Public Participation in Brownfield Redevelopment: A Framework for Community Empowerment in Zoning Practices

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Abstract

This paper discusses the importance of brownfield redevelopment in the context of the environmental justice movement. It emphasizes that the goals of environmental justice advocates and attorneys should include promoting the interests of the community in order to achieve environmental and procedural equity. This paper argues that the only way to adequately promote these goals is to allow for maximum public participation, which would include community empowerment practices and an eye towards the problems inherent in public participation. Because brownfield remediation provisions and programs rarely provide for adequate public participation, this paper argues that zoning practices can be employed as a vehicle for increasing community participation. Traditional land-use law speaks to environmental justice issues, and it also provides the community with other avenues for involvement in brownfield redevelopment. This paper’s moderate framework for fostering adequate public participation should still be applied to zoning practices, by environmental justice advocates and attorneys alike.

\textsuperscript{a1} J.D. 2012, University of Tennessee College of Law. Special thanks to advisor Dean Rivkin.
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Introduction

The present critical economic moment has instigated change in how municipal agencies are planning future urban schema. The perspective of urban revitalization has replaced the outdated idea of urban renewal.1 These urban revitalization projects “typically involve a mix of renovation, selective demolition, commercial development, and tax incentives in hopes of

1 See e.g., LeRoy C. Paddock, Green Governance: Building Competencies Necessary for Effective Environmental Management, 38 ENVTL. L. REP. NEWS & ANALYSIS 10, 609 (2008), for discussion of the negative consequences of “urban renewal” plans.
revitalizing urban neighborhoods without displacing existing citizenry.”

Urban planning and redevelopment has been cited as the key to stimulating employment, implementing smart growth, and restoring metropolitan aesthetics. In the past, discrimination, classism, and general conflicts of interest by city officials have resulted in ignoring or overlooking the interests of minority and low-income communities within urban centers. Rather than promote the concept of urban renewal, environmental justice advocates should promote urban revitalization projects, specifically those that broadly include contaminated properties such as brownfields.

Because the majority of United States brownfields are located in urban areas, cities are aptly pushing for the repopulation of cities in response to urban sprawl and related environmental concerns such as pollution, loss of open space, and traffic. As many environmental justice advocates and urban planning scholars have iterated, redevelopment of brownfields - defined by the EPA as “property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant” - can support the process of urban revitalization, thus serving to reverse the negative effects of urban sprawl. In addition to economic benefits, brownfield redevelopment can further the goals of environmental justice, which The Environmental Protection Agency (EPA) defines as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or

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3 E.g., Paddock, supra note 1.
4 See e.g., Michele Alexandre, “Love Don’t Live here Anymore”: Economic Incentives for a More Equitable Model of Urban Development, 35 B.C. ENVTL. AFF. L. REV. 1, 2-3 (2008), for further discussion of the negative consequences of “urban renewal.”
5 Kushner, supra note 2; Paddock, supra note 1, at 609.
income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.\(^8\)

Unfortunately, “most state brownfields programs use traditional public-private partnerships that do not require community involvement as a substantive component of the redevelopment process,” which can allow for development that ignores community needs, leading to side effects such as gentrification or lack of affordable housing.\(^9\) To fully address these environmental justice issues, public participation is essential; without it, the status quo will remain unchanged and the community will not become empowered towards self-interested social activism.

I. The Nexus between Environmental Justice and Brownfield Redevelopment

Studies have reflected disparate proportions of minority, low-income communities near “brownfields.”\(^{10}\) These sites are particularly abundant in urban industrial and commercial areas in large cities across the nation. In this downturned economic moment, some critics have called for the redevelopment of our inner-city urban neighborhoods and commercial districts to buttress employment.\(^{11}\) This essay suggests that environmental justice advocates and like-minded attorneys should argue that developers prioritize minority, low-income communities in the effort to boost economic stability. First, Professor Tony Arnold’s findings show that the areas in need of redevelopment are generally inhabited by low-income, minority communities.\(^{12}\) Professor

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\(^{10}\) For further discussion of disparate impact of contaminated properties on minority, low-income communities, See ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 285-93 (Rechtschaffen, et al. eds., 2d ed. 2009).

\(^{11}\) See e.g., Bruce Katz, City Centered: To double exports and create jobs, the U.S. has to invest more in its metro areas, TIME, November 1, 2010, at 62.

Arnold focused on land use regulatory patterns nationwide to determine that “[l]ow-income, minority communities have a greater share of…industrial and commercial zoning, than do high-income white communities”\(^\text{13}\) – where “commercial” zones include permitted manufacturing uses.\(^\text{14}\)

Second, a properly executed brownfield reclamation plan would serve the same ends as a plan to help the economy by way of urban economic development. Redeveloping decrepit, contaminating, unaesthetic sites in inner-city neighborhoods would directly or indirectly support education, employment, and the general quality of life in the area. Thus, in 1995, the EPA developed its brownfield program, and since then “it has been working with states, communities, and developers to clean up contaminated properties, and in the process, facilitate economic growth.\(^\text{15}\) This is fortunate because failure to clean up brownfields can have a multitude of negative economic, social, health, and environmental impacts including that inner-city residents cannot benefit from jobs that redevelopment may provide; cities receive less property tax revenues, which limits funding for basic services such as education; brownfields are unaesthetic and can contaminate the properties and water supplies surrounding it; vacant sites may tempt further environmental abuse such as “midnight dumping”; urban investment may be discouraged by these properties, thus contributing to “a pervasive sense of poverty and hopelessness.”\(^\text{16}\)

Furthermore, an abandoned site can be appealing for criminals or squatters who may be conducting illegal activities. Conversely, these abandoned sites can attract children, who have few play areas available to them, especially in rougher neighborhoods.\(^\text{17}\) Additionally, the areas

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\(^\text{13}\) Id.
\(^\text{14}\) Id., at 78.
\(^\text{15}\) Felten, supra note 8, at 680.
\(^\text{17}\) See Felten, supra note 8.
surrounding an underutilized site receive lesser funds for services such as road utilities and other public services. The brownfield site also reduces property values,\textsuperscript{18} further lending to the community’s overall nature of disrepair – a site familiar in cities across the country.

Unfortunately, brownfield remediation programs - specifically state voluntary remediation programs - generally require less stringent standards for cleanup than other EPA programs.\textsuperscript{19} Therefore, there should be great concern that significant amounts of contamination may be left behind after cleanup, which would be a concern if developers convert these sites into parks or schools.\textsuperscript{20} First, using the sites for industrial purposes may produce new contaminants\textsuperscript{21} and exacerbate any remaining contamination. One critic grimly stated that “environmental justice advocates will inevitably take a dim view of reinstituting industrial and commercial activities in predominately low-income and minority neighborhoods, especially where the cleanup will not reach” more stringent standards.\textsuperscript{22} Still, if the community is willing to take on faith that developers will adequately clean up the site, whatever the proposed use, the issue of a highly contaminated site leaking remaining toxins is mitigated because brownfield redevelopment generally occurs where less cleanup is necessary.\textsuperscript{23}

A. Participation in State Brownfields Programs

About thirty-five states have enacted general voluntary cleanup programs, and another ten have programs focused on brownfields.\textsuperscript{24} Unfortunately, these states generally require

\begin{flushleft}
\textsuperscript{18} Id.
\textsuperscript{20} See Felten, \textit{supra} note 8, at 682-83.
\textsuperscript{21} See Lowry, \textit{supra} note 19, at 372.
\textsuperscript{23} See Felten, \textit{supra} note 8, at 682-83. For a discussion of those properties classified with highly contaminated Superfund watch list sites, see Rechtschaffen, et al. eds., \textit{supra} note 10 at 286.
\textsuperscript{24} Jennifer L. Machlin & Tomme R. Young, \textit{Managing Environmental Risk: Real Estate and Business Transactions} § 9:56 (Westlaw 2010).
\end{flushleft}
minimal public participation in these programs. One explanation may be that “[b]y limiting public participation in a redevelopment project, states may be attempting to avoid possible delays in or deterrents to remediation of particular site.” Nevertheless, there still exists some opportunity for public participation.

State programs vary in terms of degree of public participation; however, public record and public notice requirements are the most common. Though these are informative for the community, “they [unfortunately] do not put in place any system for community planning or empowerment.” As will be discussed in Section II, community empowerment is a critical element in successful public participation and social action.

a. Public Record, Notice, and Hearing Requirements

Every state has public record or notice requirements within their voluntary cleanup programs. These requirements may include “publication in the state registrar or in newspapers and the posting of signs on the property.” However, some states require more public participation, in the form of public comment periods and required by thirty-nine states; these allow citizens the opportunity to voice concerns or suggestions regarding proposed development plans. “However, public comment under many of these programs only occurs after developers, municipalities, and bureaucrats have made the redevelopment plans, a point at which major change is unlikely because of the time and resources already invested in the project.”

26 Id., at 1043-44.
27 For a general discussion of the key elements that define a typical state voluntary cleanup program, see Harton, *supra* note 6, at 232.
29 Id., at 680.
31 See Felten, *supra* note 8.
32 Id., at 685.
33 Id.
the states supplement notice requirements with hearings or meetings; however, “[t]hese hearings can be limited to cases where there is a substantial public interest in the remediation, such as when the project involves a school.”

Overall, the short time frame allowed for the community to mobilize prevents the community from effectively acting against or supporting a proposed project.

b. Availability of Cleanup Project Information

States are increasingly using technology to provide information related to cleanup projects. Websites with greater access to “public record” also allow information to be more accessible to the residents. For example, “Virginia has included a weblink to its Voluntary Remediation Program database on its Department of Environmental Quality website. The site publishes ‘institutional control’ information for each cleanup site including restrictions on ground water use, residential use, and other site-specific controls.”

B. Environmental Justice Goals for Brownfield Redevelopment

Environmental justice advocates and attorneys should be concerned whether a proposed brownfields reclamation plan will (a) “provide tangible benefits, in terms of economic development or environmental quality” (b) “for the communities where brownfields are located.” Therefore, the standard of contaminant cleanup must be adequate, and the proposed use must not additionally exhibit a threat of fresh contamination. The benefits of brownfield

34 See Orien & Word, supra note 30.
35 See Felten, supra note 8.
36 See Orien & Word, supra note 30.
37 Id.
39 Eisen, supra note 38, at 220.
reclamation for developers include that, unlike greenfield development, “brownfield redevelopment can take advantage of existing urban infrastructures.”40

Densely concentrated urban areas offer better accessibility to workers…Other potential benefits include aesthetic qualities such as waterfront access and views, proximity to downtown business districts, …access to major universities and medical centers, and ancillary benefits of spending by rejuvenated industries and their workers on local goods and services.41

However, an environmental justice advocate should be concerned whether the developer’s proposed reclamation plan is benefiting outside investors or present community.42 Environment justice advocates, speaking at public dialogues held by the Waste and Facility Siting Subcommittee of the National Environmental Justice Advisory Council (NEJAC), “promoted the concept of ‘urban revitalization,’ a community-based approach focused on building capacity and mobilizing resources, as opposed to ‘urban redevelopment,’ a gentrification-driven policy that displaces existing communities.”43 The concern that redevelopment may ultimately displace the community is very real. In the urban south of Memphis, Tennessee, redevelopment is happening in industrial shipping yards and port areas along the Mississippi River.44 As expected, most people downtown and in nearer vicinity to river industry are minority and working or lower class. Unfortunately, the results of this redevelopment has created pockets of gentrification, and the resulting increased property values have caused the low-income, black communities to relocate.45

“Community activists...must decide whether brownfields programs will provide hope and opportunity to distressed neighborhoods, or exacerbate environmental contamination... and make

40 See Eisen, supra note 16, at 296.
41 Id.
42 See Eisen, supra note 38, at 220.
43 See Rechtschaffen, et al. eds., supra note 10, at 299.
44 Interview with Alexander Lynch, J.D. Candidate 2012, University of Tennessee College of Law (April 15, 2011).
Mr. Lynch is a lifetime resident of Memphis, Tennessee.
45 Id.
investors wealthy at the expense of urban residents.” The consequences of a gentrification-driven plan, in light of the current economic state, may be that the plan falters or fails. For example in Memphis, an entire complex meant for wealthy condo owners was in the course of redevelopment when the real estate development company hit hard times and halted construction. The building stands unfinished and unoccupied to this day.

II. Fostering Public Participation

A. Community Involvement and Empowerment

Public participation benefits both the community and the brownfield redevelopers. As one commentator notes, “[a] favorable response from the community to a proposed brownfield redevelopment project that involves risks is more likely when legitimate representatives of neighborhood interests have been involved in a meaningful decision-making process.” The NEJAC issued a report on community participation in 1995 based on meetings with environmental justice activists and concerned citizens. This report included empowerment of the community as one of the primary ways in which brownfield redevelopment could better serve and involve the public.

Environmental psychologists have defined empowerment as the “process by which people, organizations, and communities gain mastery over their lives. It becomes evident through social power at the individual, organizational, and community levels…Empowerment is associated with feelings of competence to change a situation and with expectations of positive outcomes for one's efforts.” Luke W. Cole, leading environmental justice advocate and attorney, states that “[e]mpowered communities make compromises, they bargain to satisfy their

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46 See Eisen, supra note 38, at 220.
47 Interview, supra note 44.
48 See Hawley, supra note 25.
49 See Felten, supra note 8, at 680, fn 1.
most immediate and pressing needs, they take small steps on their way to taking larger ones in the future.”

“Indeed, community empowerment may be the first step toward environmental equality. Empowered communities may bargain for environmental improvements, and as the community garners the benefits of redevelopment, the community’s economic and political clout may grow, perhaps making room for...priorities down the road.”

Ancillary positive effects include helping “show disenfranchised community members who are leery of the government that they are a wanted and needed part of the state and national communities. Additionally, “[p]eople in environmental justice communities generally distrust government and police…Seeing government officials and others in authority positions caring about the future of their communities, causes this distrust to dissipate. Thus, these programs are helping to strengthen the relationship between the government and citizens” and promote community interests and environmental goals.

B. Issues with Community Empowerment and Participation

a. Discriminatory decision-making.

Even if environmental justice advocates and attorneys actively strive for community empowerment, Professor Bradford C. Mank posits that existing public participation procedures may not fully “address the fundamental differences in expertise and resources between minority communities and industry. Environmental agencies may ignore or discount the comments of community members because of subtle biases against members of minority groups or in favor of

53 See Felten, supra note 8, at 695 (discussing the positive effects of community development programs).
54 Id.
55 Id.
industry experts with advanced degrees.”

Though society has come a long way, existing public participation practices nevertheless often ignore the differences between cultural and ethnic groups. Furthermore, “temporal, financial, educational, or language barriers may make it more difficult” for minority and low-income residents to participate fully in the brownfield remediation process.

Additionally, “[b]ecause high-income whites may use the political process more effectively than low-income minorities, developers may steer controversial projects to poorer communities.” This problem is exacerbated when community advisory boards are not “sufficiently representative of the community at large.” Professor Mank notes that “these boards [should] include a significant percentage of local residents,” and the greatest challenge to procedural equity involves “the criteria for selection of appropriate community representatives.” In a particular project, there exists a “[d]iverse range of stakeholders,” which may not include members of poor minority groups who are generally uninvolved in politics.

Hence, environmental justice advocates are understandably doubtful whether community working groups or similar community advisory boards can sufficiently represent those citizens.

b. Early Participation

Early opportunity for public participation is crucial in order for communities to successfully influence a project. “Failure to include the neighborhood at an early stage in the planning and remediation process is likely to cause resentment and misapprehension among the local population, which could ultimately result in the failure of an otherwise meritorious

57 Id.
58 Id.
59 Id., at 182.
60 Id.
61 Id.
62 See e.g., id., at 176.
redevelopment effort." Early participation is also important because "[m]any decisions about the sites are made before informing the community, and the developers tend to ignore or undervalue any improvements or changes requested by the community because of the cost of changing the plans."  

An environmental justice advocate should argue that "[b]y taking into account public concerns early on, a developer can avoid costly challenges to his or her project that could have been warded off merely by making some minor and insubstantial changes to the project from the outset." Conversely, early access to information allows the community to deliberate carefully and make informed decisions regarding a project.

c. Evidencing Public Health Risk

“A number of states provide explicitly that the [standard of] cleanup required at a site must be based on the public health risk that is expected in light of the site’s proposed or reasonably anticipated future use.” In gathering evidence of this public health risk, there are a number of problems that can arise, both legal and practical. One problem confronting researchers and community organizations is that each group’s underlying philosophy may conflict. Researchers may push for theory development and collection of data, while community organizations are more practically concerned with delivery of services.

At times, the quest for data interferes with the delivery of programs (and vice versa). Moreover, many researchers are unaccustomed to relinquishing

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63 Id.
64 See Felten, supra note 8, at 680
65 See Skelley, supra note 22, at 418.
66 Id.
67 See Eisen, supra note 16, at 298.
68 See Rechtschaffen, et al., eds., supra note 10, discussing the problems of gather evidence and using evidence to prove the existence of adverse health effects.
responsibility to service organizations for research programs designed and implemented within a research protocol.\textsuperscript{70}

Second, neighborhoods contending intensive use sitings in the past, such as the Diamond Community in Louisiana,\textsuperscript{71} have had to struggle with inconsistent evidentiary statistics on the concentration of chemicals in the area that were provided by biased developers. Advocates also recognized that there were problems acquiring evidence of contamination. In this community, residents who were trained by a local environmental agency acquired air samples on their own with relatively simple equipment.\textsuperscript{72} However, this may undermine the precision and credibility of the evidence in court. Thirdly, statistics acquired from medical agencies and databases are likely skewed against the presence of health risk. For example, in the Diamond Community, those who received treatment for asthma and other problems caused by air contamination were not included in the database for that particular region because the majority of residents received treatment out of state, where better medical facilities are located.\textsuperscript{73}

d. Risk Awareness and Environmental Psychology

Environmental psychology can be employed to foster better public participation. Studies in environmental psychology have found that “[f]eeling capable of influencing events may increase the individual’s sense of obligation to dosomething about the issues…In sum, a cohesive set of perceptions and motives appear to act as goals or prods to social action.”\textsuperscript{74} Thus, disunity in traditional legal methods, and even in the utilization of community empowerment tools, can cause a community effort to falter. Not often, “[c]ommunity leaders … were fully aware of the benefits and risks involved with brownfield redevelopment in their communities, [and hence

\textsuperscript{70} Id.
\textsuperscript{71} Fenceline: A Company Town Divided (PBS television broadcast July 23, 2002)
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} See Horvath, supra note 50 (citations omitted).
more involved, citizens of those communities ...were more satisfied with the process...[and] more aware of what was happening."\(^75\)

To understand how individuals and their community perceive risk, one must recognize that the “American population includes individuals who differ in their beliefs about cancer and other possible consequences of exposure to toxic agents, who disagree about the trustworthiness of scientific risk data and regulatory agencies, and who differ in the importance they assign to economic versus health considerations that are weighted in acceptable risk decisions.”\(^76\) These data compilations are not often geared toward specific sociodemographic groups, among which “[a]ttitudes regarding and behavioral responses to many environmental risks...have been shown to vary significantly.”\(^77\) If necessary, risk issues should be framed among diverse groups.\(^78\) Additionally, the risk issues must be framed in personal judgments.\(^79\)

The risk information presented to...lay populations usually offers risk estimates at the aggregate level—that is, these communications present data for the population as a whole and cannot estimate the risk for any one particular individual. However, the layperson often reframes an issue as one of personal risk. If general health information is not judged to be personally relevant, assessments of risk may be minimized and self-protective behavior less likely to occur.\(^80\)

Note, however, that “[a]lthough ‘[i]nformation is one of the sources of power in organizations and in community action, ... [a]wareness of the issues by itself, is usually not enough to induce people to engage in successful coping action. People also need motivation and confidence in their abilities.”\(^81\)

C. A “Moderate” Framework for Public Participation

\(^75\) See Flynn, supra note 52, at 487, citing Michigan study.  
\(^76\) Elaine Vaughan, Individual and Cultural Differences in Adaptation to Environmental Risks, 40:6 American Psychologist 673, 673 (citations omitted).  
\(^77\) Id., at 673.  
\(^78\) Id., at 677 (citations omitted).  
\(^79\) Id., at 674. Cf. societal judgments.  
\(^80\) Id.  
\(^81\) See Horvath, supra note 50.
Progressive environmental advocates and attorneys, such as Luke Cole…focus on community empowerment and away from legal strategies. Even environmental psychology affirms the importance of community empowerment. Studies have found a strong relationship “between perceived control and risk responses, even when controlling for factors such as information, formal education, and amount of exposure, suggests the importance of this factor in accounting for individual differences in responses to a chronic environmental risk.”  

Similarly, Cole has criticized legal tactics, stating, “As is often the case, there may not even be a legal solution to the problem faced by the community.”

Cole also argues that “the legal approach may radically disempower the community [and] [t]ranslating a community’s problems into legal language may render them meaningless.” This can reinforce “the ‘psychological adaptations of the powerless-fatalism, self-deprecation, apathy, and the internalization of dominant values and beliefs.’” Finally, Cole argues that “lawsuits take fights into the arena most controlled by the adversary and least controlled by the community” – a fact that, in the least, traditional attorneys who tend to underutilize community participation should recognize.

I argue that the best way to create environmental change is to combine the ideals of progressive environmental justice advocates and the legal tactics of traditional lawyers. I believe that Luke Cole underestimates the citizens’ intelligence and ability to assess legal situations, when provided with adequate context and legal translation. Community psychological empowerment need not exclude appropriate legal remedies; in fact, community empowerment can only enrich public participation in the legal arena. Environmental justice lawyers should

82 See Vaughan, supra note 76, at 674 (citations omitted).
83 Id., at 439 (citation omitted).
84 See Cole, supra note 51, at 436.
85 Id.
86 Id.
strive to implement programs or procedures that both empowers the community and avails it of its legal participation rights.

III. Applying the Public Participation Framework to Zoning Laws

Land use controls such as zoning influence the nature of communities and regional patterns. Zoning in the United States has generally given autonomy to local governments to apply traditional land use controls.\(^7\) These zoning provisions, however, have facilitated sprawl, thereby rendering inner-cities and brownfield communities unattractive.\(^8\) “With the exception of a few states that imposed mandatory inclusion of affordable and multi-family housing obligations of developing communities,”\(^9\) communities are free to use zoning to protect the status quo or instigate change. Thus, using land use law as a vehicle for community participation provides opportunities for attorneys to address inherent environmental justice issues. Traditional land-use decisions directly involve issues of environmental justice. For example, choosing sites for locally unwanted land uses addresses geographic equity; issues of procedural equity underlie public hearings; and, “[s]ociological factors, including which groups hold the political power to control land-use decisions” raise issues of social equity.\(^9\) Note, however, that in order to most affectively facilitate community participation, environmental justice-minded attorneys should keep in mind the issues inherent in empowering a minority, low-income community.\(^9\)

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IV. Conclusion

\(^{87}\) Kushner, supra note 2, at 866 .
\(^{87}\)Id.
\(^{87}\)Id.
\(^{91}\) See Section II.
As our greenfields diminish due to urban sprawl and our economy flounders due, in part, to inadequate employment, many critics have strongly appealed to administrative agencies and planning commission with ideas of urban revitalization and brownfield redevelopment. In order to properly instigate these programs, however, environmental justice advocates stress that attention should focus on the needs of previously ignored minority and low-income communities within urban centers. When a proposed brownfield remediation program comes to light, the community has few opportunities to participate in the planning and implementation of the cleanup project. Public participation is crucial for the community to successfully challenge or provide input regarding a proposed brownfield remediation plan, particularly when it fails to address potential issues such as gentrification or displacement. The cultural, economic, political, and evidentiary problems associated with public participation by low-income, minority communities can be mitigated by what progressive environmental justice advocates call community empowerment. However, empowerment practices need not avoid legal tactics, and if by doing so, advocates and attorneys underestimate the community’s abilities to participate in and understand legal proceedings.

Because traditional land use law such as zoning already provides the public with ample opportunities to participate, limiting the community to non-legal tactics would in effect limit the extent of community self-determination. When applying the moderate framework of public participation to zoning practices, i.e, rezoning hearings, neighborhoods affected by urban brownfields can most likely provide adequate input or more likely succeed in challenging a plan. However, this framework can only work if the attorneys/advocates involved provide the necessary legal information, cultural context, and psychological empowerment to successfully include the community in brownfield remediation planning.