

Brownfields – public involvement

A. Bogen

President, Down To Earth Consulting, LLC, USA

Abstract

It is the public's money that provides critical leverage in Brownfields revitalization. Without grants for environmental assessments or cleanup funding or tax incentives, many Brownfields sites would remain unkempt. Municipal staffs are public employees whose actions in the Brownfields process must be transparent. Regulators too must share findings and answer an enormous range of technically challenging health and ecological questions. The press seems to find stories of environmental resolution worthy copy. Their questions could be difficult to manage when the property owner may be wrestling with the responsibilities and liabilities of potential site contamination. Sometimes, in neighbourhood meetings of directly effected parties, the whole process is characterized as being self serving for developers, bureaucratic, costly and time consuming and indifferent to the real concerns of the public. The charge for all parties involved in Brownfields redevelopment is to foster the public good by resolving ecological and human health risks and fostering economic development to increase taxes and employment. A trusted and effective process can assist Brownfields resolution. Time delays from litigation can be minimized. Infrastructure improvements are more likely to receive favourable bonding votes. Sophisticated and able developers are more likely to stay committed. This paper will be about developing just such a favourable process.

Keywords: grants, leverage, bonding, increased taxes, process, trust, liability.

1 Brownfields: developing a public process

The public bears the burden of Brownfields. They endure the health risks, suffer the loss of services not provided because of diminished tax rolls, and experience the deflating presence of blight. If the sites are to be returned to beneficial reuse, public support is critical.



There are a few essentials that should be in place before the public is invited into an active role. These essentials are a competent administrator, some funding and established relationships with regulators. It would be very useful if the administrator or consultant has Brownfields experience. Hopefully that person will have attained an awareness of the patience, technology and partnerships so necessary to success. The sponsoring governmental entity needs to have held a discussion of goals and expectations for the program. Some Brownfields can take a long time to resolve. At this stage of the international Brownfields experience, many of the less complex sites have been uncovered and reused. Much of what remains may have serious issues. Therefore the expectations of success must be in the long-term work. To most fully serve the community's long-term needs, the Brownfields program ought to coordinate with other land use groups like transportation, economic development, zoning and conservation.

The first step in developing public support is a commitment to an open process by the governmental entity in charge. An open process is defined as one that shares information and decision making. Trust has to be developed. It is the public's money that will be allocated to Brownfields. People will want to know who receives and benefits from that funding. There is a delicate balance to be struck among the intentions of transparency, effective management activities and the complexity and confidentiality of deal making. An effective committee can help foster community interest and sustain commitment over time.

1.1 Forming a committee

The first committee members will probably be people familiar to the administrator and the governing body. Diverse yet inclusive membership is a vital objective to pursue over time. There is value in having specific skills and knowledge among members.

As an example, health professionals will be able to help residents understand the health risks. There are often concerns over the potential for cancer clusters. A proposed reuse may involve increased vehicle traffic to a site with the concurrent concerns about air and noise pollution. The public will want to know about the plans for resolving contamination on the different sites. There may be very vocal persons who prefer an alternative that is not economically feasible or required by regulation. A professional can lend direction and help the group reach an outcome to the debate.

Economic development professionals will understand the barriers to reuse associated with assessment and cleanup costs. They can support the effort to develop information as needed rather than to expend a lot of funds studying everything at the start. They may be able to help arrange contacts with informed developers. Bankers and non-traditional lenders may be attracted to assist in funding the redevelopment because of the relationships with these professionals. They may also have access to government programs for other sources of development funds.

A grasp of technical issues can be paramount to the management of costs. Therefore it is important to have representation from some of the associated sciences. For example, chemists and geologists can have a working knowledge



of the hazardous materials encountered on a site and of the potential for ecological impact. It could be valuable to engage an educator from an environmental discipline or a volunteer professional from an engineering or environmental sciences company.

Representatives of the community are also important to have on the committee for a number of reasons. They can help their neighbors become informed of what the issues are and how they are being addressed in an informal manner. This can lead to important support for a reuse project rather than uninformed, fear based opposition. It also seems appropriate to listen to the concerns of those most directly affected by the Brownfields site. They have borne the greatest share of the burden. They also need to be part of the process when the decision is undertaken to prioritize sites for assessment funding. That is usually the first water shed decision. How it is handled can enormously enhance or damage the credibility of the process.

On going education of the committee members is critical to the strength and effectiveness of the group and the project. Lawyers and developers are often willing to come to such a group and to explain what is required or what is needed in a successful transaction. It takes time to understand the concept of a shared burden in the remediation of a Brownfield. A task may be both remedial and developmental. An example is the combination of removal of contaminated soil that is also geo-technically unsuitable. It would be cost efficient to accomplish those objectives as one coordinated activity. If the parties were a developer and a seller and they agree to share the cost, they might both have a net savings. The committee members, if familiar with such examples explained by experienced people, may come to see this dynamic as part of reaching a deal rather than aiding and abetting a polluter. The seller may have entered the chain of title and therefore assumed liability but may not have caused the contamination. A Brownfields transaction may be the most sophisticated project some members have encountered in their careers. It is helpful to provide them with these transactional alternatives to promote flexibility, patience and dialogue. It is equally important to attend to regulation. Therefore these alternative ideas need to be presented as hypothetical so as not to create the impression that the technical standards are subject to manipulation. There can be political pressure that is uncomfortable to withstand. The best defense is in this open continuing process. Because Brownfields can be complex, the developers of the project can appear to be spoiled children demanding that everyone accommodate them so that they get what they want. If the goal remains healing the land and creating public benefit through a transaction, all parties can achieve their objectives. No one can work through all the hoops themselves. The committee is a vital part of the team making Brownfields alive again.

1.2 Committee functions

Foremost among the defined charges that the committee can carry out is the development of the criteria for site selection. These criteria will be very important when there is scrutiny as to why one site was selected over another.



The explanation needs to be clear when answering inquiries from the public or the press.

Public funds are scarce and precious. Competition for them is intense. Increasingly, projects need measurable returns to be funded. Usually communities are faced with resolving more than one Brownfield site. Therefore, they want to be able to continue to access additional funds over a period of years. Their assessments need to support a desired outcome. An environmental assessment requires rather significant funding. The work product has a shelf life. Regulations change as do site conditions. A completed study could be obsolete before active interest in the site materializes. There are too many troubled sites to attempt to build a library of data. Therefore a significant component of the selection criteria could be whether or not the site has real potential to bring a return on the public investment. The major considerations about whether or not to award funding can be developed through the following three questions:

Does the site have kinetic potential?

Is there an acceptable proposal from a capable developer?

Does the proposed reuse generate taxes and jobs or other public benefit?

If the answers to these questions are presented to it, the committee can compare and evaluate competing projects. An application form can be designed that leads the project advocates to define their answers clearly. For example, to determine the kinetic potential of the site to be reused, a number of questions can be considered.

Is there a written access agreement? If the current owner has reservations about allowing access, the study may never take place. These reservations need time to be addressed. The owner may fear that the information uncovered will force him into a costly remedial situation for which he is financially unprepared or unwilling to encounter. Defining the risk to the owner may not be the way to achieve cooperation. Instead it may be important to understand the site in question in relationship to the balance of the owner's other assets. Perhaps the owner assumes that the remedial costs will make the property inverted in value and is willing to transfer it to the community for a reduction in liability. If there is a public development interest in the site, as opposed to a delinquent tax action, the municipality may want to negotiate a deal pending the resolution of the environmental conditions. The owner may reluctantly agree but never the less agree to access. There are instances when the proprietary generation does not want to leave the burden to the next generation and so may agree to access. Sometimes there are negotiations that take place in the context of a pending or actual regulatory action. The owner may come to see the access as a start toward resolution. In some instances, the owner may see the public process as reassuring. The owner does not have to decipher what the technologists are saying. The use of the public money means that it should have some standard of accountability. Then they may not have to put up any funds to get started on developing the answers. If the owners come to see the inevitability of the need



for resolution, they will try to reach accord. The committee needs to be kept informed of the process underway all along the way that it is occurring. They have to be able to support the negotiator and understand what importance the components of an agreement have to the parties. It is almost a mantra that needs to be recalled for each project. These sites are Brownfields and therefore are often complicated to resolve.

Is there a known health risk that could delay the process until it is resolved?

There are diverse health issues that could effect a site selection decision. Sometimes, the committee may have a direct appeal from a health department so provide assistance in investigating suspected conditions on a site. For example, children may become ill from exposure to contaminants left on an unsecured site. The committee may ask why the health department doesn't conduct the assessment. In many instances, the health departments are looking at the effects on human beings and need assistance from another enforcement entity to clarify what the environmental situation is. Working cooperatively may get a site resolution underway. Not all outcomes need to be tax and job driven. Risk abatement can be a valid criterion. Perhaps the public and committee will enter into an enhanced dialogue about the uses of the site in question once the sources of concern become public information. At minimum, there will be a dialogue about abatement. The charge of the committee remains assessments. The likelihood of a resolution is increased when the baseline data is known and the real risk assessed. Otherwise these sites may stay blighted and worrisome.

Is there a tax lien and does the municipality control that lien? There are a variety of regulations that government bodies have about the procedures required when there is a delinquent tax bill. The municipality needs to have a high performing tax roll and Brownfields often owe back taxes. In some cases, the liens may have been sold and the purchaser wants full reimbursement and expected return. The municipality may need to go to court to create a universal resolution to this issue. There is no use conducting an assessment on a site that remains financially inverted in part due to the amount of the back tax bill. In some cases, a higher legislative body may hold the authority to grant the tax relief critical to getting the site resolved. The committee may want to see such sites as second tier priorities to be addressed when the tax matter is clear.

Does the owner stand to be unduly enriched if it receives this benefit? Is that owner responsible for other problems on other sites? In Brownfields work, public funds are being used to address an environmental and therefore economic situation that will affect a private party. The public perception of the benefit is critical to the ongoing health of the project. The law may hold the owner as the responsible party even if she did not cause the contamination. Assisting that innocent owner should still be a decision reached in dialogue. People will want to know that public funds are not being used as part of a bottom feeder development strategy. The committee needs to be careful that it is not manipulated into making a grant. It is also important to recall that the public's



need for such grant leverage arose from an understanding that without it sites could remain blighted indefinitely.

There can be a wide divergence in opinions as to the acceptability of a development proposal. A projected increase in tax receipts may be attractive to the majority of the community but irrelevant to the adjacent neighborhood. The increased volume of traffic and concurrent risk to pedestrian safety and associated decline in air quality can be unacceptable trade offs. The community may also object to the specific reuse. The proposal could contain new forms of visual and noise pollution. Some times the existing infrastructure can't support the new project without additional public investment, which may or may not be acceptable. Therefore, it can greatly facilitate the work of the committee if the municipality has discussed these issues and provided guidance. It may be necessary for the committee to take the lead in getting the issues discussed.

The committee can also request additional information such as awareness of sustainable environmental practices in site configuration and building design. This can be a dialogue that educates and involves people. There is no need to defend regulations as the committee's primary charge – those tasks fall to the already established appropriate bodies. There is a growing awareness that reusing sites in a way that adds to off site runoff or significantly increases sewer use may add other unacceptable and costly ecological burdens. Reuse at any cost is contradictory to the intent of Brownfields resolution. Building with green orientation means support of sustainable reuse. The committee members will need continuing education to have this information. Brownfields efforts in this area can provide leadership in the general effort to build in a sustainable fashion.

1.3 Contractor selection

First among the committee functions related to their fiduciary charge involves the selection of contractors to perform the assessment. The administrator can prepare an advertisement for a Request for Qualifications. Attention will have to be paid to the regulatory requirements of such advertising. There is usually great response to these solicitations. The administrator may want to collate some information about the various companies to assist the committee in its review. For example, it may be useful to have comparisons of insurance capacity, technical staff qualifications, number of project managers, related in house technical and computer capacity, rates for services and lab fees and the like.

The committee will need to define what qualities and capacities it most wants from the contractor. There are firms specializing in certain remedial technologies and firms with more general practice. It can be inefficient to advertise and interview for each project. The committee may choose to establish a short list of contractors that stay eligible to bid on projects as these mature. There may be certain basic selection criteria such as having the appropriate licenses, insurance and bonding capacity. There are other qualifications that may be discovered in interviews where the contractors can discuss other projects that illustrate how they handled the myriad issues that often accompany a Brownfields assessment. The contractor's relationships with regulators can be explored. It may be possible to retrieve information from the regulator about the good standing of the



license holders. The contractor can be asked directly whether any of their projects has matters in conflict. The committee can get a sense of how well the technicians can communicate to the laypeople on the committee and perhaps by inference to the neighborhood residents.

When the committee actually has a site assessment project that they put out for proposals, other factors emerge. They will need a basis to compare the different proposals. The contractors often provide a narrative and general cost estimate. It is suggested that the administrator limit the length of the narrative response. The technical skill does not expand in direct relationship to the volume of words used to describe corporate capacity.

The charge of the committee includes the circumspect use of the funds. They need specific budget lines to compare. They need to compare what tests are proposed, the number of tests, the cost of narrative reports and the like. They ought not to be required to always choose the low bid. There is a balance in every assessment among art, pragmatism and science. The training of technicians often leads them to suggest more sampling to be conservative and address the liability concerns of their insurance carriers. Part of the Brownfields assessment process can be seen as establishing the range of environmental concerns and the associated remedial cost rather than explicit detail on a site. The earlier stages of the assessment could serve to define the feasibility of the proposed project site to be remediated rather than full, specific details of a remediation plan. The first generation of data can usually provide enough information to determine that project feasibility. The issues could reveal extreme soil and/or ground water contamination. That cost of remediation could exceed the market value of the site. The municipality or other governing entity could still decide to allocate the necessary funding to create the leverage to restore the site.

The committee can also discuss rates for a particular contractor service to understand the range and value of those fees. Some governing units have arrangements with testing laboratories for lower rates, which these public projects may be able to access. A competent administrator is likely to understand the relevance to the developer and community of what is being proposed by the contractor. That person could also have a dialogue with the regulators to determine the necessity of some specific proposed activities. This will help insure obtaining the most value for the public investment.

Because the committee will independently select the contractors, the administrative staff is insulated from the pressures brought by the contractors' sales efforts. Separating the procurement and selection processes helps to reinforce integrity in contractor selection.

1.4 Project development

Soliciting sites is an ongoing activity. It is important for the administrator to establish and maintain contacts with all the parties who come into play with a real estate transaction. Developers, real estate agents and corporations often include the web in their search activities. Brownfields facilitators need to prepare internet information on sites they are managing to provide exposure for



those sites and to foster more transparency. This and other more traditional networking venues can provide the opportunity for re-development options for the municipality. The developers in turn can receive information about the capacity of the Brownfields project to provide financial resources and support to developers. This interaction will also assist the administrator in her efforts to keep up with changing regulatory responses, new forms of funding and tax concessions and unique technical solutions. The field is very dynamic and in need of ever new approaches to financing. The resolution of the liability maze is an ever evolving process.

The detailed work of the committee begins when a site is recommended for an assessment. Staff needs to collate information about a site before it is presented to the committee for decision. The specific data that went into the site selection criteria grid needs to be recapped.

Some of the information may require sensitive and confidential management. For example, as discussed above, it may be that the site owner feels vulnerable to the process. She or he may have debt with the site pledged as collateral. If the environmental conditions reveal a costly clean up, the value of the site could become inverted. This may have an immediate and deleterious effect on the financial condition of the owner. Public corporations in the US must now make representations about those liabilities. Small owners and their lenders will likely have varying degrees of awareness of the situation. However, as mentioned above, staff and the process must take into account the financial repercussions of the proposed project. In the past, where there were just such concerns, owners have sometimes abandoned the sites for fear of the cost of remediation. It is critical to discuss the risks associated with granting permission for an assessment. The administrator needs access to and the support of lawyers with transactional knowledge. Part of the charge then of the administrator is to develop such relationships. This is a point of significant balance between transparency and confidentiality that needs professional structure.

The administrator needs to also provide condensed information handouts for potential partners in a transaction. Brownfields can be among the most complicated of real estate transactions. The issues can seem overwhelming. Projects can be stalled before they start if the fears seem to be supported by the maze of questions and complexity of process. Governments have developed information handouts with answers for many of the questions that can alarm laypeople. The process can be facilitated by providing these as well as examples of successful resolutions. Some miserable sites have been redeemed. Trust can have a greater chance to develop when the prospective partners can see the road taken by other parties.

The same information is vital to the committee. They need to know that the outcome will have real value. For example, no one would want to participate in a process that appeared to provide an owner with both funding and management of an environmental problem caused by willful or careless mismanagement. Therefore staff needs to do some preliminary research on the regulatory record of the site and the owners before there is a formal assessment. The ultimate beneficiary must be the public. The owner, even if it is a shell corporation, may



have an open ended situation become closed to their coincidental benefit, but the asset gain needs to belong to the public. Measurements of that gain could be tax income and jobs as well as environmental remediation. It is important to keep on track to accomplish resolution of the site despite the anger that some members of the public feel about the individuals or company that were responsible for the contamination.

Unfortunately, the research on sites may, on occasion, reveal that the regulators could be seen as having been lax in enforcement. With the ratio of regulatory staff to the number of incidents being what it is, the attention and follow up go to the worst problems, of which there are many with new ones always being added. Therefore, it is useful for staff to discuss with the regulators what protocols and specific areas of concern they have about a site before it is presented to the committee. In this way, everyone can be prepared to answer questions about what can provide a resolution going forward rather than focusing on past events. The trust between the administrator and the regulator is essential if they are to find the points of possible flexibility along with those points of little alternative approach. Getting things done while paying attention to the appropriate resolution of areas of concern relies on knowledge and transparency. Fostering the public good is the charge of all the parties.

When there is agreement on what issues the regulators want addressed and how they want them addressed, the contractors can be asked to provide proposals. Then the committee and administrator can review the proposals. They can perform the comparison of costs and scope of work to determine if the contractor has addressed all the points of the published request. Sometimes the administrator may prefer to have the contractor meet with the public to explain the project technical approach. Sometimes the administrator wants the contractors or a facilitator to conduct public outreach to gather the reactions of impacted parties.

The Scope of Work is important to clarify as much as possible before any of the work begins. The expected outcomes are very important to define. The first round of sampling may reveal additional areas of concern that will require additional sampling. Sometimes this recommendation by the technical consultant can appear to be a self serving and make work proposal. That is why it needs to be clear to all parties what is unknown and what is expected to be known after the sampling. The final outcome of the assessment is to determine what the clean up cost is for the proposed reuse of the site. Getting to that answer can require discussion after the completion of different activities to decide on the best next course of action.

For example, the first round of ground water sampling could reveal some contamination. Additional sampling would probably be required to establish ground water flow, the area of the plume, the possible source and all the constituents of the contamination. Sometimes that source can be off site and the release is flowing onto or under the site. That situation may require new access agreements with the owner of the site where the possible source is. This situation can often cause the need for a negotiated legal solution.



The soil sampling may identify areas of concern. The first round of samples may be targeted in the areas of suspected previous potentially polluting activity or in a grid pattern across the site. The next step may be to allocate funds to conduct additional sampling to define the limits of the impacted area in order to quantify the amount of impacted soil. That information is necessary to develop a remedial strategy. It needs to be determined if the soil needs to be removed or if it can be treated in place and the cost of the different alternatives. Being patient while answers develop is important. It can take some time until the lab results are developed followed by the refining of what the contractors suggest doing and finally determining what the regulators want done next. That process may be supported if the administrator is familiar enough with the science and regulations to make suggestions as to how to reach a conclusion. As with any real estate deal, the project must move along. The dialogue costs money and needs to be managed. Often it is important to put a proposed plan in front of the parties for them to react to rather than to wait for them to have the time or to make the time to prepare a plan. They may be able to more quickly respond by editing rather than drafting.

It is also important to be certain that the contractor has continued to follow the guidance of the regulators in the site work activities. Interpretation can cause unnecessary cost if the details are not confirmed.

The administrator must look ahead to what the next steps could be. If there is contamination on site, it will need to be addressed in some fashion. The proposed reuse of the site may help determine how the parts of the remedial plan can be most economically defined. Before creating the Remedial Action Plan, a transparency of the reuse plan could be overlain on the plotted areas of environmental concern. It will be helpful to include ground water flow and possible receptors to reassure people that all the risks have been considered. This will help people visualize where contamination might be isolated and secured on site. Cleanup costs could be significantly reduced.

The work associated with assessing Brownfields will continue as long as manufacturing does. Unfortunately there will always be new sites caused by economic or natural disasters. Technology deployed through more pro-active regulatory operational controls could reduce the spills and dumping and the risks associated with abandoned sites. Elements of experimental Brownfields programs will become institutionalized. A process needs to be in place to assist the municipalities and/or more regional government entities in the resolution of these sites. If that process is open, the public will continue to want their tax dollars used as leverage for clean up and renewal. We are building a process today that will help to resolve yesterday and provide support tomorrow.

