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Silent Blight: New York's Brownfields & Environmental Justice

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I. Introduction

The past decade has seen a flurry of state and federal legislation and initiatives designed to recapture vast tracts of land that are the remnants of once vibrant manufacturing and industrial sites. These sites known as “brownfields,” are defined as “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.”¹ A growing number of states, such as Pennsylvania,² Connecticut³ and New Jersey⁴ have instituted measures designed to encourage the redevelopment of brownfields. In 2002, the United States Congress enacted the “Brownfields Reform and Small Business Liability Revitalization Act,”⁵ which provides a host of incentives including limitations on

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1. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(a)(39)(A), 115 Stat. 2356 (2002) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter “SBLRBRA”]. This varies from the definition used by the Environmental Protection Agency, which defines “brownfields” as “[a]bandoned, idled, or under used industrial and commercial facilities/sites where expansion or redevelopment is complicated by real or perceived environmental contamination.” U.S. ENVTL. PROT. AGENCY, TERMS OF ENVIRONMENT, *available at* <http://www.epa.gov/OCEPAterms/bterms.html> (last visited June 2, 2003). For a forthcoming article discussing the relief provided by the SBLRBRA, *see infra* note 6.

2. *See* Land Recycling and Environmental Remediation Standards Act, 35 PA. CONST. STAT. §§ 6026.101—6026.908 (2003) (“Act 2”).

3. *See* CONN. GEN. STAT. § 22a-133k (2001). P.A. 94-198, passed in 1994, amended subsection (a) of the statute in order to allow for differing standards based on intended use of the redeveloped site. For a discussion of the benefits of Connecticut’s legislative initiative, *see infra* Part III.

4. *See* Brownfield and Contaminated Site Remediation Act, N.J. STAT. ANN. § 58:10B-1.1 (West 2002).

5. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended at 42 U.S.C. §§ 9601, 9604, 9605, 9607, and 9622, and added 42 U.S.C. § 9628 (2002)).

future liability for those willing to redevelop brownfields.⁶ Standing in stark contrast to these state and federal initiatives is New York's inability to pass similar brownfields legislation in order to address its significant stockpile of brownfields, which continue to blight many of New York's urban, minority populated neighborhoods.

New York has not entirely ignored its brownfields problem. In June 2001, the New York State Assembly passed the Brownfield Site Remediation Act, or "A. 9265,"⁷ designed to promote the redevelopment of brownfields. The New York State Senate did not act on A. 9265 and it died in 2002.⁸ New York's inability to enact comprehensive brownfield redevelopment legislation remains an embarrassing reality, especially in light of surrounding states' ability to enact such legislation.⁹ The demise of A. 9265, however, is not a total loss, as the bill lacked some fundamental elements found in other legislation that may better serve the goal of redeveloping brownfields. This comment suggests that future legislation should more effectively address potential redevelopers' concerns, particularly in dealing with future liability and required cleanup standards, and should also maintain adequate guarantees of meaningful community participation.

One of the anticipated benefits of the bill was to improve the environmental and economic quality of life for lower income, minority neighborhoods,¹⁰ who many claim bear a disproportionate

6. For a comprehensive review of the Small Business Liability Relief and Brownfields Revitalization Act, see Joel A. Mintz, *New Loopholes or Minor Adjustments?: A Summary And Evaluation of the Small Business Liability Relief and Brownfields Revitalization Act*, 20 PACE ENVTL. L. REV. 405 (2002).

7. See A. 9265, 2001 Assemb., Reg. Sess. (N.Y. 2001); see also A. 8722-C, 1999 Assemb., Reg. Sess. (N.Y. 1999).

8. A. 9265, 2001 Assemb., Reg. Sess. (N.Y. 2001). The bill, which did not receive any "No" votes, was "referred to rules" by the New York State Senate on June 26, 2001 and "died" in the Senate on January 9, 2002. Subsequently, A. 9265 was returned to the Assembly on Jan. 9, 2002, committed to the Assembly's "ways and means" on February 5, 2002, and received no further serious consideration. See also *infra*, note 141.

9. See *supra* notes 2-4.

10. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0108 (N.Y. 2001); Press Release, N.Y. State Assembly, Assembly Majority Seeks to Clean Up and Develop 'Brownfields': Legislation Backed by New York City Partnership and Chamber of Commerce (June 19, 2001), available at <http://assembly.state.ny.us/Press/20010619/> (quoting Assemblyman Ruben Diaz, Jr. (D-Bronx): "[t]his bill will go a long way to ensuring that community groups can turn many of these eyesores into waterfront access and other venues. . . . These kinds of recreational areas are very much needed in neighborhoods of color, such as the South Bronx.").

share of environmental burdens.¹¹ The movement to remedy this inequity is commonly called "environmental justice."¹² The factors impacting whether or not legislation will assist the effort of redeveloping brownfields and promoting environmental justice requires a multi-pronged analysis. This comment recognizes that a complete prediction of the success of brownfield legislation cannot be made through statutory analysis alone. Many factors resting outside of the legislature's scope of influence and authority must work in tandem to ensure broad success in brownfield redevelopment.¹³

Economic factors play a considerable role in keeping poorer minorities in environmentally undesirable neighborhoods.¹⁴ This

11. See BUNYAN BRYANT, ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 10 (Bunyan Bryant ed., 1995); Robert R. Kuehn, *Environmental Justice: The Merging of Civil Rights and Environmental Activism: Remediating the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT. 625, 627-28 n.11 (1994) (citing Bunyan Bryant & Paul Mohai, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 167 (Bunyan Bryant & Paul Mohai eds., 1992)); UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13-23 (1987); Marilyn Anderson Rhames, *Peekskill Leaders Allege Environmental Racism*, THE JOURNAL NEWS, Aug. 17, 2001, at <http://www.thejournalnews.com/newsroom/081701/17peekskillbay.html> (last visited June 2, 2003).

12. The Environmental Protection Agency defines "Environmental Justice" as: [T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

U.S. ENVTL. PROT. AGENCY, REGION 2, INTERIM ENVIRONMENTAL JUSTICE POLICY (2000) (citing U. S. ENVTL. PROT. AGENCY OFFICE OF FED. ACTIVITIES, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS in EPA'S NEPA COMPLIANCE ANALYSIS 7-8 (1998)); see also Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384 (1994).

13. The New York State Constitution does not allow any public funds to go toward private enterprise. See N.Y. CONST. art. VII, § 8 ("The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking. . . ."); see David L. Markell, *Some Overall Observations About the 1996 New York State Environmental Bond Act and a Closer Look at Title 5 and Its Approach to the "Brownfields" Dilemma*, 60 ALB. L. REV. 1217, 1230 (1997).

14. See John S. Applegate, *Risk Assessment, Redevelopment, and Environmental Justice: Evaluating the Brownfields Bargain*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 243, 247-48 (1999), stating:

The movement away from the city centers . . . began long before liability for environmental clean-up was even imagined, and this migration had to

reality is particularly acute in New York, which is one of the oldest industrialized states and home to many urban areas plagued by the by-product of our modern economy's natural evolution.¹⁵ By investing in depressed economic neighborhoods affected by brownfields, the prospective developer's normal weighing of the burdens and the benefits of investing is compounded. The same factors that are involved in this complex economic analysis, such as juggling risk, expected return on investment and required costs to build, among others, may even directly conflict with the goals of environmental justice:

In so far as the quest for environmental justice is a quest for environmental quality and social justice, there is a natural tension between environmental justice and market mechanisms. . . . [J]ustice and the market are not easy to reconcile. In the absence of any example in history that could suggest that the market *per se* provided the mechanisms for social justice, there is nothing to suggest that it could provide the mechanisms necessary for environmental justice.¹⁶

Environmental justice has emerged as its own, definable movement, growing out of the larger struggles that seek to remedy

do with the availability of automobile transportation, the attractions of the suburbs, post-war increases in real earnings, and patterns of de jure and de facto racial segregation. Therefore, simply modifying environmental liability itself cannot bring the industry back. Other incentives – tax abatements, worker training, better schools, and the like – must carry that positive burden. . . . Nevertheless, environmental liability does have a supporting role to play in revitalization, if only because it is an obstacle that can be removed to facilitate redevelopment.

Id.; see also *Hearing before the Subcommittee on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103rd Cong. 65-66 (1993) (statement of Kent Jeffreys).

15. See Glen M. Vogel, P.E., *An Examination of Two of New York State's Brownfields Remediation Initiatives: Title V of the 1996 Bond Act and the Voluntary Remediation Program*, 17 PACE ENVTL. L. REV. 83, 87-91 (1999); Robert S. Berger et al., *Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfield Redevelopment*, 3 BUFF. ENVTL. L.J. 69, 115 (1995); Paul D. Flynn, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463, 471 n.44 (2000) (citing Chet Bridger, *Buffalo's Brownfields Dilemma State Law Makes It Very Difficult to Redevelop Polluted Land. Yet if such 'Brownfield' Acreage Isn't Opened Up, the City Will Continue to Decline, while Rural Farmland is Snatched Up for Industrial Development, Leading to Further Sprawl*, BUFF. NEWS, May 23, 1999, at 5B).

16. See Klaus Bosselmann & Benjamin J. Richardson, *New Challenges for Environmental Law and Policy*, in ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY 3 (Klaus Bosselmann & Benjamin J. Richardson eds., 1999); see also *Been*, *supra* note 12, at 1385.

enduring economic, social and political issues that have largely contributed to the disparate treatment of minorities.¹⁷ The environmental justice movement grew naturally out of the Civil Rights movement.¹⁸ Environmental justice has attempted to navigate several roads in achieving its goals, including joining forces with the mainstream environmental movement and filing actions based on equal protection¹⁹ and other statutorily granted rights.²⁰ Minorities seeking to gain redress for their disproportionate share of the environmental burden, however, have found scant help from the courts²¹ and often come part-and-parcel with a free, market-driven economy.²² It is imperative, therefore, to identify the various, intertwining issues that impact the persistence of brownfields in urban areas, and then craft legislation that serves as a true catalyst to overcoming these issues.

This comment will analyze the economic, social and political dynamics surrounding brownfields in minority neighborhoods, and discuss how legislators and the governor must leverage all tools at their disposal to achieve brownfields initiatives that will simultaneously serve to address environmental justice goals. Although A. 9265's primary focus was on redeveloping brownfields making no specific reference to environmental justice, New York's

17. See Robert D. Bullard, *Introduction to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 9 (Robert D. Bullard ed., 1993).

18. See generally, Bullard, *supra* note 17, at 9 (analyzing the Civil Rights movement in depth, as well as its impact on the growth of environmental justice).

19. See N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 9 (1986) (noting threat of action based on both Title VI of the 1964 Civil Rights Act and U.S. Department of Transportation regulations, where minority group successfully negotiated with the North Carolina DOT to block the construction of a planned highway to be routed through their community following a finding by the U.S. DOT Director of Civil Rights that the highway construction would "constitute a prima facie violation.").

20. For a summary of various approaches and statutes used to litigate environmental justice claims, and the Supreme Court's reluctance to afford plaintiff's the right to pursue an action absent a finding of "discriminatory intent," see Valerie P. Mahoney, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361, 382-94 (1999).

21. See *id.*; Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality In Urban Revitalization*, 21 ECOLOGY L.Q. 705, 708 n.7 (1994).

22. See Eleanor N. Metzger, *Driving the Environmental Justice Movement Forward: The Need For A Paternalistic Approach*, 45 CASE W. RES. L. REV. 379, 383 (1994) ("The poor are more likely to tolerate and, in fact, even encourage commercial development in their communities. . . . [T]he poor, because of their economic deficit, focus on the economic benefits industry offers rather than on the threat of negative environmental effects that are endemic to industry."); Bosselmann & Richardson, *supra* note 16, at 2; Been, *supra* note 12, at 1391.

failure to enact such legislation had the very real effect of harming the state's minority and urban communities.²³ Indeed, the normal operations of government often significantly, though perhaps unintentionally, ignore or harm minority interests, thus dampening the efforts of the environmental justice movement.²⁴ Effective legislation would not only spur redevelopment of brownfields, but would also improve the environmental condition and economic vitality of urban neighborhoods.

Part II of this comment contains a brief historical overview of the environmental justice movement, as well as a discussion of the unique characteristics of brownfields in comparison to more environmentally harmful sites such as hazardous waste and wastewater treatment plants. Part II also analyzes the intertwining economic and social issues, as well as New York's unique political system that all contribute to the continuing presence of brownfields in New York's urban, minority communities.²⁵ Part III analyzes the shortcomings of A. 9265 and discusses how future legislation should include a more flexible cleanup standard and contain clearer risk-defining provisions. This comment concludes that legislation containing strong economic incentives that attract willing investors will greatly enhance the probability of redevelop-

23. The "Purpose or General Idea" of the bill was to "create a comprehensive brownfield site cleanup program and financial incentives for its implementation." A. 9265, 2001 Assemb., Reg. Sess. (N.Y. 2001). The bill makes no mention of minority interests, though, if passed, it would have limited the program to areas with depressed economies, often having a greater concentration of minority residents. *Id.* Though beyond the scope of this comment, the extent of the role of environmental justice advocates in the drafting of A. 9265 raises interesting questions. For instance, what role did environmental justice advocates play in the drafting of cleanup goals and community participation provisions? Were environmental justice advocates too demanding with respect to the higher cleanup goals, or did environmentalists push for these higher standards against the wishes of communities seeking assistance in redeveloping long-depressed local economies? For a general discussion of the relative balance between an environmental focus and a redevelopment focus of the environmental justice movement, see Flynn, *supra* note 15, at 485-90.

24. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 810 (1992).

25. A detailed statistical demographic examination of the prevalence of brownfields in minority communities is beyond the scope of this comment. For background demographic data demonstrating the strong correlation between lower per capita income and minorities in, for instance, New York City neighborhoods, see William A. Bowen, *New York City: Percentage Black Population 2000*, in DIGITAL ATLAS OF NEW YORK CITY (2001), at http://130.166.124.2/ny_1.html (last visited June 2, 2003) (providing maps based on the 1990 and 2000 Census showing the number and percentage of African-American population as well as the 1989 income level of African-Americans by neighborhood).

ing brownfields in lower income neighborhoods, and thereby advance the goals of environmental justice.

Part II: The Environmental Justice Movement

RACE AND THE ENVIRONMENT

Environmental justice is one element of the broader equality struggle,²⁶ and seeks to remedy the disproportionate environmental harm suffered by minorities and lower income communities.²⁷ While the struggle for racial equality has a long, well-documented history, environmental justice is a relative newcomer.²⁸ First, a brief analysis of the mainstream environmental movement is important to appreciate the genesis of the environmental justice movement.

The mainstream environmental movement can be described as one in line with the "liberal pluralist" model, which is to say that it emphasizes groups as the key political action unit.²⁹ As such, these movements often mature in a relatively predictable way:

[T]he model stresses open access - the penetrability and heterogeneity of the political system. The model assumes that interest groups are homogeneous and easily defined, making it possible for representatives to represent accurately myriad holders of the interest. It also assumes, and celebrates, the notion that if

26. See Flynn, *supra* note 15, at 239 (discussing the lack of Title VI litigation relating to brownfields redevelopment as indicative of the environmental justice movement's focus on "environmental self-determination and community participation over the environment and justice. . ."); *Hearing before the Subcommittee on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103rd Cong. 64 (1993) (statement of Kent Jeffreys) ("[E]nvironmental problems - from a minority perspective - are rather trivial in comparison to the larger economic and civil liberty issues: solve these and you have solved most, if not all, of the environmental inequities."); James L. Huffman, *Free Market Environmentalism and Fairness*, in ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY 279 (Klaus Bosselmann & Benjamin J. Richardson eds., 1999).

27. See UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13-23 (1987).

28. See Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 539 (citing *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), as the beginning of the litigation component of the environmental justice movement); see also Bullard, *supra* note 17, at 9.

29. See DAVID SCHLOSBERG, ENVIRONMENTAL JUSTICE AND THE NEW PLURALISM: THE CHALLENGE OF DIFFERENCE FOR ENVIRONMENTALISM 5 (1999).

interests are organized well, and are supported by ample resources, participants with those interests will find success. . . .³⁰

The mainstream environmental movement proved no exception, with "major groups in the movement [having] settled comfortably into their roles within liberal pluralism and into their representative interest-group offices in Washington, D.C."³¹ The inherent risk in the liberal pluralist model is that the movement can easily, though perhaps unintentionally, fail to represent the interests of a large block of its membership. Leaders of the movement may unwittingly assume that all interests and groups are represented, thus the movement becomes a "biased" pluralism, with little or no protection for unrepresented minorities.³² This phenomenon can create tension, especially where leaders pursue those causes most likely to succeed at the expense of less popular, though equally or more pressing causes.³³

The mainstream environmental movement has enjoyed considerable success, though at the expense of those advocating for less popular causes.³⁴ The goal of any movement, however, is largely driven by this need to achieve success. The environmental movement's success requirement leads to the isolation and marginalization of more urban, lower income and minority interests that leaders seem to have deemed counter-productive to the movement's continued vitality and success.³⁵ Thus, the mainstream environmental movement failed to effectively include minority representation, essentially silencing minority voices in the larger environmental discourse.³⁶ In this regard, a claim of discrimination within the environmental movement itself is not unfounded. As one commentator notes:

While the lack of minority representation in the offices and on the boards of the major environmental groups was a focus, the more telling complaint centered on the movement's focus on natural resources, wilderness, endangered species and the like, rather than toxics, public health, and the unjust distribution of

30. See SCHLOSBERG, *supra* note 29, at 5.

31. See *id.* at 6.

32. See *id.* (citing WILLIAM CONNOLLY, *THE BIAS OF PLURALISM* 16 (1969)).

33. See *id.*

34. See *id.* at 7.

35. See *id.* at 6.

36. See Dorceta Taylor, *Environmentalism and the Politics of Inclusion*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 53 (Robert D. Bullard ed., 1993); see also SCHLOSBERG, *supra* note 29, at 6.

environmental risks. These issues of interest to low-income communities and communities of color had been left off the environmental agenda; the new movement's bringing them to the fore helped to expose the bias of the major groups' concerns.³⁷

Minorities understandably grew disenchanted with the environmental movement, which failed to recognize the fact that minorities were increasingly surrounded by environmentally dangerous facilities and groundwater conditions.³⁸ The environmental justice movement was a response to mounting frustration with the mainstream environmental movement, and as minority movements and activism have been with us for some time, it was logical that environmental justice, like the mainstream environmental movement before it, borrowed strategies and tactics from the Civil Rights movement.³⁹ Specific instances of minority protest and activism can be found in the early to mid 1980s. For example, in Warren County, North Carolina, African-American citizens were arrested during a protest of the siting of a PCB disposal facility in their community despite the fact that it had the state's shallowest water table and, in South Chicago, Illinois, African-American children chained themselves to waste-filled dump trucks in protest.⁴⁰

A watershed study published in 1987, *Toxic Wastes and Race in the United States*,⁴¹ presented compelling evidence that Afri-

37. See SCHLOSBERG, *supra* note 29, at 9.

38. See Taylor, *supra* note 36, at 54.

39. Lazarus, *supra* note 24, at 787 n.10.

The environmental movement's prominence in the aftermath of the civil rights movements' successes in the 1960s was not mere happenstance. Environmental groups not only adopted organizational structures, civil disobedience approaches, and litigation strategies based on those utilized by civil rights organizations, but also used the rhetorical power of the civil rights movement on behalf of environmental protection. Environmental rights were analogized to civil rights, and parallels were drawn between the emancipation of African-Americans and the emancipation of wildlife, plant life, and nature in general.

Id.; Hearing before the Subcommittee on Civil and Constitutional Rights of the Comm. on the Judiciary, 103rd Cong. 65-66 (1993) (statement of Kent Jeffreys); James L. Huffman, *Free Market Environmentalism and Fairness*, in ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY 279 (Klaus Bosselmann & Benjamin J. Richardson eds., 1999).

40. Deohn Ferris & David Hahn-Baker, *Environmentalists and Environmental Justice Policy*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 68 (Bunyan Bryant ed., 1995).

41. UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13-23 (1987).

can-Americans and other minorities disproportionately bore the environmental burden. This study, authored by the United Church of Christ Commission on Racial Justice, revealed that race was the predominant factor in locating hazardous waste sites.⁴² *Toxic Wastes and Race in the United States* prompted investigations by the U.S. Environmental Protection Agency⁴³ and the National Law Journal,⁴⁴ with each finding race a significant factor in the distribution of environmental burdens. Beginning in the late 1980s the number and activity of environmental justice groups began to grow at an "unprecedented rate."⁴⁵ Indeed a full 65% of environmental justice groups were founded in the 1980s and 1990s.⁴⁶ Currently, there exists a multitude of grassroots environmental justice groups, and this has changed the face not only of the environmental justice movement, but also the environmental movement as a whole.⁴⁷ The growing realization that minorities have faced disproportionate environmental burdens can be helpful in driving brownfields redevelopment initiatives.

Brownfields, as an environmental creature, differ from their far more hazardous siblings such as sites specifically designated for hazardous waste disposal or wastewater treatment.⁴⁸ By definition,⁴⁹ brownfields are less of an environmental concern than sites listed on the National Priority List, commonly known as Superfund sites, and therefore receive less scrutiny from federal regulatory agencies.⁵⁰ Of note, many states have created volun-

42. See *id.*; Mahoney, *supra* note 20, at 369.

43. See Mahoney, *supra* note 20, at 369 (citing Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 803-04 (1993)) ("[M]inority and low-income communities endure disproportionately greater exposure to environmental pollutants and suffer higher disease and death rates.").

44. See *id.* (citing Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law: A Special Investigation*, NAT'L L.J., Sept. 21, 1992, at S2) (analyzing the EPA's enforcement of environmental laws and finding a "serious racial imbalance.").

45. See Taylor, *supra* note 36, at 53-54.

46. See *id.* (citing Robert D. Bullard, *Environmental Justice for All*, ENVTL. NEWS DIGEST FOR NAT'L WILDLIFE FED'N, Nov. 1991).

47. See Ferris & Hahn-Baker, *supra* note 40, at 68.

48. See generally Flynn, *supra* note 15.

49. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0103 (N.Y. 2001) (defining a Brownfield as "a potential inactive hazardous waste site that is also abandoned or underutilized real property in a brownfield redevelopment area where real or suspected environmental contamination has significantly inhibited redevelopment.").

50. See Peter B. Meyer & H. Wade Van Landingham, *Reclamation and Economic Regeneration of Brownfields*, in REVIEWS OF ECONOMIC DEVELOPMENT LITERATURE AND PRACTICE: No. 1, 9 (U.S. Economic Development Administration 2000), available at

tary cleanup programs to assist in the redevelopment of brown-field sites, which routinely feature streamlined administrative procedures, use-based cleanup standards and liability limitations designed to address developers' fears of unknown future environmental liability.⁵¹ Lower cleanup standards may be a source of controversy, as some maintain that minority neighborhoods should not have to settle for less stringent cleanup standards than wealthier communities.⁵² Experience indicates, however, that cleanup standards may pose less of a concern for communities, most notably where there is significant local participation in the redevelopment approvals process.⁵³ In this regard, one may validly choose to define environmental justice as a yearning for self-determination and a meaningful voice in the land use of one's neighborhood, rather than a purely equitable distribution of environmental hazards.⁵⁴

<http://www.doc.gov/eda/pdf/meyer.pdf> (last visited June 2, 2003) (The EPA "has indicated that it is not routinely pursuing brownfield redevelopers voluntarily executing cleanups. . . ."); Flynn, *supra* note 15, at 473 (citing ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 385 (2d ed. 1996)) (noting that sites are analyzed to determine the level of hazardous material and toxicity, and those falling below a certain threshold are effectively left to the states to address).

51. See Flynn, *supra* note 15, at 473; cf. A. 9265, 2001 Assemb., Reg. Sess. § 58-0113 (N.Y. 2001). New York notably (and stubbornly) clings to a "pre-disposal conditions" standard. See Part III, *infra*, for a fuller discussion of the problems the pre-disposal standard creates for the potential developer.

52. See Lincoln L. Davies, *Working Toward A Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 295 (1999); see also James C. McKinley, Jr., *Impasse in Albany Stalls Financing for Superfund*, N.Y. TIMES, July 3, 2002, at B1 ("The Democrats have balked in negotiations at changing liability rules or giving tax credits to people who want to develop old industrial sites. . . . One of Mr. Pataki's Democratic rivals for governor, H. Carl McCall, criticized Mr. Pataki on this issue. 'The governor has demanded that weak cleanup standards must be agreed to before funding can be made available.'").

53. See Davies, *supra* note 52, at 321 ("The extent to which community members felt the city governments were open to accepting their ideas also seems to correlate with their satisfaction of redevelopment."); R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 AM. U.L. REV. 229, 245 (1998) ("By actively seeking community input and involvement, the Brownfields program, in theory, enables poor and minority communities to influence the decision-making process; thus, addressing the problem of powerlessness by providing these disadvantaged communities with a modicum of political empowerment.").

54. See Flynn, *supra* note 15, at 488-89.

THE DISPROPORTIONATE PRESENCE OF ENVIRONMENTAL HAZARDS
IN URBAN COMMUNITIES

While this comment focuses on the legal and economic aspects of brownfields, it would be incomplete to divorce the topic from its racial underpinnings. The roots of the racial minority struggle reach as deep into the soil of our past as does the earliest stages of our political, social and economic metamorphoses.⁵⁵ Our nation's lingering struggle with discrimination casts a dark shadow over our otherwise impressive achievements and progress as a nation. Indeed, each step we have taken forward has been taken with much deliberation, conflict and, in one case, a Civil War to be long remembered.⁵⁶ In some respects, racial attitudes, disparity and under-representation are with us each day, and often go unnoticed owing to their familiarity.⁵⁷ To be sure, many minorities reside in urban neighborhoods surrounded by noxious odors, pervasive dust, poor air quality, contaminated groundwater, dilapidated buildings and a chronically depressed local economy.⁵⁸ Accordingly, those who are more likely to suffer from the choice-limiting effects of poverty are also more likely to reside in areas where pol-

55. See T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1073-74 (1991) (commenting on the historical justification for a Minority Business Enterprise set-aside overturned by the U.S. Supreme Court in *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989)); Lazarus, *supra* note 24, at 806-07 ("The structural roots of environmental inequities are very likely the same as those that produce other forms of racially disproportionate impacts. In this regard, environmental protection is yet another expression of a more widespread phenomenon.").

56. It is beyond the scope of this comment to cover the vast landscape of Civil War history, however, one example of slavery and abolitionism being a motivating force in the Civil War can be found in Supreme Court Justice Oliver Wendell Holmes, Jr. A fervent abolitionist, Holmes likened his enlistment in the Union army to "a crusade in the cause of the whole civilized world . . . the Christian Crusade of the 19th Century." G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES, LAW AND THE INNER SELF* 45 (1993) (citing letter from Oliver Wendell Holmes, Jr., to Charles Eliot Norton (April 17, 1864) (on file with Harvard Archives)); see also SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 54-55 (2003) ("It took a tragic civil war and adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to begin the process of assuring equal justice under the Constitution for *all* our citizens, black as well as white." (emphasis in original)).

57. See Aleinikoff, *supra* note 55, at 1065-66 (1991) (citing *A COMMON DESTINY: BLACKS & AMERICAN SOCIETY* 122-23, 278, 280-81, 293, 295, 302-03, 399, 416-17, 465, 524, 530 (G. Jaynes & R. Williams, Jr. eds., 1989)).

58. A situation representative of the environmental harm suffered in many minority communities can be found in Camden, New Jersey, where the conditions are so noxious, and the odor so foul that students consider outside play during recess a "punishment," and the incidence of asthma among youth is alarmingly higher than in surrounding neighborhoods. See Olga Pomar, *Fighting for Air*, SHELTERFORCE: J. OF AFFORDABLE HOUSING & COMTY. BUILDING, Nov./Dec. 2002, at 9.

lution has blighted the landscape.⁵⁹ The financial straits of poorer communities also render them vulnerable to accepting further environmentally harmful plants and industry for the perceived benefit of employment and a higher standard of living.⁶⁰

The poverty rate for racial minorities far exceeds that of whites, and a visit to any large city in New York or elsewhere reveals the prevalence of racial minorities in the poorest and most environmentally hazardous neighborhoods.⁶¹ To exacerbate the problems accompanying racial minorities inviting in environmentally harmful plants and industry, data exist that dispel the intuitive notion that redevelopment in a neighborhood will carry with it increased local employment, and the prospect of a higher standard of living for the neighborhood residents.⁶² Two instances shed light on this point.

59. See Eleanor N. Metzger, *Driving the Environmental Justice Movement Forward: The Need For A Paternalistic Approach*, 45 CASE W. RES. L. REV. 379, 383 (1994) (citing Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, 12 NAT'L BLACK L.J. 176, 177-79 (1993)); see also Applegate, *supra* note 14, at 286 ("Where the community to be compensated is poor, as in the core brownfields context, the voluntariness of the consent to the bargain has been questioned. People who are unemployed will feel compelled to prefer jobs to the environment.").

60. See Metzger, *supra* note 59, at 383 (citing Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, 12 NAT'L BLACK L.J. 176, 177-79 (1993)); see also Applegate, *supra* note 14, at 286.

61. See U.S. CENSUS BUREAU, TABLE B, NUMBER OF POOR AND POVERTY RATE BY RACE AND HISPANIC ORIGIN: 1998 TO 2000, CURRENT POPULATION SURVEY MARCH 1999, 2000, AND 2001, at <http://www.census.gov/hhes/poverty/poverty00/tableb.pdf> (last visited June 2, 2003) (11.9% of the total population lives below the poverty line, with 7.8% being White/Non-Hispanic and 23.9% being African-American); U.S. CENSUS BUREAU, MEDIAN INCOME OF HOUSEHOLDS BY SELECTED CHARACTERISTICS, RACE, AND HISPANIC ORIGIN OF HOUSEHOLDER, 2000, 1999, 1998, MONEY INCOME IN THE UNITED STATES, at <http://www.census.gov/hhes/income/income00/inctab1.html> (last visited June 2, 2003). The 2000 Census reported the median household income for Whites at \$44,226, and for African-Americans at \$30,439, revealing a 50% higher income for Whites. U.S. CENSUS BUREAU, MEDIAN INCOME OF HOUSEHOLDS BY SELECTED CHARACTERISTICS, RACE, AND HISPANIC ORIGIN OF HOUSEHOLDER, 2000, 1999, 1998, MONEY INCOME IN THE UNITED STATES, at <http://www.census.gov/hhes/income/income00/inctab1.html> (last visited June 2, 2003). For households residing inside central cities with a population of 1,000,000 or more, the median income for Whites was \$42,478, and for African-Americans was \$28,554, also revealing 50% higher income for Whites. *Id.*

62. See Sheila Foster, *Piercing the Veil of Economic Arguments Against Title VI Enforcement*, 10 FORDHAM ENVTL. L.J. 331, 340-343 (1999) (citing NAACP v. Engler, Case No. 95-38228-CV (Genessee County Circuit Court May 29, 1997) & Environmental Protection Agency, Office of Civil Rights, Title VI Administrative Complaint Re: Louisiana Department of Environmental Quality/Permit for Proposed Shintech Facility 20-21 (EPA File No. 4R-97-R6)) ("The underlying assumption . . . is that jobs and other economic benefits materialize when industrial facilities locate in communi-

In *NAACP v. Engler*,⁶³ the court struck down the proposed construction of a wood waste incinerator plant, holding that the 2.4 tons per year of lead emissions allowed by the permit offered the community no real counter-balancing benefit.⁶⁴ The court noted that the construction of the \$80M plant did not employ one person of color, and that only one of the thirty permanent employment positions at the plant would have gone to a person of color, who was to be hired at minimum wage.⁶⁵ Although the benefit did not flow to the community, the substantial environmental burden did, and the court halted the project.⁶⁶ Subsequently, the State of Michigan appealed, and the lower court's order was overturned,⁶⁷ adding to the frustration of environmental justice advocates. A second instance involves the Shintech Corporation in St. James Parish, Louisiana.

In 1997, Shintech Corporation desired to build a polyvinyl chloride (PVC) manufacturing factory in St. James Parish, Louisiana,⁶⁸ a 100-mile stretch of land between New Orleans and Baton

ties. . . . As many communities can attest to, more often than not there is a gap between the promise and the reality of economic benefits in vulnerable communities which host these facilities."); see also Applegate, *supra* note 14, at 285-86 ("In its core meaning, the Brownfields Bargain is predicated on an exchange by inner city brownfields neighbors of environmental protection for economic improvement in those areas. . . . Discussions of environmental justice frequently comment on lack of symmetry between the economic and environmental benefits and burdens of industrial activity."); Lazarus, *supra* note 24, at 800 ("[E]ven when the improved environment is itself a low-income residential area, the resulting economic value is not necessarily captured by those living in the area but is more likely to be gained by absentee property owners who can subsequently charge their tenants higher rent for living in a cleaner neighborhood."); Pomar, *supra* note 58, at 9.

63. *Engler*, Case No. 95-38228-CV.

64. See Foster, *supra* note 62, at 341 (citing *NAACP v. Engler*, Case No. 95-38228-CV (Genessee County Circuit Court May 29, 1997)). Subsequently, the State of Michigan appealed, and the lower court's order was overturned. *NAACP-Flint Chapter v. Governor*, No. 205264 (Mich. Ct. App. Oct. 2, 1997).

65. See Foster, *supra* note 62, at 341 (citing *NAACP v. Engler*, Case No. 95-38228-CV (Genessee County Circuit Court May 29, 1997)).

66. See *id.* (citing *NAACP v. Engler*, Case No. 95-38228-CV (Genessee County Circuit Court May 29, 1997); Flynn, *supra* note 15, at 468 (citing CHRISTOPHER H. FOREMAN JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* 122 (1998) ("[T]he lion's share of the benefits of redevelopment actually accrue to manufacturers, service establishments, and real estate interests.")).

67. See *NAACP, Flint Chapter*, No. 205264.

68. See OFFICE OF CIVIL RIGHTS, U.S. ENVIRONMENTAL PROTECTION AGENCY, SUMMARY OF TITLE VI COMPLAINT AND INVESTIGATION REGARDING ISSUANCE OF PERMIT FOR THE PROPOSED SHINTECH ST. JAMES PARISH FACILITY (1999), at <http://www.epa.gov/civilrights/docs/shinsum1.pdf> (last visited June 2, 2003) (Complaint File No. 4R-97-R6) [hereinafter SUMMARY OF TITLE VI COMPLAINT].

Rouge.⁶⁹ A two-mile radius around the site had a population of more than 80% African-Americans, or 2.6 times Louisiana's average.⁷⁰ Shintech applied for and received an air permit from the Louisiana Department of Environmental Quality ("LDEQ").⁷¹ In addition to being home to many who are unemployed and live below the poverty line, St. James Parish, known as "Cancer Alley," was also home to "seven oil refineries and up to 350 industrial plants."⁷² The Tulane Environmental Law Clinic filed an action with the United States Environmental Protection Agency ("EPA") "on behalf of St. James Citizens for Jobs and the Environment et al. alleging violations of Title VI and EPA's Title VI regulations" by the LDEQ.⁷³ Shintech subsequently indicated its intention to abandon the permit,⁷⁴ while the EPA indicated it would continue to "investigate the broader and related issue of whether LDEQ's permitting program has a disparate adverse impact on African-Americans in the industrial corridor and the state."⁷⁵

Brownfields legislation must be drafted to maximize the local neighborhood's participation⁷⁶ and benefit, as only then can the costs and burdens be properly balanced.⁷⁷ The *NAACP v. Engler* and *Shintech* matters are just two recent examples that indicate a growing discontent with the persistence of the disproportionate impact faced by African-American and other racial minorities. These and other incidents also highlight the lack of minority polit-

69. See Foster, *supra* note 62, at 342 (citing generally Barbara Koeppel, *Cancer Alley, Louisiana: A 100 Mile Stretch is Home to Numerous Industrial Sites and Many Sick People*, THE NATION, Nov. 8, 1999, at 16).

70. See SUMMARY OF TITLE VI COMPLAINT, *supra*, note 68.

71. See *id.*

72. See Foster, *supra* note 62, at 342 (citing generally Barbara Koeppel, *Cancer Alley, Louisiana: A 100 Mile Stretch is Home to Numerous Industrial Sites and Many Sick People*, THE NATION, Nov. 8, 1999, at 16); Henry Payne, *Planting Prosperity or Sowing Racism? EPA Policy that Bars Polluting Plants from Minority Communities Comes Under Attack*, PITT. POST-GAZETTE, June 15, 1998, at A9).

73. SUMMARY OF TITLE VI Complaint, *supra*, note 68.

74. *Id.*

75. See *id.*

76. See R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 AM. U. L. REV. 229, 245 (1998).

77. See Applegate, *supra* note 14, at 285. A brownfields redevelopment project: [I]s a good deal only if those who are accepting the reduced environmental protection [if any] also see the economic benefits; it is a bad deal if the same inner city neighborhood, which is already suffering from abandoned industries, must sit by as workers and shoppers from elsewhere drive in and out of the redeveloped facility.

Id.

ical muscle that is a natural by-product of the relatively inferior financial and organizational resources of minorities.

While the modern, mainstream environmental movement gained much from the Civil Rights struggles of the 1960s, it is disturbing, though not necessarily surprising, that minorities have borne a considerable burden as a result of environmental legislation.⁷⁸ To be sure, the challenges facing minority groups in realizing greater influence over the decision-making process goes well beyond a relative lack of success gained from the mainstream environmental movement. The goal of environmental justice, however, is to ensure that all people live in a healthy environment, rather than to shift the burden to non-minority communities.⁷⁹ There are many other factors contributing to the disproportionate allocation of environmental burdens.

Influence in the political process requires adequate funding and a sound organizational foundation. Historically, however, minority residents tend to be poorly informed and unaware of policy decisions, lack sufficient organization to mobilize effectively, lack the required time, money and political resources and face underrepresentation in the political process,⁸⁰ both in the popularly elected and the administrative realms.⁸¹ Lower income and lack of overall wealth leads to fewer resources available to join the political fray.⁸² These factors, coupled with being a numerical mi-

78. See Lazarus, *supra* note 24, at 856-57, stating:

The more significant lesson of environmental justice lies, however, in its far broader social implications. The last two decades have witnessed a radical rewriting of the nation's laws in an effort to promote environmental protection concerns. . . . It is enormously unsettling that such laws could themselves be riddled with distributional inequities, especially when the nation's modern environmental movement grew out of, and indeed was largely inspired by, the civil rights movement that has long resisted those very inequities.

79. See Taylor, *supra* note 36, at 53-54, stating:

[A]ctivists of color were shocked when they learned of the dangers to their communities . . . [and] looked directly at the relationships among class, race, political power, and the exposure to environmental hazards. . . . They refused to say 'not in my backyard' without questioning or caring about whose backyard the problem ended up in. . . . [T]hey insisted that such hazards should not be located in anyone's backyard. . . . Activists of color were more experientially equipped to perceive the injustice in the distribution of environmental hazards. . . .

80. See Kuehn, *supra* note 11, at 640 n.86 (1994) (citing Paul Mohai & Bunyan Bryant, *Race, Poverty, and the Environment: The Disadvantaged Face Greater Risks*, EPA J., Mar./Apr. 1992, at 6, 7).

81. See Lazarus, *supra* note 24, at 822.

82. See Kuehn, *supra* note 11, at 640.

nority, lead to the reality that minority groups carry less clout in the political negotiation process.⁸³ Thus, minority interests are often given less attention, or even discarded:

Lawmakers inevitably seek the path of least political resistance when allocating the burdens of environmental protection. In deciding both from where and to whom environmental risks should be reallocated in the treatment and prevention of pollution, lawmakers are necessarily more responsive to the demands of constituents who possess the greatest political influence.⁸⁴

In the socio-political marketplace, where competing interests are thrown headlong into the struggle for dominance, weaker groups will often secure the least benefit, while carrying the greatest burden.⁸⁵ Exacerbating this problem is that areas with existing environmental hazards often fall prey to further environmental neglect or harm, thus perpetuating a cycle of minorities living in the most environmentally hazardous areas.⁸⁶ It is not a broad leap to understand why so many urban brownfields have received little attention. Therefore, it is of utmost concern to ensure that New York passes legislation that harnesses the entire corrective potential residing within the legislature's power.

NEW YORK'S UNIQUE POLITICAL CLIMATE

The likelihood of effective brownfields legislation is further complicated by New York State's unique and often contentious political climate. Even the casual observer of Albany politics knows that little gets done unless the individual objectives of Governor George Pataki, Assembly Speaker Sheldon Silver and Senate Majority Leader Joseph Bruno simultaneously align.⁸⁷ This political

83. See *id.*

84. See Lazarus, *supra* note 24, at 810.

85. See *id.* at 814.

86. See *id.* at 811 ("Once a particular geographic area becomes the locus for an activity presenting a heightened set of risks, that has historically been a reason favoring, not opposing, the siting of more such activities in that area.")

87. See James C. McKinley, Jr., *Before Bills Move in Albany, 3 Leaders Cut Deals In*, N.Y. TIMES, Oct. 21, 2002, at A1 ("New York's is a government where secrecy has become the rule. . . . Its culture of clandestine negotiations keeps the public from seeing some of the less attractive aspects of bills, leaves legislators in the dark about bills they must vote on and leads ultimately to flawed legislation, critics say."); Richard Perez-Pena, *Legislating the New York Way In a Chronic Case of Gridlock*, N.Y. TIMES, Oct. 20, 2002, § 1, at 1 ("When important deals are struck at last, it is usually with a secrecy befitting matters of national security, with Governor Pataki, Senator

dynamic suggests continued frustration for brownfields redevelopment.⁸⁸ Political scientists marvel at the “abnormal” nature of New York politics, and wonder how for twenty-eight years the Assembly has remained under the control of Democrats, while the Senate has been controlled by Republicans for the same time period, with neither party showing any discernible desire to gain on the other.⁸⁹

Even during election years, when the Governor and legislators ordinarily “find ways to get things done,”⁹⁰ issues such as funding for environmental clean-up, including brownfields remediation, remain off the agenda.⁹¹ The conflicting sides of New York’s power dynamic appear so entrenched that an optimistic outlook on the enactment of brownfields legislation should be taken with caution.⁹² The benefits of enacting effective brownfields legislation, however, would prove beneficial to all.

Part III: An Appraisal of A. 9265’s Responsiveness to the Brownfields Redevelopment Challenge

A. 9265 sought to breathe life into New York’s effort to cleanup brownfields and properly recognized the state’s failure to revitalize this long-ignored segment of the economy.⁹³ This focus

Bruno and Assemblyman Silver meeting privately and disclosing as little as possible to the public – the much-derided ‘three men in a room’ system.”).

88. Richard Perez-Pena, *Lax New York Rules Make Big Money Talk*, N.Y. TIMES, Oct. 22, 2002, at A1 (“Moneyed interests can always make themselves heard . . . [b]ut in New York, where top legislators, the governor and administration officials do much of their most important work in virtual secrecy, the system amplifies the private voices of the few who have the lawmakers’ ears.”).

89. Richard Perez-Pena, *Legislating the New York Way In a Chronic Case of Gridlock*, N.Y. TIMES, Oct. 20, 2002, § 1, at 1 (“In two centuries of partisan American democracy, [political scientists] say, no other state has had divided government for nearly as long.”).

90. *Id.*

91. See Richard Perez-Pena, *Legislating the New York Way In a Chronic Case of Gridlock*, N.Y. TIMES, Oct. 20, 2002, § 1, at 1, stating:

Time and again, bills gain the support of clear majorities in both houses, but never go to a vote in one house or the other, only because one of the three leaders stops it. . . . New York’s Superfund program to clean up the worst toxic-waste sites is out of money, and three years of intensive negotiations over how to finance it and set new cleanup standards have not produced even a temporary fix. Lawmakers let the program stop in 2001, and failed this year to revive it.

92. See Richard Perez-Pena, *Legislating the New York Way In a Chronic Case of Gridlock*, N.Y. TIMES, Oct. 20, 2002, § 1, at 1.

93. See A. 9265, 2001 Assemb., Reg. Sess. (N.Y. 2001) (“This bill addresses the need to clean up the thousands of acres of brownfields . . . [t]here has been no compre-

on economic revitalization likewise recognized that brownfields do not pose the more dangerous health risks that come part-and-parcel with heavily contaminated industrial plants, waste disposal sites and wastewater treatment plants. In order for wide-scale brownfields redevelopment efforts to take root and flourish, New York must enact legislation that both meaningfully involves the affected community⁹⁴ and addresses the potential developers' cost-benefit analysis. Central to this task is drafting legislation that: 1) affords local residents the opportunity to have an effective, though not stifling, voice in the redevelopment of their community; 2) allows for flexible, use-based cleanup goals; and 3) limits, to the greatest extent possible, the future risk of investors and developers choosing to revitalize brownfields. A brief overview of A. 9265 will provide a backdrop to this analysis.

A. 9265 required that the Empire Zones Designation Board⁹⁵ designate a neighborhood as a Brownfields Redevelopment Area if it meets one or more of the following characteristics:

(A) a poverty rate of at least twenty percent; or (B) an unemployment rate of at least one hundred twenty-five percent of the statewide unemployment rate; or (C) a population change of at least five percent; or (D) location within three miles of any geographic area which satisfies any of the conditions listed in paragraph a, b or c of this subdivision.⁹⁶

Once designated, a municipality could then label a parcel an Environmental Opportunity Zone. Such designation opens the door to the bill's several financial incentives, including a ten-year property tax exemption, tax increment bonds and credits for payment of back taxes owed on the parcel.⁹⁷ The requirements for Environmental Opportunity Zone designation clearly indicated A.

hensive approach to addressing brownfield sites that are blights on the landscape of New York." (emphasis added)).

94. See Joel B. Eisen, *"Brownfields of Dreams"?: Challenges and Limits of Voluntary Cleanup Programs and Incentives* 1996 U. ILL. L. REV. 883, 887 (1996), stating:

Relaxing the rigorous cleanup standards of current laws also shifts risks to the affected community. Some states link cleanup standards to anticipated future uses of brownfield sites, which may add to cumulative risks borne by urban communities. This renders a brownfield redevelopment project morally troublesome unless the affected community voluntarily approves of it.

95. The "Empire Zones Designation Board" pre-existed the Assembly's passage of A. 9265, and was created by N.Y. GEN. MUN. LAW § 960 (McKinney 2001).

96. A. 9265, 2001 Assemb., Reg. Sess. § 58-0108 (N.Y. 2001).

97. A. 9265, 2001 Assemb., Reg. Sess. § 58-0109.

9265's purpose of limiting the scope of the bill to redevelop poorer neighborhoods facing unemployment, poverty or an unstable population base.⁹⁸

The bill required the participating redeveloper to negotiate a remedial program with the Department of Environmental Conservation ("DEC") prior to any program implementation.⁹⁹ Upon certification of satisfactory completion of the remedial program by the DEC,¹⁰⁰ the redeveloper would enjoy a limited "covenant not to sue."¹⁰¹ Provisions dealing with limiting liability present some troubling requirements, as outlined below, most notably a cleanup goal of "pre-disposal condition," and liability "reopeners" that would have exposed a site's owner to future liability even if no threat to public health existed.

This comment's focus is on whether or not A. 9265 effectively addressed two primary elements of a successful brownfields redevelopment, namely meaningful community participation, and measures adopted to clearly define and minimize a potential investor's or developer's risk in proportion to the potential environmental impact of the redevelopment plan. A clearly defined community participation requirement is a central component of this process.

COMMUNITY PARTICIPATION COMPONENTS OF A. 9265

The merits of meaningfully engaging the affected community in the redevelopment process have been addressed above.¹⁰² The Assembly recognized the relative importance of community participation, as A. 9265 contained comprehensive community participation provisions. For instance, a participating municipality would have been required to develop and submit for approval a community participation plan, the goal of which was to "provide an opportunity for the residents of the community within which an area or a zone is located to meaningfully participate in the brownfields redevelopment area, and/or environmental opportunity zone decision-making process."¹⁰³

98. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0108.

99. A. 9265, 2001 Assemb., Reg. Sess. § 58-0111(1).

100. A. 9265, 2001 Assemb., Reg. Sess. § 58-0115(1).

101. A. 9265, 2001 Assemb., Reg. Sess. § 58-0117(1).

102. See Part II, *infra*; Flynn, *supra* note 15, at 239 ("The relative importance of public participation in environmental justice necessitates a conception of environmental justice that focuses on empowerment and political tools rather than environmental rights and administrative action.").

103. A. 9265, 2001 Assemb., Reg. Sess. § 58-0105(3)(B) (N.Y. 2001).

The bill also required that a community participation plan provide area residents access to the draft brownfields redevelopment area or environmental opportunity zone application, public notice and newspaper notice to inform the community of the application, a comment period of at least sixty days and a summary and response to public comments submitted on the draft application.¹⁰⁴ The redeveloper wishing to enter into a cleanup agreement with the DEC would also have to provide public notice and newspaper notice to the community, describing “the contaminated site, its exact location and any current, intended, or reasonably anticipated reuse plans.”¹⁰⁵ A forty-five-day public comment period for the proposed remedial investigation plan, and sixty-day public comment period for the proposed remedial action plan were also mandated.¹⁰⁶ Prior to the start of any remedial construction, a “public availability session” was required to explain the proposed activity and to address community concerns and questions.¹⁰⁷

Clearly, the Assembly recognized the value of community involvement at all levels of the remediation and redevelopment process. The community participation requirements, however, were criticized as too extensive by several key business groups who claimed the measures reached the tipping point between respecting the opinions and concerns of the community and scaring off otherwise willing participants.¹⁰⁸

The days following A. 9265’s passage by the Assembly saw a flurry of opposing memos from state business advocacy groups, such as the New York State Economic Development Council¹⁰⁹ and the Business Council of New York State.¹¹⁰ One of the pri-

104. A. 9265, 2001 Assemb., Reg. Sess. § 58-0105(3)(B)(c).

105. A. 9265, 2001 Assemb., Reg. Sess. § 58-0105(4)(A).

106. A. 9265, 2001 Assemb., Reg. Sess. § 58-0105(4)(C)(4).

107. A. 9265, 2001 Assemb., Reg. Sess. § 58-0105(4)(C)(6).

108. While the level of involvement of environmental justice groups in the actual drafting of A. 9265 is beyond the narrow scope of this comment, the higher cleanup goals of the bill raise the legitimate question of whether the bill’s drafters were too demanding. As discussed in Part II, *supra*, minority communities, like any other community, seek to exercise local decision-making power in an effort to strike *their* ideal balance between the often competing interests of maintaining economic vitality and limiting environmental harms.

109. See Memorandum from Brian McMahon, Executive Director, New York State Economic Development Council, to the New York Assembly Environmental Conservation Committee (June 22, 2001), at http://www.nysedc.org/brownfield_mem.shtml.

110. See Memorandum from the Business Council of New York State, to the New York State Assembly Environmental Conservation Committee (June 21, 2001), at <http://www.bcnys.org/inside/Legmemos/2001/A9265kp.htm>.

mary points of contention was that A. 9265's community participation requirements would serve only to deter investors from participating, because New York's State Environmental Quality Review Act (SEQRA) already requires several community participation provisions.¹¹¹ Of greater concern to individuals seeking to build up long-ignored minority neighborhoods is the specter of less marketable sites being the first to fall off potential investors' radar screens as viable investment opportunities.¹¹²

While these business groups were predictably exercising their right to participate in the legislative process, they also spoke in large part for the concerns and interests of New York businesses and investors, and as such, should be seen as a force in the bill's demise. Indeed, the Business Council of New York State, a supporter of New York's 1996 Bond Act that has proven to be the state's only viable source of brownfields cleanup to date, has been called "the state's most influential business lobbying organization."¹¹³ While A. 9265's community participation provisions may be seen as burdensome, the value of engaging the community is paramount to a successful brownfields redevelopment program.¹¹⁴ The community participation provisions should be seen in a relatively positive light, as they serve the dual purpose of garnering community support for a plan's approval, as well as, avoiding protracted litigation that can arise in opposition to a redevelopment plan.¹¹⁵ However, the financial and risk burdens placed on poten-

111. See Memorandum from the Business Council of New York State, to the New York State Assembly Environmental Conservation Committee (June 21, 2001), at <http://www.bcnys.org/inside/Legmemos/2001/A9265kp.htm> ("[T]he bill also subjects these projects to review under the State Environmental Quality Review Act. These requirements will add significantly to the time and costs required to obtain approval for voluntary cleanup projects, will add to the uncertainty regarding the ultimate approval of proposed development projects.").

112. *Id.* ("These procedural requirements *will be especially burdensome on the less marketable sites* that are supposed to be the focus of this legislative program." (emphasis added)).

113. Markell, *supra* note 13, at 1218. (citing Sarah Metzgar, *State's Voters Approve Environmental Bond Act*, TIMES UNION, Nov. 6, 1996, at A16). It should also be noted that as of the writing of this Comment, New York has failed to appropriate any additional funds under the Bond Act, which was bankrupted in 2001. See Richard Perez-Pena, *Legislating the New York Way In a Chronic Case of Gridlock*, N.Y. TIMES, Oct. 20, 2002, § 1, at 1.

114. See Applegate, *supra* note 14, at 283-84; Flynn, *supra* note 15, at 478 ("The public participation solution appears to achieve a precarious balance between brown-field redevelopment and environmental justice . . . by relying – for better or worse – on the ability of empowered communities to negotiate justice in redevelopment.").

115. See Flynn, *supra* note 15, at 239; OFFICE OF CIVIL RIGHTS, U.S. ENVTL. PROT. AGENCY, TITLE VI COMPLAINTS FILED WITH EPA, at <http://www.epa.gov/civilrights/>

tial developers found in other provisions of A. 9265 may have proved far more detrimental to the bill's potential success.

UNDERSTANDING THE DEVELOPER'S RISK DYNAMIC

The environmental uncertainty surrounding brownfields redevelopment only adds another, more complex dimension to the developer's risk-evaluation process.¹¹⁶ Acknowledging that factors contributing to the persistence of brownfields in poverty-stricken areas are multi-dimensional, it is imperative that any arrows in the legislature's quiver be carefully aimed to gain the fullest potential of the effort. Brownfields redevelopment legislation must contain provisions that entice willing investors to place their limited capital at risk. A recent study commissioned by the U.S. Economic Development Agency finds that:

Investors can accommodate risk, provided it can be quantified: they simply accept only those projects that promise higher, "risk-adjusted" returns on their investments. If, however, reliable quantification of risk is not possible, then determination of the needed risk adjusted rate of return is impeded. Not having firm numbers, investors may simply abandon projects – or only pursue those with truly exceptional returns. Thus it is the uncertainty associated with brownfields, even after completion of extensive site assessments, that can pose a major barrier to redevelopment.¹¹⁷

docs/t6csfeb2003.pdf (Feb. 28, 2003). The vast majority of listed complaints involve siting of hazardous waste disposal sites, wastewater and sewage treatment plants, landfills, and industrial plants. *See id.*

116. See Julia A. Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 286-87 (1995), stating:

All former industrial property is perceived to have a high risk of contamination, and thus is avoided regularly by investors. The properties, . . . then sit idle and abandoned, usually in low-income urban neighborhoods. . . . The loss of new business development has exacerbated economic hardship in these areas. Former industrial urban centers are now characterized by falling tax bases, increased joblessness, and a large number of abandoned properties.

See also Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. ENVTL. L. & LITIG. 1, 1 n.1 ("Lenders and developers . . . consider even 'mild' contamination too serious a liability threat; for this reason, among others, brownfields tend to lie fallow rather than be redeveloped.").

117. See Peter B. Meyer & H. Wade Van Landingham, *Reclamation and Economic Regeneration of Brownfields*, in REVIEWS OF ECONOMIC DEVELOPMENT LITERATURE AND PRACTICE: NO. 1, 9 (Aug. 2000), available at http://12.39.209.165/ImageCache/EDA/Public/documents/pdfdocs/meyer_2epdf/v1/meyer.pdf; *see also* H. Edward Abelson, *Environmental Risks for Lenders*, 441 PLI/REAL 1029, 1068, in PRACTICING LAW INSTI-

In order to accomplish the goal of spurring investment, legislation must draw as tight and definable a circle as possible around the added risk associated with developing brownfields.¹¹⁸ Unfortunately, several provisions of A. 9265 gave rise to legitimate concerns among business groups and the development community, and may shed light on why the state senate failed to embrace the bill. For instance, the bill set a cleanup goal of "pre-disposal condition,"¹¹⁹ and contained "reopeners" that significantly muddled the potential developer's risk evaluation process.¹²⁰ Most disturbingly, the failure to effectively address the investor's risk would have been felt most acutely by less marketable sites,¹²¹ such as urban, minority communities.

A cleanup goal of "pre-disposal condition" for a brownfield site raises great concern among business groups and potential redevelopers.¹²² Cleanup tied to prospective use, however, would be far

TUTE, REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK SERIES (1999) ("When lending on Brownfield sites, the most important consideration for a lender to keep in mind is that these projects are actually real estate deals . . . [and] both the lender and the developer are seeking as much certainty and closure regarding as many components of the project as possible.").

118. Abelson, *supra* note 117, at 1068; Sarah W. Rubenstein, *CERCLA's Contribution to the Federal Brownfields Problem: A Proposal for Federal Reform*, 4 U. CHI. L. SCH. ROUNDTABLE 149, 160 (1997).

119. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0113 (N.Y. 2001). Though beyond the scope of this comment, this raises the question of what role environmental justice groups in the drafting of cleanup standards played, and whether the environmentalist argument was too persuasive or ambitious, thus leading to its ultimate demise in the NY Senate.

120. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0117.

121. See Memorandum from the Business Council of New York State, to the New York State Assembly Environmental Conservation Committee (June 21, 2001), at <http://www.bcnys.org/inside/Legmemos/2001/A9265kp.htm>; *Hearing before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103rd Cong. 64 (1993) (statement of Kyle E. McSkarrow).

122. See Memorandum from the Business Council of New York State, to the New York State Assembly Environmental Conservation Committee (June 21, 2001), at <http://www.bcnys.org/inside/Legmemos/2001/A9265kp.htm> (emphasis added), stating:

The bill establishes cleanup "goals" . . . that are more stringent than those established in the state superfund statute and applied to responsible parties . . . the goal of all brownfield cleanups is to restore sites to "pre-disposal conditions" where "feasible," and to achieve existing state groundwater (e.g., drinking water) standards, irrespective of their feasibility. *Neither pre-disposal conditions, nor achievement of water quality standards, is required under the current superfund law.*

See generally Casey Scott Padgett, *Selecting Remedies at Superfund Sites: How Should "Clean" Be Determined?*, 18 VT. L. REV. 361 (1994), for a thoughtful discussion of the remedy selection process debated at the federal level.

more palatable.¹²³ After all, the underlying purpose of environmental regulation is to identify and remedy activity that *harms* residents.¹²⁴ As such, any legislation and subsequent regulatory oversight should avoid interfering with a reinvestment plan as long as remedial measures and the particular use of a site do not raise the risk to public health. New York would be better served to implement a more flexible cleanup program, offering environmental cleanup levels tied to the site's intended use.¹²⁵

Connecticut provides an interesting case study on how a legislature can begin the process of encouraging brownfields redevelopment. Connecticut initially required that cleanup be to "pristine" condition,¹²⁶ not unlike New York's call for "pre-disposal condition," but subsequently recognized that this "pristine" requirement left many brownfields unremediated and undeveloped.¹²⁷ The Connecticut legislature responded in 1994 by passing brownfields legislation that allowed for standards "'which differ according to the present and future use of the property'. . . [and allow for] different permissible contaminant levels for soils depending on whether the land will be used for residential use, or for commercial or industrial use."¹²⁸ While this initiative has not served as a magic wand for Connecticut's brownfields, it has pro-

123. See generally Memorandum from the Business Council of New York State, to the New York State Assembly Environmental Conservation Committee (June 21, 2001), at <http://www.bcnys.org/inside/Legmemos/2001/A9265kp.htm>.

124. See Applegate, *supra* note 14, at 246 ("CERCLA's overriding purpose is not economic development but protecting human health and the environment.").

125. The reasons driving higher cleanup goals, though beyond the scope of this comment, give rise to interesting questions. A. 9265's cleanup goals clearly failed to quiet the concerns (and voice) of business groups, and represent one of the bill's more contentious provisions that quite possibly led to the New York State Senate's decision to let the bill die. It follows that any bill passed by the Assembly should consider measures that minimize any legitimate resistance on the part of the New York State Senate. The political process is a fluid, organic process whereby support and opposition is voiced based on the underlying purpose or goals of the organization or group. By minimizing unpopular provisions, the proponents of A. 9265-like legislation might create a strategic advantage, thus increasing pressure on the New York State Senate, and the Governor. For an interesting theoretical discussion on bargaining theory in general as it relates to a democratic political system, see DAN USHER, ECONOMICS DEPT., QUEEN'S UNIV., MYSTERIOUS BARGAINING (2001), at <http://qed.econ.queensu.ca/pub/papers/abstracts/download/2001/1001r.pdf>.

126. See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 797 (1995).

127. See *id.*

128. See *id.*; see also, Eugene E. Smary & Daniel K. DeWitt, *Learning from Our Mistakes: Brownfields Redevelopment*, 5 WIS. ENVTL. L.J. 149 (1998) (analyzing brownfields legislation enacted by several other states).

vided a "useful" framework for the state.¹²⁹ A similar provision in New York could increase interest in redeveloping brownfields, thereby enhancing the likelihood of reviving long-stagnant local economies.¹³⁰ The argument that poorer, minority communities might be exposed to increased health risks resulting from lower levels of cleanup is ill-founded if the intended use were considered, and the cleanup agreement focused on identifying and controlling *real* risks to public health.¹³¹

Brownfields are often ignored for a considerable amount of time, thereby posing a continual and largely unknown health risk to the community. Cleanup, even to a lesser standard than "pre-disposal," would necessarily "improve, not degrade, the environment,"¹³² especially if cleanup were commensurate with the site's intended use. Proponents of A. 9265 may argue that the bill allowed for a lesser cleanup level with DEC approval. The bill reads in pertinent part: "the goal of a brownfield site remedial program. . . shall be to restore that site to pre-disposal conditions, *to the extent feasible*. . . [and] the remedy selected shall eliminate or mitigate all significant threats to the public health and environment."¹³³ An investor or developer would look warily at this provision and ponder the potentially restrictive interpretation of "feasible" and "significant."¹³⁴ Investor wariness stands in the un-

129. See Susan Bryson, 2001 *Gallivan Conference: Smart Growth Policies in Connecticut*, 34 CONN. L. REV. 591, 593 (2001).

130. See Applegate, *supra* note 14, at 272 ("The consideration of future use is integral to brownfields redevelopment. . . . 'Redevelopment,' after all, means restoring the presumed future use of the site to an industrial or commercial use . . . [which] also happens to be less intensive future use. . . which results in less expected exposure, creating a lower residual risk profile.").

131. See generally Applegate, *supra* note 14.

132. Flynn, *supra* note 15, at 482.

133. A. 9265, 2001 Assemb., Reg. Sess. § 58-0113 (N.Y. 2001).

134. A. 9265 defines a "feasible" proposed remediation plan as "one that is suitable to site conditions, capable of being successfully carried out with available technology, and that considers, at a minimum, implementability and cost-effectiveness." A. 9265, 2001 Assemb., Reg. Sess. § 58-0113. This definition may well beg the question of what does "suitable" and "successfully carried out with available technology" mean. Indeed, one of the liability reopening provisions may be triggered if "an environmental standard, factor, or criteria" relied upon to strike a cleanup agreement is subsequently determined to be non-compliant with the provisions of A. 9265. A. 9265, 2001 Assemb., Reg. Sess. § 58-0117. Ambiguities of this sort would serve only to discourage potential developers from participating in a brownfield redevelopment. Owing to the risk-intense nature of development in general, most developers tend to increase estimates of unknown costs and liabilities in proportion to the unquantifiable risk's ambiguity. The Assembly's failure to effectively address this simple dynamic would only have served to shrink the pool of willing participants. See also Peter B. Meyer & H. Wade Van Landingham, *Reclamation and Economic Regeneration of Brownfields*,

known and frightening shadow of environmental liability. Fear of such liability leads developers to set their sights on non-hazardous or virgin parcels, thereby leaving brownfields and other contaminated sites unremediated.¹³⁵ Why would anyone want to place his or her limited capital at risk to redevelop an abandoned site as a parking garage or a shopping center when the legislation would require cleanup be to “pre-disposal condition?” In this regard, A. 9265’s call for a “pre-disposal condition” goal was misguided and would have had a harmful, reverberating effect on developer participation. Brownfields legislation must pass a “test of certainty” if it is to encourage investors to place their limited capital at risk.¹³⁶ Such cleanup goals pose uncertain liability and risk when cleanup is not directly linked to a particular site’s intended use.¹³⁷

A. 9265’s “covenant not to sue” provision contained “re-openers” to future liability that cast uncertainty on when, if ever, the developer may be relieved of liability flowing from its efforts to redevelop a brownfield site. The bill provided that future liability would have attached where contamination was unknown to the DEC at the time of its issuance of the certification of completion.¹³⁸ Unfortunately, the provision, like the initial requirements for development of the remedial action plan, ignores whether or not the remaining contamination even poses an environmental health risk to the community.¹³⁹ An additional concern was that A. 9265 might have exposed a site owner to future liability even if contamination migrated onto the site from another, off-site source.¹⁴⁰

in *REVIEWS OF ECONOMIC DEVELOPMENT LITERATURE AND PRACTICE*: No. 1, 9 (Aug. 2000), available at http://12.39.209.165/ImageCache/EDAPublic/documents/pdfdocs/meyer_2epdf/v1/meyer.pdf.

135. See Applegate, *supra* note 14, at 249.

136. Bryson, *supra* note 129, at 593.

137. See Applegate, *supra* note 14, at 271 (“[A] major innovation in risk assessment, of importance to brownfields, is the increasing reliance on limited future uses of the site to justify a less intensive type and degree of clean-up than would otherwise be required.”).

138. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0117 (N.Y. 2001).

139. See A. 9265, 2001 Assemb., Reg. Sess. § 58-0117.

140. See Memorandum from the Business Council of New York State, to the New York State Assembly Environmental Conservation Committee (June 21, 2001), at <http://www.bcnys.org/inside/Legmemos/2001/A9265kp.htm> (last visited June 2, 2003) (“[T]his reopener could also subject the site owner to additional liability due to contamination that has migrated onto the property from off-site sources.”); Memorandum from Brian McMahon, Executive Director, New York State Economic Development Council, to the New York State Assembly Environmental Conservation Committee (June 22, 2001), at http://www.nysedc.org/brownfield_mem.shtml (last visited June 3, 2003).

The cumulative effect of these cleanup and liability uncertainties would have weighed against the widespread participation required to effectively redevelop New York's brownfields. The collateral effect of A. 9265 would have been to thwart the environmental justice goals of safer, economically revitalized neighborhoods.

Conclusion¹⁴¹

The persistence of undeveloped brownfields has for too long choked formerly-industrialized, urban communities. The New York legislature needs to craft legislation that properly balances sufficient environmental cleanup with allowing the local community to recapture critical parcels of land in its effort to revitalize a chronically depressed local economy. Legislation must not fall prey to its own danger, namely an undue reliance on a theoretical fear, which is not necessarily shared by the resident community, nor commensurate with the proposed use of the site. Brownfields pose less of an environmental risk to the community than heavily contaminated sites, and thus should be freed from inflexible cleanup standards. New York should incorporate cleanup standards that are driven by the site's intended use, and should yield to the economic needs of a community absent any real threat to public health.

New York needs innovative and creative legislation that provides adequate protection against unquantifiable, potentially unending risk if developers are to take on the additional environmental risks presented by the redevelopment of brownfields. Legislation must be designed to help communities in need maximize their potential. Numerous states have succeeded in this task by incorporating more clearly defined cleanup standards tied to the site's proposed use, which focus on eliminating real environmental threats that may arise from a particular redevelopment plan. New thinking is required to solve the problems that continue to smother lower income, minority communities in

141. As of June 2003, the New York State Assembly had passed a Superfund/Brownfields bill, A.9120, and the New York State Senate was considering similar legislation, S. 5702. Following the close of the June 2003 session, reports of on-going discussions indicated that the State Senate will reconvene in September 2003 to finalize legislation. See Eric Durr, *State Senate to return for special session on Sept. 16*, ALBANY BUSINESS REVIEW, at <http://www.bizjournals.com/albany/stories/2003/07/14/daily34.html> (July 16, 2003).

urban areas, and attracting investment capital should be the primary focus of brownfields legislation. Investment will not only promote the redevelopment of brownfields, but will go a long way towards achieving the worthy goals of environmental justice.