent domain contexts.²⁷¹ Restructuring the twenty-year provision to account for a broader understanding of what a “public benefit” is could make the Grant more conducive to private development. This can be done in a couple of ways.

First, the state could leave the deed restriction as is, but maintain that private entities could own a property held for “public benefit” for twenty or more years and become eligible for Green Space Grant funding just as a public body could. This is likely unfeasible because it would require a very broad interpretation of “public benefit” and also alterations of other administrative provisions that guide the Green Space Grant’s application.²⁷² Moreover, private entities are not likely to develop *only* greenspace (though, they could, conceivably, use the funding for solely one portion of a larger development).

Second, the state could mandate that if municipalities utilizing the Green Space Grant wish to sell a portion of the redeveloped land before the twenty-year deed restriction passes, they must then maintain a public-use easement over the property for park space.²⁷³ “Greened” brownfields are frequented by nearby residents and workforce,²⁷⁴ so a

269. Making the deed restriction in the Green Space Grant more flexible, or even just allowing its guidelines to be read more liberally, is consistent with suggestions in other states that say interpreting laws more liberally could help overcome limitations to economic development. See Reshwan, *supra* note 54, at 697 (highlighting that the Georgia General Assembly has suggested that, to encourage effective partnerships that could overcome economic limitations to development, the Redevelopment Powers Law in Georgia should be liberally construed).

270. See *Rogers Dev., Inc. v. Rock Cnty. Planning & Dev. Comm.*, 2003 WI App 13, ¶ 13, 265 Wis. 2d 214, 666 N.W.2d 504.

271. See *supra* note 243 and accompanying text.

272. See WIS. ADMIN. CODE NR § 173.03(5). Notably, an “[e]ligible project” means the remediation and redevelopment of an eligible site or facility that has a long-term public benefit, *including the preservation of green space, the development of recreational areas, or the use of a property by the local government.* *Id.* (emphasis added). Though the present language does not explicitly preclude any private economic development efforts from being public benefits, it seems that chapter 173 as a whole fails to consider the possibility.

273. Schofield, *supra* note 113, at 980–82.

274. Christopher De Sousa, Co-Dir. Brownfields Research Consortium, Presentation at Brownfields Study Group Meeting 13 (May 25, 2010), *available at*

cooperative effort involving an easement could be put to good use. More research should be done to determine the feasibility of using public-use easements to better facilitate private involvement in brownfields projects while still complying with the base goals of the Green Space Grant.

Nonetheless, I think the best approach would be to keep the deed restriction as is, but build on what can be done with the property. If a municipality develops a brownfield single-handedly, with the goal of using the brownfield for greenspace and using the Green Space Grant for cleanup assistance, the twenty-year provision should stay—and at the end of twenty years, the municipality should be able to do with the property as it wishes.

However, the municipality should have an option to let a private entity develop on the property—in a planned context—so long as that private entity maintains *part* of the property redeveloped with assistance by the Green Space Grant, as its designated use, for *perpetuity*. The Grant should allow municipalities and private entities to share in the development of greenspace and, ultimately, allow for part of the land cleaned up through the Green Space Grant to be converted into taxable, privately-owned property. Requiring the portion developed as greenspace to be kept in that form for perpetuity would ensure that a “narrowly-read” conception of the public benefit requirement is met (i.e., a conception that excludes any form of private development from having a “public benefit”). The idea of maintaining the public benefit for perpetuity was actually contemplated during the Grant’s planning stage before the twenty-year stipulation was set.²⁷⁵ Thus, it is not unreasonable to consider this option given the benefit a private developer would receive through added cleanup assistance that is otherwise unavailable to private entities.

Furthermore, municipalities may consider purchasing and converting a contaminated lot into greenspace after long-realizing that the lot has lost potential for development in the private market. Potentially, developers may become interested in the lot again upon realizing that cleanup would be paid for with public dollars or by simply noticing the

<http://www.dnr.state.wi.us/Org/aw/rr/rbrownfields/bsg/> (highlighting that 72% of survey respondents visited greened brownfields once per week, while 25% visited daily).

275. See Telephone Interview with Michael Prager, *supra* note 141 (the interviewee mentioned that initially the WDNR considered making the twenty-year provision of the Green Space Grant a deed restriction for perpetuity).

effect that the cleaned-up property had on the area's business potential. Allowing part of the property to be sold gives municipalities in dire need of private investment a unique option for economic growth, while the "in perpetuity" provision ensures that a public benefit will be maintained. In fact, this could work similar to the alliance approach described in Part III.C.²⁷⁶ A development could be simultaneously owned and operated by public and private entities; and the resulting PPP could make decisions to sell the redeveloped greenspace to other private entities for private development, or, it could maintain portions of the land as public greenspace that is publicly maintained while allowing private developments on the remaining land.

A \$200,000 cleanup award may seem minuscule in the big picture, but that amount could be instrumental to facilitating redevelopment because one award can trigger more project investment and awareness.²⁷⁷ More importantly, since banks are so reluctant to offer loans for brownfields redevelopments, giving municipalities other methods to cleanse brownfields *for* interested private developers may help those developers secure loans.²⁷⁸ Restructuring the Green Space Grant and applicable chapter 173 guidelines to allow private entities to do what they want with portions of brownfields that are made ready-to-reuse, so long as the other part of the plot is maintained as greenspace for perpetuity, ensures that public benefit exists and fosters private-party interest. If this provision is implemented, then private entities could offset cost disincentives, and brownfields might even become more attractive to developers than greenfields—which, for many reasons, such as pollution, sprawl reduction, and municipal economic and job interests, may be an ideal result. Further, allowing a

276. For a description of the alliance approach that is used in some northwestern European brownfields projects and an example of its use in Nantes, France, see *supra* Part III.C and note 134.

277. Telephone Interview with Michael Prager, *supra* note 141. Particularly, if the public is willing to spend money on a project, then private investors might become less risk averse when it comes to investing their own funds, which demonstrates how one award's influence could trickle down to other funding sources as well. See *Greenspace Uses*, *supra* note 45, at 2 (highlighting an Atlanta brownfields redevelopment project where one of the development partners said that a small EPA award helped move the project forward and "legitimize" the project because the award "showed that [the project] passed a level of scrutiny in a national competition").

278. See Telephone Interview with Mark Wendorf, *supra* note 23 (where the interviewee insisted that the singular commercial development in recent years since the Ann Street redevelopment began would not have happened without public support because the developer's bank was *frightened* by funding a brownfield project).

municipality to partition off cleaned-up property that it owns encourages cost-sharing, promotes efficiency, and alleviates risk—all marks of successful brownfields remediation efforts.²⁷⁹ Because this suggestion is based on the Green Space Grant, the large economic and even larger environmental benefits of redeveloping brownfields into greenspace—and the original purpose of the Green Space Grant—are still in place.

Ultimately, the Green Space Grant must be maintained, not ignored or stripped of funding. If it is maintained, it should incorporate more flexible measures, such as those described in Part VI.B.

VII. CONCLUSION

Success obtained by WPRI prompted the WDNR to apply to the EPA for an additional \$1 million to continue funding that initiative.²⁸⁰ The momentum resulting from WPRI's success should be used to promote greenspace initiatives and implement more innovative greenspace redevelopment measures. The Green Space Grant, when initially funded, was a creative and innovative approach that helped spark brownfield cleanup efforts, and the Oshkosh and Delavan success stories show that marginal funding for small greenspace contributions can be helpful to certain projects. However, stripping that movement away by not funding the Green Space Grant crushes any momentum previously obtained.

Municipalities may shy away from adding greenspace because of the costs they perceivably incur by maintaining it—especially since many municipalities are currently having trouble funding their park systems.²⁸¹ Yet, Milwaukee has seen over seventy brownfields success cases since 2000, and estimates show that for every \$1.00 the city put in, it received \$37.00 of private investment.²⁸² Thus, areas plagued by brownfields should strongly consider using their own available funds and grant packages because private investment likely follows those investments.

279. Van Hook et al., *supra* note 122, at 149.

280. See Marek & Gore, *supra* note 179, at 1, 3.

281. Telephone Interview with Michael Prager, *supra* note 141; see also DE SOUSA, *supra* note 5, at 190 (“[T]he financial challenges involved in cleaning up, constructing, and even justifying the expenditure of funds for greening projects is very difficult given the budgetary predicaments of many cities and states.”).

282. David Misky, Assistant Exec. Dir.—Sec’y, Redev. Auth. of the City of Milwaukee, Presentation at the Minn. Brownfields Reclaiming Recalcitrant Brownfields Forum 36 (Nov. 23, 2010), http://assets.mnbrownfields.org/Misky_CityMilwaukee.pdf.

Whether the budget will provide funds is one aspect, but the laws that control grant and award packages for potential brownfields redevelopments must be flexible enough to induce interest and promote activity. Wisconsin should attempt to incorporate greenspace developments and PPPs into its existing brownfields programs, but the laws must allow for such flexibility—strictly limiting “public benefit” solely to municipally-operated projects ignores the potential public gains made by encouraging private involvement, such as increased tax revenue and jobs. The Oshkosh and Delavan developments show that marginal greenspace investment by the state can go a long way toward economic progress in blighted areas—even during an economic recession. So, even though the Green Space Grant maxes out at \$200,000, using the Grant to help fund PPP efforts could bring a mixture of public benefit and private investment to struggling areas, with the potential to trigger economic activity.

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