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BROWNFIELDS

1998 Warren M. Anderson Legislative Breakfast Seminar Series

MAY 13, 1998



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New York State Conference of Mayors

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Business Council of New York State, Inc.

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Environmental Advocates

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WARREN M. ANDERSON

Warren M. Anderson is a distinguished alumnus of Albany Law School and an active member of the Government Law Center Advisory Board. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988.

Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

PROGRAM DESCRIPTION

In furtherance of its mission to serve as a resource to all levels of government in the resolution of specific problems, the Government Law Center is pleased to present the seventh annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs feature experts addressing the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

1998 HONORARY CO-HOSTS

The Government Law Center is grateful to the Leadership of the New York State Senate and Assembly for serving as honorary co-hosts of the 1998 Series:

Honorable Joseph L. Bruno
Senate Majority Leader

Honorable Sheldon Silver
Speaker of the NYS Assembly

Honorable Martin Connor
Senate Minority Leader

Honorable John Faso
Assembly Minority Leader

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INTRODUCTORY REMARKS

PATRICIA E. SALKIN, ESQ.

**Associate Dean & Director, Government Law Center
Albany Law School**

I would like to welcome our friends, old and new, to the 7th Annual Warren M. Anderson Legislative Breakfast program.

The Government Law Center of Albany Law School celebrates its 20th Anniversary this year. We are pleased to provide this Series and other beneficial programs during this commemorative year.

The Government Law Center was established at Albany Law School in 1978 to facilitate multi-disciplinary study of government and the problems facing government, to introduce law students to methods of policy analysis and to public service, and to serve as a resource to government at all levels in the resolution of specific problems. It is this last role which brings us here today.

This breakfast program was designed to provide policy makers and law makers with current information on the state of the law and its practical applications in New York and across the country. Each month the Government Law Center presents a discussion focusing on legal and policy aspects of an issue which is awaiting legislative action here in New York. The Series is named in honor of former Senate Majority Leader Warren M. Anderson who is not only a distinguished alumnus of the New York State Legislature but also an alumnus of Albany Law School and a member of the Government Law Center Advisory Board. Senator Anderson is particularly pleased that the four legislative leaders agreed to serve as honorary co-hosts of the 1998 Breakfast Series. Albany Law School is proud and honored to have this bipartisan support.

We are pleased to make the contents of this year's Anderson Series available to a wider audience through this publication. Within it, five major issues before the New York State Legislature—Court Restructuring, the Sexual Assault Reform Act, School Reform, Brownfields, and Computers & Technology in the Year 2000—are examined. It is our intention that the information will serve as an effective resource to law makers and policy makers throughout the State, as the debates on these consequential topics continue in the months ahead.

BROWNFIELDS

May 13, 1998

PANELIST

ERIN CROTTY

Deputy Commissioner

Office of Water Quality & Environmental Remediation

NYS Department of Environmental Conservation

Thank you for inviting me to be here today. It is important to talk about brownfield redevelopment because it is not only an environmental issue, but an economic development issue. It is an important environmental and economic development initiative of Governor Pataki, Commissioner Cahill and Empire State Development Chairman Gargano. It is through this working partnership between DEC and the Empire State Development Corporation, as well as the local government member organizations like NYCOM, that we can truly begin to develop and bring to fruition a brownfields program that is unmatched in the nation. The Clean Water/Clean Air Bond Act of 1996 provides \$200 million for brownfields redevelopment, specifically, for grants to municipalities at a 75:25 cost share. Up to 75% of a site's investigation and remediation is paid for under the Bond Act, and 25% is paid for by municipalities. It is the most heavily funded brownfields initiative in the country. We have a truly historic opportunity to jump start many of our urban areas that, unfortunately, due to either perceived or real environmental liability issues, companies have abandoned, and municipalities have refused to take over the foreclosures because of the very real environmental liability concerns.

With the goal of returning sites back to productive use, we have begun the Brownfields Initiative under the Bond Act. We have over 100 applications, have approved over 80 investigation applications, and have approved four remedial grants so far. The Bond Act was passed in November of 1996 and, since that time, we have had to go through a regulatory rule-making and could not make any remediation grants until the rule-making regulations were effective. Some people have criticized the program for

being too slow, but, in terms of regulatory rule-making, it has been lightening speed. We continue to push the staff on a daily basis and to work with our partners, the municipalities.

The brownfields program is also very important and helpful because it not only provides a large sum of funding, but it also provides a liability release to municipalities and any subsequent property owners. Once the municipality takes title to the property and is approved for a brownfields investigation grant under the brownfields program, they are given a liability release from the State. That is a very important piece of paper from the State and provides an incentive.

The brownfields program also offers municipalities an indemnification from the State that is truly historic. We do not really give away indemnifications all that easily. It is an indemnification against third-party actions from parties who are claiming a harm from the environmental contamination at a site that receives a Bond Act brownfields grant.

The brownfields program is working. One of our best successes is in Irvington, a riverfront community along the Hudson River. You have probably heard me talk about it on a number of occasions. It tends to be my favorite because I go to New York City often and can see the site from the train. My staff complains because I call them up on a regular basis and say "What is going on there? Why isn't this done? Why isn't that done?" The Village of Irvington has entered into a partnership with the environmental community, NYSDEC, and the NYS Office of Parks, Recreation & Historic Preservation and is turning this waterfront property into a magnificent municipal park right on the Hudson River, providing access to the River. The brownfields program is working in Irvington in the Hudson Valley, in Syracuse and Buffalo, and throughout the State.

I wanted to touch on, not only the brownfields program under the Bond Act, but also the Voluntary Cleanup Program at DEC. The Voluntary Cleanup Program is slightly different in that municipalities obviously are eligible applicants, but private businesses are also eligible. We have entered into over 150 voluntary clean-up agreements, and we feel that the success of the brownfields redevelopment effort here in New York has been achieved and will continue to be achieved.

I have defined the problem and touched on the State's role and the role of local governments and citizens. In both of these programs, there is a community involvement process. The brownfields program is consistent with the State's Superfund Program, and under the Voluntary Cleanup Program, there is a public comment component as well. I have already addressed the liability issue. The clean-up standards under the

Bond Act program are the State's Superfund clean-up standards. The Voluntary Cleanup Program is based on a slightly different clean-up standard: clean-up to the next use.

Thank you.

PANELIST

DONNA GILIBERTO

General Counsel

New York State Conference of Mayors

I want to thank the Government Law Center for the invitation to be on this panel, and especially for the opportunity to see the esteemed Senator for whom this prestigious program is named.

For those of you not familiar with the Conference of Mayors, we are a voluntary membership association in the State of New York. We represent villages and cities only.

Anything that I say that will be received as a possible criticism of any program has already been communicated to Deputy Commissioner Crotty. We have a very open door policy between my organization and her office and we are very pleased with that relationship as well as the relationship we have with the Governor's Office. Nothing that I am saying here should be perceived as coming out of left field. We have been discussing these issues and are making great progress.

Like the Department of Environmental Conservation, we view brownfields as one of the most significant economic development opportunities that the cities have right now. That may sound a little bit odd because we are talking about "dirty" property. But, as many of you who have grown up in this State have seen, our once booming urban centers are now looking more and more ravaged by the economy, loss of population, and tax-base erosion. Businesses are moving to the suburbs and out of state, leaving buildings behind and abandoning these sites—whether through bankruptcies or tax foreclosures or just closing down factories. The sites are already available for clean-up and redevelopment. As a benefit, these city sites do have infrastructure and a workforce in place.

Businesses are not re-entering our cities to clean up these sites, take responsibility for them, and return them to the tax rolls. We, therefore, see a very large role here for the economic development community. Brownfields are the ultimate in recycling—these areas can be cleaned up and reused. We have a very high recycling ethic in this State. We should include "recycling" our land.

This is not just an environmental issue for us. The environmental challenge, the first step, is to clean up this property. But for what reason? To return it to productive use and to the tax rolls to generate revenues for our cities.

There are a number of stumbling blocks that we have come across in the last two years with the Bond Act. Our observations have developed as this program has developed. No program, no matter how well thought out at the outset, can do without periodic review. We learn from our experiences, and discuss it with the program administration. As we have looked at the various programs, especially the Bond Act, NYCOM has worked with a task force of approximately 15-20 city and village officials. We have, therefore, gotten direct input from our membership on what works and does not work.

One of the problems we see with the Bond Act is that it focuses on municipally-owned sites. The number of municipally-owned sites in the State of New York that fit the qualifications of brownfields is very small. For our smaller cities, coming up with 100% of the funding is very difficult. Schenectady and Ogdensburg can attest to that, as well as many, many other cities around the state. Once you get through that threshold, however, if the seed money were available, it becomes a little bit easier for the smaller cities to get involved in the process.

Another problem for smaller cities is the lack of staff. It is very difficult for municipalities to be the driving force on a brownfields project when they do not have staff resources. We are looking at successes in the State within the bigger cities like New York City, Rochester and Buffalo because they do have staff with the technical capability.

Another major stumbling block is the stringency of the standards. We are advocating clean-up standards to intended use, much like what is in the voluntary program we just talked about. We find the standards right now to be expensive, time consuming and not time sensitive for development where a developer is involved in the process.

Another drawback is the lack of coordination among state agencies. We would like to emulate the system at the EPA level where all of the affected agencies that could assist in the brownfields development process are integrated and utilized, from the Department of Energy to Transportation to Health to Education. These agencies working together can make a project become a reality, although it may take many years of planning.

I will end with a reminder about municipalities. Municipalities like to see things

move a little faster. Elections are held every 2-4 years. Certainly with the low rate of return of individuals to office lately, elected officials have only about two years to accomplish anything. It is, therefore, important to municipalities for results to be achieved quickly.

Thank you for your time.

PANELIST

KENNETH POKALSKY

Director of Environmental & Regulatory Programs Business Council of New York State, Inc.

The Business Counsel has been working on this issue for the past four years and it is a bit of a challenge for me to squeeze all of that into five minutes. We have put together legislation that has been introduced in both Houses here in New York. The legislation is based on our members' experiences both under New York State's Voluntary Clean-up Program and General Superfund Program, as well as through the brownfields redevelopment programs in other states, especially those neighboring New York.

What we are proposing is a fairly dramatic change in New York State statute. Dramatic, at least, as far as New York State is concerned in terms of what we have done statutorily either to promote brownfields redevelopment or to modify the State's Superfund. What we are changing is not particularly dramatic when you look at what other states are doing, particularly our neighboring states and other key industrial states across the U.S. I do not think there is anything in our proposal that is not currently being implemented in a number of other states and, in some cases, actually being implemented with some degree of formality in New York State.

For the first 10 or 12 years of remediation efforts in New York, clean-ups were driven primarily by the environmental concerns and the impacts on public health and environmental quality. Over the last 5 years or so, New York and other states have begun to recognize a strong link between environmental restoration and economic development. That is why we are seeing measures such as the Voluntary Clean-up Initiative in New York and the 1996 Bond Act. In the early years of the remediation programs, we pointed to the success of the State's Superfund Program and said it has been due to the enforcement staff. New York State has Title 13, and has a billion dollars from the 1986 Bond Act to compel clean-up. The State basically has used an enforcement approach to environmental restoration.

With the 1996 Bond Act, New York State created a fairly significant "carrot" for the people who are eligible for the program. Title V of the new Bond Act addresses

municipally-owned sites and provides monies towards municipal site investigation and clean-ups. It also provides very significant liability reform for participants in the program. It is, however, limited to municipally-owned programs and its resources are limited to the \$200 million provided in the Bond Act.

What we are proposing is a broader incentive program for which any site in the State would be eligible. It is not restricted to state financing and will bring significant additional private dollars into the program. The key features we are suggesting for New York are as follows: creating a new set of clean-up standards that are based on the intended use of the site and the actual risks posed at a site. These standards will consider the hazards of the chemical contaminants present and the intended use of the site.

The risk-based standards approach has been adopted in approximately twenty states right now. On our borders, Massachusetts, Connecticut, New Jersey, and Pennsylvania have all gone to risk-based standards for brownfields programs. In some cases they extend those same standards to responsible party sites as well. Around the country, other major industrial states like California, Texas and Illinois, emerging new industrial states like North Carolina, and environmentally progressive states like Minnesota, have done the same thing.

We are also looking to take some of the liability reform ideas that were found in the 1996 Bond Act and extend them to other sites.

We are creating an additional economic development incentive that will be available once the clean-up is done to help off-set the up-front costs of building on a brownfield site. Our economic development program is based on a program already in place in New York State—the Economic Development Zone Program—that provides property tax abatements, sales tax abatements, and accelerated investment tax credits for the redevelopment of the contaminated sites. Under our proposal, in addition to giving liability releases to persons directly involved in brownfields projects, their financial partners would also have their liability limited. If municipalities, banks or industrial development agencies that either held title, had a secured interest in the property in the case of municipalities, or became involved in the property because it foreclosed for tax reasons, they will not be financially liable for clean ups at the site.

We think that this type of approach is far more aggressive than what New York State is doing under its Voluntary Clean-up Program. It is also far more certain. You can come into the program knowing, as a matter of statute, what the clean-up standards are going to be, what the liability release is going to be, and what the process timing is

going to be. It is an opportunity for people to come onto a site to do environmentally sound clean-ups in less time for less money. This is good for the environment because you are getting sites done earlier and the clean ups are environmentally sound. It is going to be good for the State's budget, making more private dollars available for the redevelopment of contaminated sites. Last, but certainly not least, this is going to be good for the State's economy by promoting the economic development of sites that now face some significant barriers to clean-up costs.

PANELIST

VAL WASHINGTON

Executive Director

Environmental Advocates

I understand that I am here to say something different from everybody else. I will start by saying that I, for one, do not like the bill. I believe everyone else here is supporting it. It is incredible, however, how much agreement there actually is at this table. We have really been getting a dialogue on this and I am very happy about that.

I have been to a lot of brownfields conferences sponsored by the business community, environmental groups and so forth. What I hear consistently from the business community is that consistency and predictability is a huge problem. Right now, New York State has four or five brownfields programs. The Municipal Bond Act (Brownfields Program Bond Act), the Voluntary Clean-up Program, the Superfund Program, and the Oil Spill Program. This is a problem in terms of consistency and predictability.

The Voluntary Clean-up Program undercuts the Bond Act Program. Each of the programs has different rules, clean-up standards, public participation, and liability provisions. For every municipality that rejects the brownfields program under The Bond Act in favor of the Voluntary Clean-up Program (because the clean-ups might be a lot cheaper going from Superfund standards to Risk-Based standards), there are probably a hundred others that are waiting to see what happens next. It is a moving target. I hear this frustration over and over and over again from the business community.

Other states are way ahead of us. New York is behind. New York City does not even like to acknowledge that there is a state government, but it is suffering terribly from a lack of state policy on this issue. There is frustration with their own efforts to create a brownfields program for the City.

In creating a brownfields program, there are four elements that have to be considered: 1) predictability and consistency, 2) planning, 3) incentives, and 4) protective standards.

We should aim for consistent and predictable clean-ups across programs. There is no reason that just because a particular site is cleaned-up under a separate program,

it should end up cleaner or dirtier than the one next door. That is not good for business, and it is certainly not good for the environment.

Planning is essential. Not all sites are created equal; some are more marketable than others. Some sites are in areas where a developer may see a greater potential while there are other areas in greater need of a revitalization effort. By not planning and by just putting money where there is an active interest in development, we do not adequately address the economic issue or the environment issue. There also has to be a community role. The successful brownfields efforts in our State and across the country occur where the community has been involved in the planning aspect.

There is no question that there has to be an incentive package. The Business Council Bill goes a long way in presenting ideas about the incentive possibilities that are out there. But, again, I think a good brownfields program has to acknowledge the fact that not all brownfield sites are created equal. A river front or other waterfront site is very different from an inner-city site. Some sites are highly contaminated, and some are less so. Some are just more marketable by virtue of their location. There has to be a tiered approach where there are more incentives for the sites that are less desirable economically. I have no doubt that the river front sites are going to be considered as incredibly valuable property in most cases. They are, in fact, the sites currently being developed. These differences should be acknowledged in an incentive program.

Finally, we need protective standards. We heard the words "future-use" standards, "risk-based" standards and "superfund" standards. They are not all that different. The Superfund Program has a very prominent risk-based element to it that is very similar to the risk-based programs that have been talked about otherwise. Again, a set of standards has to be predictable. It has to be based on protective analysis. It has to be consistent from site to site. We also have to address the problem with risk-based/future-use programs in that they let the future take care of itself. We need to know 30, 50 or 100 years from now what is in a site if it was not cleaned up to the cleanest residential type standards. What is it "safe" to be used for? People need to know and have some assurance that they are getting accurate notice. We need a monitoring program to assure that we go back and do a review when we are not doing complete clean-ups of sites. Protective standards are linked with incentives. I am hearing all too often a kind of economic blackmail argument when we are talking about standards in conjunction with incentives. For example, "This community is just going to have to live with those brownfields, unless you make it affordable for us to develop them." In other words, settle for a second class clean-up or live with the pollution. I am

not insisting on pristine conditions at all of these sites. I think risk-based remediation can work; it will continue to offer an important opportunities as long as the future is addressed with archived information about the sites and an ongoing monitoring program.

Thank you for giving me the opportunity to speak here today.