

IN PRACTICE

LAND USE

Brownfields Redevelopment Boom or Bust in New Jersey?

By William J. Beneduce

During the real estate boom of the first five years of this millennium, developers were looking anywhere and everywhere to build condominiums, townhouses and retail buildings in New Jersey. Real estate was a gold mine in this state as buyers were ubiquitous and willing to pay almost whatever price asked. The term *flip* became mainstream. Major beneficiaries of the real estate boom were "brownfield" sites. Brownfields are commonly defined as former industrial or commercial properties that are currently vacant or underutilized, and on which there is, or there is suspected to be, a discharge of a contaminant. With the right mix of policy and market conditions, brownfields became a major source of opportunity for developers.

As a result of New Jersey's leadership role during the Industrial Revolution in the early 1900s, today we have thousands of properties with varying levels of contamination left behind, many of which are now brownfields. The New Jersey Department of Environmental Protection (DEP) estimates that there are approximately 10,000 brownfields in the state. These contaminated sites are drains on the local economy because they generate very limited or no tax revenue. They also drive away business and wealth. The longer the brownfields exist, the longer the local economy and environment suffer.

It takes a real estate boom and a tool box of incentives to generate redevelopment at these contaminated sites. Moreover, brownfield development reduces pressure to build on undeveloped areas (or green areas) which facilitates a Smart Growth policy. Many of the brownfields are located in urban areas that have become very trendy places to live. Take, for example, the City of Hoboken, which has a significant industrial history. During the 2000-2005 housing boom, developers were flocking to Hoboken as young professionals were willing to spend huge amounts of money to buy condominium units or rent expensive apartments built on former brownfield sites.

The state decided to help incentivize developers in 1998, when New Jersey enacted the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.1 et seq. (the Brownfield Act), to protect brownfield redevelopers from liability when purchasing contaminated sites. The Brownfield Act also paralleled the successful reimbursement program that came out of the Municipal Landfill Site Closure, Remediation and Redevelopment Act (enacted two years earlier), by including a financial incentive program under which redevelopers would be reimbursed for up to 75 percent of their remediation costs. The reimbursement money is derived, in both the landfill and brownfield context, entirely from taxes generated from the redevelopment. While the liability protection was very important to attract developers to the brownfield properties, the reimbursement of remediation costs was the real driver in bringing almost immediate state-wide success to remediating and reusing once-contaminated properties.

While redevelopers have raked in huge profits during the early years of the twenty-

first century, the state (and the real estate dip in general) has almost entirely derailed the brownfields program.

For example, Brownfield Reimbursement Agreements, which are the agreements entered into between the state and the redeveloper, document the conditions of reimbursement for the remediation costs. In November 2005, the New Jersey Commerce, Economic Growth and Tourism Commission (NJ Commerce), which merged with the New Jersey Economic Development Authority (EDA) in 2008, amended its regulations by requiring payment of the prevailing wage rates to workers employed in the performance of any "construction contracts" in excess of \$2,000, undertaken in connection with NJ Commerce financial assistance, or undertaken to fulfill any condition of receiving NJ Commerce financial assistance pursuant to N.J.A.C. 12A:2A-3.1-3.6. This prevailing wage regulation was thereafter applied toward "construction contracts" that relate to brownfield redevelopment projects since NJ Commerce (now EDA) was a signatory on all Brownfield Reimbursement Agreements.

If developers cannot profit from redevelopment, brownfield sites will continue to drain the local economy.

The prevailing wage law sets pay for work on (public) projects at a level equivalent to union wages for each profession within the contracting field. Although the extension of the prevailing wage requirement did not significantly affect redevelopment along New Jersey's Gold Coast (the west bank of the Hudson River, across from New York City), it caused a severe disincentive for redevelopers to purchase, clean up and build on brownfield sites located in other areas throughout the state, many of which involve significant investment risk because of very complicated clean ups. It is estimated that complying with prevailing wage laws increases the labor costs of construction by approximately 25 percent.

Accordingly, as of the middle of 2006, all Brownfield Reimbursement Agreements included a provision requiring that the redeveloper comply with prevailing wage laws as a pre-condition of receiving reimbursement of remediation costs, and that all "construction contracts" at brownfield sites comply with the prevailing wage laws despite these laws having been historically applied solely toward public contracts where contractors are doing work for public entities. In fact, no one foresaw the significance of the adoption of this NJ Commerce regulation as there were no comments published in the adoption notice.

Notably, however, Executive Order No. 66 (1978) stipulates that all regulations adopted after May 15, 1978, will have an expiration date ("sunset") no later than five years from the effective date. The regulations must be reviewed for either re-adoption with

out change, re-adoption with amendments or repeal of all or part of the chapter prior to the expiration date. The sunset provision ensures that each chapter is reviewed for its continued effectiveness at least every five years. The NJ Commerce prevailing wage regulation expired on May 16, 2010, which effectively terminated NJ Commerce's requirement that all construction contracts involved with brownfield projects be in compliance with the prevailing wage laws.

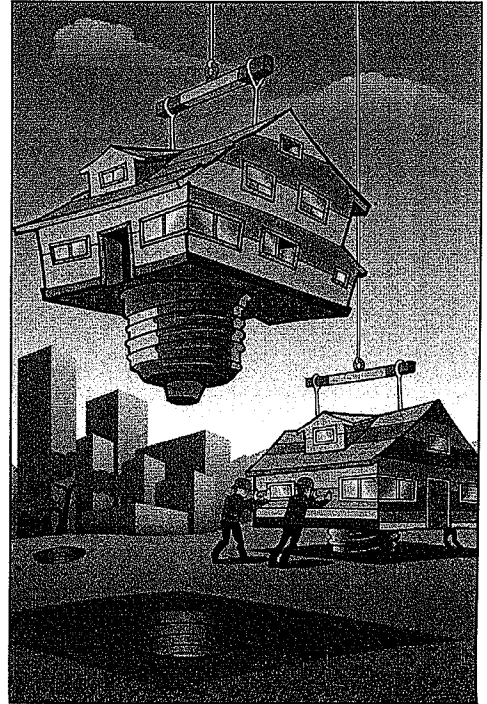
Recall, however, that NJ Commerce merged into EDA in 2008. The EDA had previously adopted (well before the November 2005 NJ Commerce regulations) prevailing wage regulations (N.J.A.C. 19:30-4.2) which required the payment of prevailing wage to workers employed in the performance of any "construction contracts" in excess of \$2,000 undertaken in connection with a project that has received final approval for EDA assistance and paid for in whole or in part with funds received through EDA assistance. Thus, due to the fact that NJ Commerce merged into EDA, the prevailing wage requirement continues for all Brownfield Reimbursement Agreements.

EDA has stated that it is bound by existing statutory requirements that require it to include compliance with prevailing wage laws in Brownfield Reimbursement Agreements. EDA has cited N.J.S.A. 34:1B-5.1 as the controlling statutory provision. This statute mandates that EDA adopt rules and regulations requiring workers to be paid the prevailing wage in the performance of construction contracts undertaken with EDA financial assistance.

To clarify, EDA's role in the brownfields reimbursement context is to work with the state treasurer to provide a negotiated reimbursement to the approved brownfield developers out of a special fund, known as the Brownfield Site Reimbursement Fund, which was created under the Brownfield Act. The state treasurer is not permitted to reimburse the redeveloper any amount of the remediation costs from the fund until the state treasurer is satisfied that the anticipated tax revenues from the redevelopment project have been realized by the state in an amount sufficient to pay for the cost of the reimbursements. The brownfield reimbursement funds are not coming out of EDA allocated funds.

EDA believes its hands are tied by statute, vis-à-vis applying the prevailing wage requirement to brownfield reimbursement. But the state legislature could carve out an exception for Brownfield Reimbursement Agreements, and then redevelopers might be more willing to take on the same risk now, during the economic recovery, that they did during the housing boom. The Final Report from the DEP Transition Subcommittee dated Jan. 15, 2010, states on page 19 that, "In order for the State to attract investment and compete for economic development with bordering states, New Jersey must eliminate the prevailing wage requirement under state reimbursement programs for brownfield sites." EDA believes that it cannot remove the prevailing wage requirement from the Brownfield Reimbursement Agreements without clear legislation directing it to do so.

The idea for brownfield reimbursement was to provide a financial incentive for re-



developers to make productive use of such properties, but, truth be told, many projects are not profitable if they are required to pay prevailing wages to the employees who are hired by the contractors to build on the site. New Jersey's political leaders realize that to help the tide turn toward a real estate recovery, there is a need to offer more incentives to clean up brownfield sites, not less.

Between 2000 and 2008, more people moved away from New Jersey than moved in. The Tax Foundation of Washington, D.C., indicated that New Jersey had a net loss of 304,000 residents with a combined income of \$12.3 billion. "They're pulled out because of retirement and climate reasons," Joseph Seneca, a Rutgers economist, told the *Star-Ledger*. "They're pushed by taxes and costs and through this decade a relative lack of economic opportunities in terms of job growth." These numbers are striking. Many long term New Jersey residents have been leaving this state and heading to the more affordable Commonwealth of Pennsylvania or Delaware. Such moves are understandable considering that New Jersey has the highest property taxes and leads the nation in median housing costs. Cleaning up brownfield sites and returning them to productive use is not only good for the environment, but it also boosts local tax revenue, creates jobs and affordable housing, lowers property taxes and preserves this state's dwindling open space.

We live in a "bottom line" society – if developers cannot profit from brownfield redevelopment, those sites will continue to drain the local economy. Government involvement in brownfield redevelopment is necessary. Such involvement, however, should include incentives to developers for their willingness to undertake risky ventures while also protecting the public health and safety and the environment. ■

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Taxation

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