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# HOW A CITY'S PILOT PROJECT CAN INFLUENCE A STATE'S BROWNFIELDS PROGRAM

BONNIE BIEMER\*

## I. BACKGROUND INFORMATION

### A. Roots in the Community

Residents of some of the lowest income neighborhoods in Louisville, Kentucky, came together in January of 1994 to prepare a strategy and application for the federal Empowerment Zone program. This program was the Clinton Administration's effort to address problems of cities, and the reward was \$100 million over a ten year period.

An important part of the community's vision statement—things community members would like to see happening in their neighborhoods by the year 2000—related to the environment: clean neighborhoods where clean businesses coexist with homes, old factories turned into schools, rehabilitated structures, reduction in harmful chemicals used and stored near homes, community involvement in decisions about locating new businesses, and heightened environmental awareness.

This community base created a communication network and resulted in a higher level of trust in the local government than had existed in recent years. The focus on common goals knitted together elements of the community that had strong differences in the past.

### B. The Michael Porter Theory

In a discussion paper, *The Competitive Advantage of the Inner City*, Professor Michael E. Porter of the Harvard Business School, writes that past efforts to create a sustainable economic base in inner cities have failed.<sup>1</sup> He believes that is because those efforts were based on direct relief aimed at addressing social needs, rather than on economic self-interest and true competitive advantage.

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<sup>1</sup>Michael E. Porter, *The Competitive Advantage of the Inner City* (unpublished manuscript, on file with Professor Porter).

Professor Porter thinks the time is right for significant economic revitalization in inner cities by identifying the unique existing and potential competitive advantages they possess, which can translate into genuinely profitable businesses that have the potential not only to serve the local community, but also to “export” services and goods. He sees the advantages as including the existence of an infrastructure, a nearby labor force, convenience to transportation arteries, and tax incentive programs.

### C. Not in an Economic Development Vacuum

The Empowerment Zone work in Louisville created a context for environmental progress to take place, but the city’s brownfields program was just one piece in a much larger economic development puzzle. The community group agreed that economic opportunity is the key to progress. The group identified the need for an economic engine (this was later manifested in the creation of a Community Development Bank that can loan money for home ownership and business development in the area). They saw the need to work on creating jobs, training residents for those jobs, supporting people who had never worked with mentoring programs, and providing day care and transportation assistance.

## II. HAS A BROWNFIELDS PILOT MADE A DIFFERENCE IN LOUISVILLE?

### A. What Do We Have to Show For It?

Louisville began by assessing its situation and working out a plan of action. The City focused on changing the process for redevelopment, which was perceived as being overly long, overly expensive and having unpredictable standards for cleanup. The plan was to learn by developing strategies as we actually worked with property in pilot projects.

The Brownfield Working Group (Working Group), formed of twenty-five people with an interest in the issue of brownfields redevelopment, has been meeting since September 1994. Its members include a well-known environmental lawyer and activist, an industrial real estate developer, a commercial realtor, a Chamber of Commerce officer, a mortgage banker, an environmental development attorney, a Community Outreach officer from the Federal Reserve Bank, two members of the Empowerment Zone Community Board to act as

liaisons to the community, and key city and county government representatives.

The Working Group's goal can be stated as follows:

To develop workable strategies and processes to identify and remove barriers to reinvestment in the urban area that stem from environmental concerns; to bring about or cause environmental cleanups which might not otherwise occur. Our priorities are brownfields sites for which a viable market exists.

First, the Working Group identified the current process for redevelopment of a brownfield-type property with uncertain standards, time, and costs of cleanups. It noted several points at which real-world deals collapse during this process. The solution was to streamline the process and eliminate those points.

The Working Group established a six-point agenda to address these issues.

- (1) Establish a computer database of brownfield sites, including information on the quality of the Louisville aquifer;
- (2) Obtain input on process from residents, developers, end users, and the business community;
- (3) Establish a new process for cleaning up brownfields;
- (4) Educate the community on the cleanup process;
- (5) Collect ideas from other cities and states;
- (6) Create a way to give the public guidance on brownfield cleanups.

Members of the Working Group have taken every opportunity to spread the word about their program throughout the community, speaking before elected officials, Realtors, bankers, investors, and other interested parties. These discussions have begun to convince people that investing in brownfields can be a good idea, and that there is help available through government. Breaking down old fears is sometimes a long process, but the work has begun, and developers are beginning to use the program.

### B. How About That Database?

Using grant funds and building on the existing Louisville-Jefferson County Information Consortium (LOJIC) Geographic Information System, the Working Group built a site-specific environmental database, using data from public records. Included in the data base are registrations of underground storage tanks, hazardous materials spills, hazardous materials handling permits, zoning classifications, land uses, Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) sites, and toxic release inventory facilities. A list of tax delinquent abandoned properties, state superfund sites, aquifer study data, and other sets of data are also layered into the data base. The Working Group has now created a master list of brownfield sites which may be prioritized to target city redevelopment efforts more effectively.

### C. The Garfield Pilot: Ready for Sale

The city's first brownfields site is the Garfield Pilot Site, formerly, Ni-Chro Plating Co., an abandoned metal plating operation. The neighboring metal working business approached the City of Louisville in early 1994 and requested the City help the business acquire the abandoned site. At the time, the half-acre site carried an EPA emergency response action lien for \$163,000, much more than the value of the property. Working with the EPA, the City was able to get the lien released, then foreclose on the property for back taxes owed. It placed the property in the Louisville-Jefferson County Landbank Authority to cleanse the property of all liens for back taxes.

The Louisville-Jefferson County Landbank Authority was formed pursuant to section 65.350-.375 of the Kentucky Revised Statutes. Created primarily to help the City consolidate residential property, the Authority is comprised of all local taxing entities—city, county, state and school board. It has the power to forgive back taxes in an effort to reclaim real property for the active tax rolls.

At the Garfield site, the Working Group oversaw site characterization, working in cooperation with State Natural Resources personnel. It met with neighbors to explain what was going on at the site, performed a minor removal of soils containing elevated quantities of lead, and is currently negotiating its sale to the neighboring business, Louisville Dryer Co., which is expanding by adding ten new jobs.

#### D. Schuler Machine Company

Schuler Machine Company, a metal working company, was able to purchase neighboring property for future expansion after the City facilitated the demolition of a burned down plant and the sale of the land to Schuler. Schuler is holding the property for future expansion purposes.

#### E. Trolley Barn

The Trolley Barn property is an historic building once used to service mule-drawn trolleys as well as more modern mechanical trolleys. Brownfield Pilot funds were used to characterize the site and the City's Urban Renewal agency purchased the building from the owner who was using the location for an insect control business. The site has been cleaned of environmental concerns and awaits redevelopment. A citizen group would like to use at least part of the building for an African-American Cultural Museum.

#### F. Rowan Street Site

This half-block property is located on Rowan Street in the City's near northwest side, between 21st and 22nd Streets. It is the site of a former tobacco warehouse once used by Louisville's most notorious waste "mishandler", Donald Distler. The land was cleared by an arson fire in April 1997, when neighborhood youngsters set fire to the abandoned warehouse building. To address neighborhood concerns for safety, the City tested some soils at the site and found constituents which were not at hazardous levels. The property had been abandoned in bankruptcy and carried many liens. The City brought a foreclosure action, but during public sale at the courthouse door, a private developer bought the site for \$35,000. The City intends to discuss possible uses with the developer and see whether a partnership would be possible for future development.

#### G. Exmet and Beyond

Exmet of Kentucky, a former fertilizer manufacturer, was located on about three and one-half acres on Meriwether Avenue across from the City's Solid Waste Management Department. Kentucky's Natural Resources Cabinet brought an enforcement action against the

site, but it had been abandoned in bankruptcy. The Cabinet cleared the site and demolished the derelict buildings. The cost of this was about \$660,000, since one of the buildings was found to be encased in asbestos. The Brownfields program is working on obtaining a marketable title for site. If location were the only criteria, the site would undoubtedly be included in the program. This area is located along a railroad line and about half a block from an access ramp to I-65. Two neighboring businesses have expressed interest in acquiring the land to expand their operations.

For the next phase of Brownfields work, the City is looking to assemble a larger parcel of land in hopes of attracting new businesses with a corresponding increase in new jobs. There are two areas being considered for this target project.

### III. LEGISLATION, DOING WITH AND DOING WITHOUT

#### A. 1996 Law (Senate Bill 219)—Doing With

To address the liability concerns of brownfield cleanups, the Working Group drafted and lobbied through the 1996 Kentucky Legislature a bill to permit the Cabinet for Natural Resources and Environmental Protection (Cabinet) to issue a “No Further Remediation Letter,” (NFRL) to any local government who owned a site that was cleaned up to proposed use standards, cutting off exposure pathways to human health and the environment. The bill, codified at section 224.450 of the Kentucky Revised Statutes, extends protection from liability from state superfund concerns to innocent purchasers, local governments, and lenders. It took the Cabinet fourteen months to issue the first NFRL under this provision.

#### B. 1998 Session—Doing Without

No new brownfields legislation was introduced during the 1998 Kentucky Legislative session. There was some discussion prior to the session, but the Secretary of the Cabinet for Natural Resources and Environmental Protection was unwilling to sponsor brownfields legislation at that time.

Private sector interests, including the Associated Industries of Kentucky and the Kentucky Chamber of Commerce, said they would pursue amending section 224.450 of the Kentucky Revised Statutes to include giving the state authority to grant an NFRL to the private

sector. In addition, they also proposed possibly seeking regulatory authority for the Cabinet to institute a fee system to finance the increase in project reviews that would be anticipated. These initiatives, however, may await the 2000 legislative session.

#### IV. PARTNERSHIP WITH STATE GOVERNMENT: A MAJOR PARADIGM SHIFT

##### A. The Early Years

In January, 1994, when the Governor's office encouraged all state agencies to work with the City of Louisville in submitting its Empowerment Zone application, the Kentucky Natural Resources Cabinet supplied a team to work with the Environmental Practitioners' Group, (a predecessor of the Brownfields Working Group). This partnership exemplified the only time in recent history that the City and State sat on the same side of the table when it came to environmental matters. It marked a real break-through in City-State relations because all prior contacts had been conducted in an adversarial setting.

After working together closely for about five months, many barriers were removed. It was natural, therefore, to include the State when the Brownfields Working Group was constituted. The Working Group certainly could not have accomplished all that it has to date without the cooperation and partnership role taken by Kentucky's Natural Resources Cabinet. It was supported by Natural Resources Secretary Philip Shepherd during the Jones Administration, and then by General James Bickford, Secretary under Governor Paul Patton. Indeed, when Secretary Bickford came into office, he placed brownfields issues on his Top Ten list of issues to address. Jeff Pratt, who is the former Superfund Director and is now the assistant director of the Division of Waste, has been a staunch member of the Working Group, as was Cabinet attorney Larry Moscoe. Another Cabinet attorney, Lauren Anderson, also joined the Working Group. Both have now left the Cabinet but continue with the working group.

In the summer of 1997, there came a point, however, where the Working Group realized that it did not have the complete backing of the Cabinet. Mid-level government officials did not seem interested in pursuing brownfields objectives. If there were large, financially driven projects, the Cabinet always came through, managing each project individually. Missing, however, was a program for the ordinary property owner or developer of small sites. Owners of small properties

were awed at the prospect of approaching the Cabinet for help and were afraid of immanent prosecution. The liability ogre was too scary for much to happen, and this attitude was found to prevail in small cities in the state, as well.

## B. Kentucky Works

Once the local changes were in place for brownfields, the group turned its attention to Cabinet changes that would support recycling of brownfields in Kentucky. In late August 1997, Secretary Bickford granted then-Mayor Jerry Abramson's request for a three-day work session designed to do two things: (1) institutionalize, streamline, and speed up the process within the Cabinet for issuance of the NFRLs; and (2) look at proposals to encourage more private sector cleanups from a state level.

For this work session, those who participated included an EPA Region 5 engineer experienced in voluntary cleanup programs, a Region 4 project manager, an attorney with the Natural Resources Cabinet, a Kentucky Chamber of Commerce representative, a Kentucky League of Cities representative, an attorney for Associated Industries of Kentucky, a representative of the State's Economic Development Cabinet, and the Louisville Community Development Bank's chief loan officer. Twelve members of the Working Group also participated, including state and city officials, an experienced environmental engineer, the head of the Kentucky Resources Council (environmental activist group), a local industrial realtor, and a private sector environmental attorney.

The group was divided into two teams, and at the conclusion of their sessions, the teams presented their ideas to Secretary Bickford and Mayor Abramson for acceptance, rejection or further study.

Secretary Bickford agreed to name a State Brownfield Coordinator and to consider a Standard Operating Procedure for brownfields that would incorporate a team review approach, so that proposals could be fast-tracked, rather than going through multiple reviews with changes made in sequence. He agreed to establish the procedure within ninety days. He also agreed to a proposal to let a task force (composed mostly of the same team members that made the proposal) study the concept of a Kentucky voluntary cleanup program. He said, however, that he would like to create a forty-five-day window in which the group would work and present him with a direction everyone in the group agreed upon. He agreed, in general, on the need for internal and external education.

Meetings were scheduled weekly and the Task Force was working in earnest on its proposal when it received a letter from Secretary Bickford to Mayor Abramson that seemed to cut short the process. The letter proposed that the State would do several things to support brownfield redevelopment:

1. Name Jeff Pratt State Brownfields Coordinator.
2. Adopt Prospective Purchaser Agreements such as EPA uses.
3. Apply the same lender liability criteria to enforcement actions as that adopted by Congress.
4. Publicize brownfield redevelopment.
5. Offer NFRLs to private parties who clean up sites when cleanup is complete.
6. Publicize the Cabinet's practice of cleaning up to future land use with institutional and engineering controls.

### C. Brownfields Skunkworks

Mayor Abramson responded to Secretary Bickford's letter with a letter thanking him for the promises but bemoaning the loss of the momentum for a Kentucky Voluntary Cleanup Program. He pointed out the increasing economic competition Kentucky faces among its neighboring states. Shortly thereafter, Secretary Bickford convened an internal problem-solving session of his own, which he calls Skunkworks.

For the Brownfields Skunkworks program, the Secretary enlisted four top-level Cabinet officials, each with many years of experience with the Cabinet, although not in brownfields redevelopment. He gave them a week away from their other duties to evaluate whether Kentucky should have a voluntary cleanup program (VCP), and if so, how, and when.

With Jeff Pratt and a staff attorney who had participated in the Kentucky Works sessions as staff for the Skunkworks, the team went to work. They determined that a VCP would be a good idea for Kentucky, and that the State could have a program under existing statutes (especially section 224.01-400 of the Kentucky Revised Statutes), and regulations, although some specific program items may require subsequent legislation.

## V. A VOLUNTARY CLEANUP PROGRAM FOR KENTUCKY

### A. Structure and Promise

The Skunkworks team identified seven program elements for a Kentucky VCP and a time line for implementing them:

1. Generic cleanup standards and presumptive remedies (in addition to site-specific cleanup standards and engineering and institutional controls). The Cabinet will suggest screening levels, based on specific chemicals, using 10-to-the-minus-6 cancer risk levels. Such levels could be incorporated in a "volunteer's" contract for cleanup. Both residential and industrial standards would be addressed.
2. State oversight. The Natural Resources Cabinet will oversee all cleanups in the program. The Cabinet is presently prepared to provide full oversight to any applicant for a voluntary cleanup. There will be public participation components when the project indicates the need, with advertisements and comment periods.
3. Review deadlines. The Skunkworks looked at a ninety-day turnaround for program submissions based on current law that requires a response within thirty days and a final decision within sixty days. This period would begin once an agreement is in effect. The Cabinet would try for a shorter turnaround whenever feasible.
4. Funding of administrative costs (through participant fees and federal grants). The Cabinet is considering setting a fee for each agreement based on projected hours of oversight required. This would be agreed to in a contract between the cleanup candidate and the State. The State also has begun seeking new funds from EPA grants to support a VCP.
5. Financial incentives (to be pursued jointly with Economic Development and Revenue Cabinets).

Financial incentives are not to be available to persons who caused, currently possess or control the release of pollutants. Secretary Bickford has assigned a deputy secretary, along with his aide, Mark York, to discuss state tax and other incentives with the Economic Development and Revenue cabinets.

6. Limitations of liability may be available through EPA Prospective Purchaser Agreements, No Further Remediation Letters, and a memorandum of agreement with EPA, but only for persons who did not cause, possess, or control the release of the pollutant.

7. Public participation. This will be tailored to individual sites, but will include at least a publication notice.

#### B. MOA With EPA

The Kentucky Cabinet has contacted Region 4, EPA, about obtaining a Memorandum of Agreement (MOA) similar to those EPA regions have granted to eleven other states with VCPs. The purpose of the MOA is to transfer CERCLA enforcement responsibility from the EPA to the State. The Working Group sees this action as being of special importance in reducing fears of liability on the part of lenders and developers. The number of states with VCPs is now up to forty, according to EPA. Kentucky Cabinet officials have begun discussions on the MOA with Harold Taylor, head of the Superfund program for Region 4.

In early August 1996, EPA issued Draft Guidance on components in a voluntary cleanup program that would be required for an MOA. Since many states with voluntary cleanup programs were unhappy with the guidance, EPA withdrew it in late 1997, deferring to a memorandum of November 14, 1996, which it is now using as guidance. The State has halted work on obtaining the MOA, citing the withdrawal of EPA's guidance.

The Cabinet has developed a remedial action guidance document that contains generic screening levels. The Cabinet created a brochure on "Kentucky's Voluntary Cleanup Program" and placed it on the Cabinet's Internet site.

As for limits of liability and the creation of incentives surrounding brownfields, the thinking of the Skunkworks group was that anyone could participate in a VCP, but Potentially Responsible Parties (PRPs) should not receive any available incentives, or protections from liability. The distinction between PRPs's and others has been questioned by members of the Brownfields Working Group who fear that it will continue to make people afraid to come forward to clean up their sites. The Skunkworks group's plan was that Potentially Responsible Parties could get "civil penalty forgiveness."

### C. Tax and Other Incentives for Brownfields Redevelopment

Federal assistance to brownfields redevelopment is offered through a change in the Community Reinvestment Act (CRA) of 1977. The Federal Register of May 4, 1995, Volume 60, No. 86, Pages 22156-22225, contains a joint final rule amending regulations implementing the CRA and substituting a new system that evaluates institutions based on actual performance in helping to meet their communities' credit needs, rather than emphasizing the process. This rule reduces record keeping and reporting requirements and otherwise modifies and clarifies the law.

On September 28, 1996, Congress added a lender liability relief package to an unrelated appropriations measure.<sup>2</sup> The legislation codified the *Fleet Factors* case decision<sup>3</sup>, clarifying the conditions under which lenders could be held liable for loans made to companies that pollute and clarified that normal banking functions would not trigger liability for contamination.<sup>4</sup> It also provides lenders with some limits on potential exposure to cleanup costs at projects they finance and helps the lenders preserve the value of facilities they use as collateral.<sup>5</sup>

On August 5, 1997, President Clinton signed the "Taxpayer Relief Act," part of his budget agreement. It allows non-responsible parties, both owners and prospective purchasers, to fully expense cleanup costs (make them fully deductible as a business expense in the year incurred).<sup>6</sup> To be eligible, property must be located in an area

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<sup>2</sup>Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 Pub. L. No. 104-208, 110 Stat. 3009-462 (1996) [hereinafter Lender Liability Act].

<sup>3</sup>United States v. Fleet Factors Corp., 90 F.2d 1550 (11th Cir. 1990).

<sup>4</sup>Lender Liability Act, Pub. L. No. 104-208 (1996).

<sup>5</sup>Lender Liability Act, Pub. L. No. 104-208 (1996)

<sup>6</sup>Taxpayer Relief Act, Pub. L. No. 105-34 (1997).

designated as a Brownfields Pilot prior to February 1997.<sup>7</sup> In addition, the property must be a census tract where population is under 2,000 and has seventy-five percent or more land zoned industrial or commercial, and the property must be adjacent to census tracts with a poverty rate of twenty percent or more, and any federally designated Empowerment Zone or Enterprise Community is included.<sup>8</sup> Under this program, the one and one-half billion dollars expected to be expensed are anticipated to leverage six billion dollars in private investment and return an estimated 14,000 brownfields to productive use. This provision will sunset after a three-year period, through December 31, 2000.

The EPA expects to set aside one hundred million dollars next year to fund additional site assessment and cleanup activities at Brownfields Pilot locations, and it also expects to provide twenty-five million dollars million in technical and financial support to state voluntary cleanup programs. EPA will also clarify the applicability of its risk-based corrective action (RBCA) approach to brownfields.

Other federal agencies plan brownfields incentives: the Department of Housing and Urban Development plans further revision of Community Block Development Grant (CDBG) regulations to encourage local governments' use of block grant funds and Section 108 loan guarantees for brownfields; the Department of Transportation will clarify that brownfield cleanups are eligible for funding as part of transportation projects; and the Department of Energy (DOE) expects to provide \$240,000 to help transfer relevant DOE-fostered technologies to brownfield site characterizations and cleanups.

The City of Louisville has received EPA grant funds to assist in site characterization of brownfields where there is no responsible party present; Louisville has also received a \$350,000 revolving loan fund for site remediation of brownfield sites, many of which are located within state-designated enterprise zones that provide tax relief to businesses who hire a percentage of their employees from the Zone.

## VI. CONCLUSION

Kentucky Works represented an opportunity for the State Natural Resources Cabinet to work with interests most concerned with enhancing brownfield redevelopment—those at the local level. It was an opportunity for people to come together in mutual agreement on a

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<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

voluntary cleanup program approach that will work for Kentucky. It was very difficult for some Cabinet employees to agree to sit down with members of its regulated community and even discuss ideas for a legislative or regulatory approach.

But, brownfields redevelopment is a national movement that will not be stopped. It makes good, common sense to recycle inner-city industrial and commercial properties to keep from using up "greenfields." These neglected properties cry out for environmental solutions that protect people but allow re-use.

It may be only a matter of time before Kentucky has a full-fledged voluntary cleanup program and an EPA Memorandum of Agreement. These are tools necessary to make this state economically competitive with its neighboring states. With the help of Louisville's Brownfields Working Group, the State is moving toward a program more quickly than it might otherwise.