

ALL APPROPRIATE INQUIRIES • EMINENT DOMAIN

# BrownfieldNews

VOL. 10, ISSUE 1 FEBRUARY 2006

[www.brownfieldnews.com](http://www.brownfieldnews.com)





# A CHARLIE BROWNFIELD POST-HOLIDAY WISH LIST

photo: Urban Outfitters

BY TODD S. DAVIS, ESQ.

As I flew from Cleveland to Chicago in late October for the annual meeting of the *Brownfield News* editorial board, I had a feeling I was in trouble. My flight was delayed by heavy rain in the Midwest. I arrived both a little late and a little soggy to the meeting, being held in the conference room of a skyscraper. The board of brownfield luminaries already was hotly debating what topics we should cover during 2006.



After listening intently for a while as my suit dried out, I think I said something like, "Why don't we write an exposé about all the policy issues keeping the brownfield industry from getting to the next level." Someone else chimed in, "Yeah, we can be brutally honest. No sugarcoating issues! It can be a wake up call to regulators, legislators, and government stakeholders around the country! It should be the lead cover story of 2006!"

As the room grew more and more excited about the idea, an intellectual bomb suddenly exploded. "You know, this story could actually spark some controversy. Nobody in the public sector likes to hear about the problems, they only tout the victories."

So, when it came time to select the person who would write the *All the President's Men* of the brownfield industry sometime over the holiday season, the vote went something like this, "Since it was Davis' idea in the first place, I think he should write it!" It quickly became like an episode of "Survivor." The tribe had spoken and there was no way to back out without risking my status as this week's "head of household." (Or am I mixing reality TV shows?)

In any event, I could think of nothing better to do with my free time between Thanksgiving and New Year's than craft the seminal policy argument that, when widely adopted, will fundamentally and dramatically increase the velocity of catalytic brownfield redevelopments across the United States.

### We Already Have Great Policies, Charlie Brown!

I must first earnestly inventory the tremendous list of brownfield redevelopment accomplishments that have taken place over the past decade. Undoubtedly, both the rise and support by the federal government of state voluntary action programs has been paramount to brownfield redevelopment success across the country. Further, since all real estate development is conducted on

a local level, the more top down support the federal government can provide to states and municipalities, the more successful brownfield redevelopment projects we will see.

Additionally, hiring dedicated and talented public sector brownfield development staffers who focus on the right priorities should continue to be encouraged. Finally, the concept of creating incentives to entice corporate property owners to embrace brownfield development, instead of relying exclusively on the threat of regulatory enforcement, is a huge step in the right direction. The real question, however, remains — do these policies go far enough to create a thriving, sustainable brownfield market?

As a brownfield developer, advising policy makers on how to adopt meaningful changes to create a vibrant brownfield market puts me in the same untenable position Charlie Brown finds himself when listening to adults. (I know it will be January when you read this, but it's December as I write it and I just watched a certain holiday classic with my kids.) We all know that Charlie speaks in plain English, readily understood by his peers. Yet all Charlie hears when an adult speaks is: "Wuh wuh wuh, wuh, wuh wuh wuh ..."

That's not to say that policy makers don't communicate effectively or listen to practical advice. I mean, I am sure you could find someone outside of Washington to agree it was worth four years of time and millions of dollars to devise the "new" All Appropriate Inquiries Rule — essentially an improvement of zero percent over the existing ASTM standards, consequently pushing the marketplace forward exactly zero percent. (Sorry, I just couldn't resist.)

Nevertheless, the real answer, from an oxymoronic humble developer's perspective, is that taking brownfield development to the "next level" is actually pretty simple, assuming you can overcome the politics and define the "appropriate" roles for both the private sector and the public sector.

### We Hold These Truths to Be Self Evident

In my brownfield utopia, I would answer the following core policy questions about the "appropriate" roles the private sector and the public sector should play in the brownfield redevelopment process as follows:

**The private sector as deal-makers:** The private sector should be the primary focus of brownfield redevelopment deal making. As in all meaningful markets, encouraging private sector companies to invest private capital is the only way to sustainably and comprehensively address the brownfield issue throughout the United States. That said, the public sector must play a critical role in facilitating brownfield transactions and encouraging investment.

**The public sector as facilitators:** The public sector should use its tremendous resources to leverage the private sector's ability to successfully complete brownfield deals. Period! The public sector simply is not structured to serve as an efficient development entity. In fact, the most successful brownfield development projects (both for the developer and the community) have occurred when the public sector facilitated private sector development in public/private partnerships.

Further, municipalities should facilitate deals. Period! Don't do deals yourself, unless you can't incentivize the private sector to do them. In reality, municipalities should be the brownfield developer of very, very last resort. Strike that. You are always better off structuring a deal with the private sector. Nonetheless, public sector end uses may be tremendous tools to encourage private sector brownfield projects.

### Corollaries to the Public Sector As Facilitators

If the public sector truly wants to create a meaningful brownfield marketplace, it must overcome the following fundamentally flawed, but widely held, public sector beliefs.

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**Process is more important than results:** No matter what level of bureaucracy we are talking about, most programs are still measured by how the bureaucracies manage or expand their turf, rather than by how many transactions they facilitate. Bureaucrats inevitably focus on protecting "their" programs, "their" branch, "their" funds.

Instead, measure programs by how many deals you facilitate. Focusing less on process and more on results will have a much bigger impact on cleaning up brownfield sites and revitalizing distressed urban areas.

**Making money is bad, very bad:** Whether you are willing to admit it or not, the public sector does not like to see private companies profit from brownfield development. Actually, financially successful transactions are the foundation of our entire system of free enterprise. They are why we are the world's leading economy. I ask: do members of the public sector wish to invest their hard-earned pensions in companies that fail to generate a significant profit? I could go on and on. The point is: unless there is a substantial opportunity to profit, no "meaningful" market for brownfield development will evolve.

Additionally, returns or "profit" must be commensurate with both the effort and risk inherent in a deal. All market-savvy real estate investors agree, brownfield deals are inherently riskier than greenfield developments. Therefore, successfully executed brownfield deals must earn a higher return than ordinary transactions to create a sustainable brownfields deal market. If that can't happen, the risks of the deals must be substantially reduced.

One lesson I learned long ago in business applies directly to this discussion: Don't worry about what the other guy is making — worry about what you are making. Applying this tenet to public sector involvement in brownfield deals — if a developer does what he or she says, fully remediates a site, and develops the property (purportedly the

reasons for public support in the first place), don't worry if the developers make "too much" money. Worry if they don't!

#### Brownfield Policy Wish List

As I previously stated, figuring out what policies the brownfield development industry needs from Santa, Chanukah Charlie, or any other deity delivering gifts over the holidays to seriously enhance the brownfield marketplace is actually pretty simple. My wish list for the biggest presents goes as follows:

**Move faster:** Time is the enemy of all deals. It currently takes way too long to do brownfield transactions, primarily due to necessary public sector involvement. If the public sector moved faster to facilitate projects, more deals would be successfully accomplished.

**Clean up the real issues:** I can't tell you how much time and money we have spent studying, analyzing and remediating non-issues. As just one example, low levels of benzo(a)pyrene are present on many, if not most, brownfield sites, driving risk assessments and risk-based cleanups. What's the remedy? Cap it with asphalt, which contains what? Benzo(a)pyrene. I mean, is this a "Twilight Zone" episode or what?

**Adopt one set of cleanup standards:** I could dedicate a book to this one. Simply stated, there should be one clear set of cleanup standards (and one universally accepted approach) to

remediate any given contaminant of concern. It doesn't matter whether the release of hazardous substances was from a spill, a tank or a transformer; took place today or before or after 1984; is subject to CERCLA, RCRA, active enforcement, whatever! Adopt a process that allows volunteers to quickly remediate a brownfield site to applicable cleanup standards (i.e., like most state voluntary action programs). Additionally, make the process self-executing and universally applicable.

**Create real tax incentives for brownfields:** The best way to broaden the marketplace for brownfield redevelopment requires aggressive tax incentives for brownfield projects. Further, we don't have to reinvent the wheel here (i.e., All Appropriate Inquiries).

Adopt the approach used in low-income tax credit deals, modified for brownfield transactions. The market already understands this approach and the policies can be quickly applied to rapidly expand the brownfield investment marketplace.

**Dramatically increase brownfields funding:** I just had to ask.

#### It's Just Not That Difficult

Policymakers please take note. Just as in life, several of the best gifts on my wish list are free! The others cost less than the price of soap-on-a-rope in the context of their impact on U.S. economy. While I wish I could make it more difficult to devise a strategy to take brownfields to the next level in our economy, I can't.

The fact is, it's not hard to figure this one out. The trick is identifying the leadership eager to fight for the necessary changes to the status quo. **BFN**

Todd S. Davis, Esq. is the CEO of Hemisphere Development LLC, a nationally recognized brownfield redevelopment company based in Cleveland. He is also the author of the American Bar Association's best selling book *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property*.

Don't worry if developers make too much money. Worry if they don't!



# Letters to the Editor



## Praise for Our February Issue

I'm not sure who is responsible for the cover photo for your latest issue (We Have Issues), but I wanted to thank them. This photo has been making me laugh for two days now, and I've hung it prominently in front of my desk. Honestly, it's a stroke of genius. Anyways, thanks for the laugh. Cheers!

George M. Chapman IV

Office of State Representative Frank I. Smizik  
Boston, Massachusetts

I rarely read something that prompts desire to praise the author. Todd Davis' article (A Charlie Brownfield Post-Holiday Wish List) is on the money — blunt and accurate. Thank you.

Scott Chafin

ENTACT

Westmont, Illinois

As usual, your publisher's letter in the February issue was excellent. Keep up the good work. By the way, is that Robert Colangelo on the cover? Love it. Very creative. It will certainly catch people's attention, as it did mine, when my copy of Brownfield News appeared in my in box yesterday.

Bruce Moore

Michigan Department of Environmental Quality  
Lansing, Michigan

What a great article by Todd Davis in the February issue of Brownfield News. This should be required reading for all bureaucrats who work in brownfield redevelopment!

An anonymous former state regulator, now an environmental consultant, who has been working in brownfield redevelopment for 17 years. **BFN**

View all of the Brownfield Redevelopment Celebrations in America here: [www.brownfieldnews.com](http://www.brownfieldnews.com)



"I really did not see how we could use any other product due to the complexity of the project and the number of penetrations."

Ibraheem Alshunnar | NTH Consultants

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### Fairlane Green Development | Allen Park, MI

An old industrial landfill owned by Ford Land Corporation is now home to the new Fairlane Green Development in Allen Park, Michigan.

The new one million sq. ft. development offers an outdoor shopping center, which consists of a mix of retail stores, restaurants, and a considerable amount of green space for recreational activities, natural habitat preservation for wildlife and energy conservation.

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