Brownfield Redevelopment: Looking for Certainty in the Uncertain

by Mallory A. Goodwin



Fifteen million acres—this represents the amount of potentially contaminated property across the United States.[1] This property is often neglected and underutilized as a result of its designation as a contaminated property, or a "brownfield." The U.S. Environmental Protection Agency ("EPA") estimates that there are over 450,000 brownfields nationwide.[2] Brownfields are "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[3] In our increasingly eco-friendly society, more emphasis is being placed on the redevelopment and reuse of brownfields; however, given the inherent problems associated with redeveloping a contaminated site, brownfields often remain contaminated, underutilized, and dormant as developers opt for undeveloped, contamination-free sites, known as "greenfields."[4]

A major concern of brownfield redevelopment is uncertainty. The amount of time, effort and money that it will take to get the site in compliance with set government standards is often unquantifiable. Initial investigations to determine the extent of contamination and the necessary cleanup are not always conclusive. The contamination plume[5] may be underestimated, resulting in a larger cleanup, over a longer period of time, at a greater cost. With all of this uncertainty, "brownfield paralysis" often results, impeding the redevelopment of contaminated sites.[6]

What can be done to prevent brownfield paralysis? One way federal and state governments have tried to overcome this problem is through the implementation of environmental land use restrictions ("ELURs"), also known as "institutional controls" and "land use controls."[7] ELURs are "non-engineered instruments, such as administrative and legal controls, that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy"[8] that are intended "to reduce or eliminate potential exposure to chemicals of concern; prevent activities that may interfere with a response action; and ensure maintenance of a condition of 'no significant risk' to human health and the environment."[9] ELURs are often used along with physical and engineering controls[10] at sites where a total cleanup is impractical or infeasible, in order to prevent contamination from spreading. Types of ELURs include traditional property law tools (such as easements, equitable servitudes, and restrictive covenants), as well as other regulation tools like zoning ordinances, variances, and consent decrees.[11] As long as the restrictions keep contamination at acceptable levels, then contamination will not need to be removed from a site completely, which can promote brownfield redevelopment.

Where ELURs Fail

Although ELURs are useful in preventing the spread of contamination, they "can reduce, but not eliminate, the risks" associated with brownfield redevelopment.[12] For starters, ELURs cannot provide a clear indication of the total costs or the time that will be needed to remediate a site and achieve compliance. ELURs themselves can be costly and time-consuming to implement and maintain. Even to determine which environmental land use restriction(s) are appropriate, preliminary site investigations and possibly, some remedial work, will likely have to occur, which can be both expensive and time-consuming, potentially deterring developers. If the developer is not convinced that the return will more than justify the risk, then it is not likely to move forward

with that particular project.

To be truly effective, ELURs need to be continually monitored and enforced; however, the responsible regulating agencies often do not have this capability. Monitoring *every* ELUR that has been implemented at every brownfield site in a designated area could easily overwhelm an agency's resources. Without an entity to adequately enforce ELURs, or some comprehensive system to assist the regulating agencies and provide notice to others of the restrictions in place, there is an increased probability that ELURs will be neglected or completely fail, putting public health at risk.

Another problem associated with brownfield remediation is changing regulations. Regulatory agencies can—and often do— change the already ambiguous cleanup standards as more information relating to the health-effects of certain hazardous substances becomes available. Changing standards can reduce or even eliminate the usefulness of implementing ELURs and can create a "black hole" of potential liability. If the regulating agency finds that a site needs additional remedial measures, then the owner must take those required actions and incur the related costs to avoid financial penalties and even more costly litigation.

Consider the case of *State of Minn. ex rel. Northern Pacific Center, Inc. v. BNSF Railway Company*.[13] A contaminated site underwent remediation subject to the state's environmental cleanup standards at the time, as administered by the Minnesota Pollution Control Agency (MPCA). However, by the time the plaintiff, a subsequent owner, sought to redevelop the site, the standards had changed and even more remediation was required to move forward with the redevelopment. Even though the MPCA deemed the former standards to be "permanent," the court agreed that even permanent remedies were subject to change by the regulating agency.[14] The idea of an ELUR to make cleanups more practical and cost-effective is great in theory, but, if government decides more remediation is later necessary, then the restriction becomes virtually irrelevant.

The question then becomes, is there a way to make the unknowns associated with brownfield redevelopment known? Practically speaking, there is no way to completely eliminate the problem of the unknowns in brownfield remediation; however, there are additional measures that can help to lessen some of the uncertainty likely to be encountered during redevelopment.

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Presumptive Remedies

Environmental land use restrictions can help lessen the uncertainty associated with remediation, but not immediately. As mentioned, ELURs can, generally, only be implemented after preliminary investigations and (some) remedial work has been conducted, which can potentially require large expenditures of time and money. However, ELURs can be supplemented by another type of control known as presumptive remedies. Presumptive remedies are "preferred technologies" implemented at particular types of sites where they have been historically successful in eliminating contamination, resulting in significantly reduced costs and time spent on the cleanup of a contaminated site.[15] These remedies have been designated as "presumptive" by analyzing historical patterns and scientific data regarding the implementation and effectiveness of the remedies at particular sites.[16] Essentially, through this analysis, the remedy (or set of remedies) is determined to be the "most appropriate" for addressing a particular type of contaminated site.[17]

The use of presumptive remedies can lessen the upfront investigation costs associated with brownfield redevelopment.[18] To determine which presumptive remedy may be appropriate, a limited assessment will still be needed to determine what contaminants are present. However, this limited assessment is likely to be all that is needed in terms of investigation. Investigation generally encompasses not only contaminant assessment, but also, a demarcation of the potential contamination plume (known as "delineation"), repeated testing of the soil and groundwater, and the evaluation and analysis of potential cleanup methods. Utilizing a presumptive remedy at a site will eliminate all but the contaminant assessment portion of the investigation. This streamlined approach will help promote consistency in the cleanup of particular types of contaminated sites, while creating a smaller window for potential uncertainty.[19]

Presumptive remedies have been incorporated into various state cleanup initiatives, but there are still limitations on when such remedies can be utilized. For instance, presumptive remedies will not be available for every type of brownfield that exists. The EPA has acknowledged that there are "unusual circumstances ... [such as] unusual site soil characteristics, demonstration of significant advantages of alternate (or other innovative) technologies over the presumptive remedies, or extraordinary community and state concerns" that could make the use of presumptive remedies ineffec-

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tive.[20] Another problem of presumptive remedies is that they generally lack any statutory or regulatory authority. In fact, the EPA's presumptive remedy site specifically states that, although it strongly recommends utilizing presumptive remedies when available, the directives it has endorsed are only guidelines for reference by interested parties, and are not final or legally required.[21]

Despite these limitations, presumptive remedies, when they fit a particular site, are valuable tools in limiting both the uncertainty in the remedial work needed and the costs. When used in conjunction with ELURs, the two tools can help developers, owners, and lenders to feel a greater sense of certainty in the redevelopment of a particular brownfield.

Improving ELUR Implementation through Uniform Government Action

Another way to help promote the successful selection, implementation, and operation of ELURs is to have federal, state and local governments work together to clarify the process, rather than confuse it. A lack of coordination between these regulating entities creates an outward perception of uncertainty. If governing agencies cannot agree on the methods or standards needed to achieve regulatory compliance at a particular brownfield, it makes it difficult for developers and potential owners to feel confident investing in a brownfield redevelopment project. Also, given that brownfields have a direct impact on the communities in which they are located, it makes sense for local governments to be involved in the decision-making process. Local governments are in the best position to evaluate the impact on their community; however, they may not have the same knowledge and experience base that the state or federal governments may have from dealing with prior brownfield redevelopments. Together, these levels of government can educate one another and work to create the best plan for a particular site, instead of issuing confusing, inconsistent, and perhaps conflicting, orders.

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A uniform law to be used by federal, state, and local governments alike would provide a clearer picture of the legal liability associated with brownfield redevelopment, and would address the central problem of "unknown and unquantifiable environmental risk."[22] In 2003, the Uniform Environmental Covenants Act ("UECA") was approved by the National Conference of Commissioners on Uniform State Laws.[23] One of the goals of the UECA is to improve the legal and practical enforceability of institutional controls.[24] The UECA has been enacted in 23 different states, as well as the District of Columbia and the U.S. Virgin Islands.[25] The UECA creates a statutorily defined agreement called an "environmental covenant."[26] An environmental covenant will incorporate any ELURs that have been put into place at a property, and ensure that they remain binding against any future purchasers of that property. For restrictions to be successful, they ultimately need to run with the land, be binding on future owners, and continue to protect the health and safety of the public and environment.[27] Creating a statutory basis on which ELURs can be enforced would provide a stronger incentive for owners and developers to ensure that the restrictions are properly implemented and maintained.

A Transparent Monitoring System

Without a mechanism to ensure the reliability and enforceability of ELURs, an entire cleanup remedy can be jeopardized, posing potential threats to public health.[28] The Environmental Land Use Restriction Tracking System (ELURTS) is an idea for a comprehensive database that could both lessen the uncertainty associated with brownfield redevelopment, and ensure that the public is protected. The ELURTS would enable the participating parties in a brownfield redevelopment project to input information relevant to the redevelopment process, from beginning to end. To best preserve the integrity of the ELURTS and the project information it makes available, only active participants to a site would have the ability to edit information. However, the public would have access to any information that has been entered into the database. Essentially, the ELURTS would provide information: to developers about the time-frames and costs they could expect given similar redevelopment projects; to investors about the capital they would potentially be investing; and to regulators to ensure that ELURs remained in place and viable as land changed hands in the future.

The EPA currently maintains a website, "Published Institutional Controls," listing Superfund sites and the institutional control category each site was placed into—"no institutional controls needed," "institutional controls needed," "institutional controls needed and implemented," and "no information publicly available."[29] Clicking on the site identification tag brings up a subsequent screen with some site-specific details. However, there is often no information about the contaminants at issue, the site's expenditures, or whether institutional controls have been implemented and monitored successfully. The website contains a disclaimer giving fair warning of the database's limitations, including a notice that there may be additional controls in place at a site that are not listed.[30]

A more comprehensive and user-friendly system like the ELURTS would be better suited to address the problem of enforcing environmental land use restrictions, which could ultimately address part of the uncertainty problem

in brownfield redevelopment. As compared to the static "Published Institutional Controls" website, the ELURTS would be a dynamic system, enabling the regular editing and updating of information. As time passed, more information would become available to developers and investors. Providing a way for people to look up a site that has been remediated would help to decrease some of the uncertainty regarding relative costs and time-frames at similarly situated brownfields. Of course, each site will be different and uncertainty will never be completely eradicated, but the ELURTS at least presents a way through which the brownfield redevelopment process can become somewhat less ambiguous.

Giving ELURs More Backbone

As a society, we want to ensure that there are protections in place for both our health and the environment. Is there a way to reconcile the concerns for our health and safety while still promoting the redevelopment of brownfields? Investors and developers are likely to be concerned about the implementation of new, more stringent standards in the future, which will require further remediation and further expense over those they had already anticipated and planned for. How can they prepare for the unexpected? The answer may be rooted in the modification of current environmental land use restrictions.

Some suggestions include issuing a binding "No Further Action" certificate upon completion of a site's cleanup to the specified standards. This binding certification would "run with the land," ensuring its transferability as land ownership changes.[31] As long as the land uses remained consistent, the ELURs continued to be monitored, and contamination remained at safe levels, the certificate would remain binding upon the property and additional remedial work would not be required. However, this certification would be void if the land was used for some purpose other than what the ELUR specified, or it was later learned that the specific hazardous substance was too dangerous to remain in the land at its current levels. There would, undoubtedly, be discussions over what qualified as "too dangerous to remain," so it might be helpful to list this certification as part of statutory language in the federal or the state's relevant environmental statutes with a clear definition of the phrase. Given that we cannot predict the future and what we may learn about particular chemicals of concern, developers, owners and lenders cannot assume that once they remediate a property, they will not have to do so again. Unfortunately, there will likely remain a chance for future liability, unless legislation or effective regulations can be put into place to truly limit liability in this instance.

Conclusion

An abandoned brownfield site does harm to the environment, as well as to society as a whole. Abandoned sites have the potential to be developed into something that will create jobs and revenue and provide revitalization to distressed communities. But, if developers or investors are driven away by the uncertainty they perceive as associated with redeveloping brownfields—along with increased costs, longer timeframes, and unending potential liability—these lands will remain unused, underutilized, and contaminated. Environmental land use restrictions can reduce the uncertainty by controlling the environmental risks; however, they are limited in their results if not properly implemented and monitored.

There are actions that can be taken to improve the effectiveness of ELURs and create a greater sense of certainty in brownfield redevelopment. Additional environmental techniques and controls, such as presumptive remedies, can be used in conjunction with ELURs to create greater certainty at the initial phase of brownfield redevelopment. Governments at all levels can work together to promulgate similar laws and regulations to help provide some clarity in an already complex process. A new, comprehensive database can be put into effect to track brownfields and to ensure ELURs are being continually monitored and properly implemented. Finally, ELURs can be modified and codified to give them a greater sense of requirement and permanency, in order to prevent remedial activities from having to occur again and again. Brownfield redevelopment is inherently uncertain, but there are ways to reduce this uncertainty and prevent brownfield paralysis.

Notes

1. *Land Recycling 101: The Benefits of Land Recycling,* Center for Creative Land Recycling, http://www.cclr.org/101/#/benefits (last visited Mar. 13, 2012).
2. *Brownfields and Land Revitalization: Basic Info*, U.S. Environmental Protection Agency, http://www.epa.gov/brownfields/basic_info.htm (last updated Oct. 04, 2011).
3. *Brownfields and Land Revitalization,* U.S. Environmental Protection Agency, http://www.epa.gov/brownfields/index.html (last updated Dec. 19, 2011).
4. *Land Recycling 101: Definitions*, Center for Creative Land Recycling, http://www.cclr.org/101/#/definitions (last visited Mar. 13, 2012).
5. A "contamination plume" is the area of contaminated soil and/or groundwater.
6. Elizabeth Glass Geltman, *Recycling Land: Understanding the Legal Landscape of Brownfield Development 3,* (2000).
7. ELURs, institutional controls, and land use controls are just a few of the terms that are used interchangeably in this field. This article prefers the use of Environmental Land Use Restrictions (ELURs).
8. *Institutional Controls,* U.S. Environmental Protection Agency, http://www.epa.gov/superfund/policy/ic/index.htm (last updated Dec. 12, 2011).
9. Amy L. Edwards, *Implementing Institutional Controls at Brownfields and Other Contaminated Sites*, 5 (Amy L. Edwards, ed., 2003).
10. An example of an engineering control is a cap, an impermeable covering to prevent leaching of contamination. A physical control is something preventing access to an area, like a fence. Joe Schilling, Christine Gaspar, Nadeja Mishkovsky, *Beyond Fences: Brownfields and the Challenges of Land Use*

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Local Preferences

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14. *White*, 460 U.S. at 215, n.12.
15. 465 U.S. 208 (1984).
16. *Id.* at 211.
17. *Id.* at 214.
18. *Id.* (quoting *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 388 (1978)).
19. *Id.* at 221.
20. *Id.* at 222 (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)).
21. *Id.* at 217-18.
22. *Id.* at 218.
23. *Id.* at 216 (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)).
24. *Id.* at 220.
25. *Id.* (emphasis in original).
26. *Id.*
27. *Id.* at 222.
28. *Id.*
29. *Id.* at 223. The case later settled, leaving future researchers wondering whether Camden (or any city) could satisfy the "peculiar evil" test.
30. Salla v. County of Monroe, New York, 48 N.Y.2d 514, 525 (1979).
31. *Id.* at 519.
32. *Id.* at 520.
33. *Id.* at 520-21.
34. *Id.* at 521 (quoting Federalist No. 80).
35. *Id.*
36. *Id.* at 523.
37. *Id.*
38. Utility Contractors Ass'n v. City of Worcester, 236 F. Supp. 2d 113, 115 (D. Mass. 2002).
39. *Id.*
40. *Id.*
41. *See, e.g.*, MD. ANN. CODE, art. 24 § 8-102 (2011).
42. *See, e.g.*, Bristol Steel and Iron Works, Inc. v. State of Louisiana, 507 So. 2d 1233, 1236 (La 1987).
43. *See, e.g.*, APAC-Miss. v. Deep South Constr. Co., 288 Ark. 277, 282 (Ark. 1986).
44. *See, e.g.*, A. L. Blades & Sons v. Yerusalim, 121 F.3d 865 (3d Cir. 1997), W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984), People ex rel. Bernardi v. Leary Constr. Co., 464 N.E.2d 1019 (Ill. 1984), Neshaminy Constructors, Inc. v. Krause, 181 N.J. Sup. 376 (N.J. Super. Ct. Ch. Div. 1981); Laborers Local Union v. Felton Constr., 654 P.2d 67 (Wash. 1982).
45. Smith Setzer & Sons v. S.C. Procurement Review Panel, 20 F.3d 1311, 1324 (4th Cir. 1994).
46. *Id.* at 1316, 1324.
47. 992 F.2d 745 (7th Cir 1993).
48. 641 P.2d 745 (Wy. 1982).
49. *Smith Setzer & Sons*, 20 F.3d 1311, 1316.
50. 96 F. Supp. 2d 1238 (D.N.M. 2000).
51. *Id.* at 1244-50.
52. United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 221 (1984).
53. *Id.* at 214.
54. *Id.* at 223.
55. *Id.* at 219-20.
56. 33 F. 3d 265 (3rd Cir. 1994).
57. *Id.* at 271.
58. *Id.* at 269-70.
59. *Camden*, 465 at 220.
60. *Salem*, 33 F. 3d at 270.
61. *Id.* at 273.
62. *Id.* at 274 (citing *Hicklin v. Orbeck*, 437 U.S. 518 (1978)).
63. *Id.* at 275-6 (citing *Camden*, 465 U.S. 208, 221 (1984)) (emphasis in original). **M**

Tasers

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ted and no threat; subject stepped away from officer and was tased the first time, and subject on the ground and unable to resist when tased the second time).
36. 635 F.3d 354 (8th Cir. 2011).
37. *Id.* at 360.
38. Hoyt v. Cooks, 672 F.3d 972 (11th Cir. 2012).
39. *Id.* at 979.
40. *See* Sanders v. City of Dotham, 409 Fed. Appx. 285 (11th Cir. 2011) (law was not clearly established).
41. *See* Floyd v. Corder, 426 Fed. Appx. 790 (11th Cir. 2011) (law was not clearly established).
42. *See* Buckley v. Haddock, 292 Fed. Appx. 791 (11th Cir. 2008) (no Fourth Amendment violation).
43. *See* Chaney v. City of Orlando, 291 Fed. Appx. 238 (11th Cir. 2008) (no violation of clearly established law).
44. *See* Draper v. Reynolds, 369 F.3d 1270, 1277-78 (11th Cir. 2004) (taser analysis includes the need for application of force, relationship between need and amount of force used, and extent of injury inflicted).
45. *See* Moretta v. Abbott, 280 Fed. Appx. 823 (11th Cir. 2008).
46. *See* Oliver v. Fiorino, 586 F.3d 898, 903 (11th Cir. 2009).
47. *See, e.g.*, Bryan v. Macpherson, 630 F.3d 805, 826 (9th Cir. 2010).
48. Hoyt v. Cooks, 672 F.3d 972, 979 (11th Cir. 2012).
49. *Id.* at 980. *See also Draper*, 369 F.3d at 1278 ("Although being struck by a taser gun is an unpleasant experience, the amount of force Reynolds used—a single use of the taser gun causing a one-time shocking—was reasonably proportionate to the need for force and did not inflict any serious injury. ...The single use of the taser gun may well have prevented a physical struggle and serious harm to either Draper or Reynolds.").
50. 652 F.3d 524 (4th Cir. 2011).
51. *Id.* at 532.
52. The U. S. Supreme Court has denied *certiorari*. *See* Purnell v. Henry, 132 S. Ct. 781 (U.S. Nov. 28, 2011). Similarly, in *Torres v. City of Madera*, 648 F.3d 1119 (9th Cir. 2011), *cert. denied*, *Noriega v. Torres*, 132 S. Ct. 1032 (U.S. Jan. 09, 2012), an officer mistakenly used a Glock semiautomatic pistol instead of her taser, resulting in the death of a handcuffed arrestee in a police cruiser. The Ninth Circuit held that the district court improperly granted summary judgment, as there was a question of fact as to whether the mistake was objectively reasonable. **M**

Brownfield Redevelopment

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CONTROLS, 5 (2000).
11. Edwards, *supra* note 9, at 5.
12. John Pendergrass, *Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health*, 29 ENVTL. L. REP. 10243, 10244 (2000).
13. 723 F. Supp. 2d 1123 (D. Minn. 2010).
14. *Id.* at 1130.
15. *Presumptive Remedies: Policies and Procedures*, U.S. Environmental Protection Agency, http://www.epa.gov/superfund/policy/remedy/presump/pol.htm (last updated Dec. 12, 2011).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

20. U.S. Envt'l. Prot. Agency, *Presumptive Remedies: Site Characterization and Technology Selection for CERCLA Sites With Volatile Organic Compounds In Soils, 3* (1993).
21. *Presumptive Remedies: Policies and Procedures, supra* note 15.
22. Glass Geltman, *supra note 6*, at 338.
23. *Environmental Covenants Act Summary,* Uniform Law Commission, http://tinyurl.com/bmfk4xx (last visited Mar. 13, 2012).
24. Kurt A. Strasser & William Breetz, *The Benefits of a Uniform State Law for Institutional Controls, in* Implementing Institutional Controls at Brownfields and Other Contaminated Sites, 31-37 (Amy L. Edwards, ed., 2003).
25. *Environmental Covenants Act Summary, supra* note 23.
26. *Id.*
27. Strasser & Breetz, *supra* note 24, at 33.
28. U.S. Gov't Accountability Office, GAO-06-900T, *Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public* (2005).
29. *Superfund: Published Institutional Controls, U.S.* Environmental Protection Agency, http://tinyurl.com/78xqmzv (last updated Feb. 13, 2012).
30. *Id.*
31. Glass Geltman, *supra* note 6, at 348-49. **M**

Ordinances

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than ineffective or remote support' for the City's stated interests."

The *Dex Media* case is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit, with oral arguments being heard on February 09, 2012. San Francisco has voluntarily postponed enforcement of its ordinance until 30 days after the Ninth Circuit renders its ruling in *Dex Media*,[9] and in the meantime, the City defendants in the San Francisco case have applied for, and obtained, a temporary stay of proceedings pending the Ninth Circuit's resolution of the *Dex Media* case.[10]

Notes

1. *See* Grass Roots Recycling Network page at http://archive.grrn.org/zerowaste/articles/campaign_zw.html.
2. The Ordinance is available online at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances11/o0078-11.pdf.
3. *Id.*
4. Richard Gonzales, *San Francisco Moves To Ban Yellow Pages*, NPR, May 16, 2011, at http://www.npr.org/2011/05/16/136368752/san-francisco-moves-to-ban-yellow-pages.
5. *Id.*
6. Ordinance, *supra,* note 2.
7. Gonzales, *supra*, note 4.
8. *Local Search Ass'n v. City & County of San Francisco*, No: C 11-02776 SBA, 2012 U.S. Dist. LEXIS 61613 (N.D. Cal. May 02, 2012).
9. *Id.* at *3.
10. *Id.* at *12. **M**

Cases

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lease the lot at the intersection from the owner. Only one member of the Planning and Zoning Board voiced concern (because the lot was zoned "C-2" for larger businesses, and the intersection concerned was the busiest in the city). The Board granted Bowlby the requested permits and told her to proceed with her business plan, and Bowlby opened her business later that month.

In September 2009, the Board again discussed Bowlby's business and decided to revoke the permits. Bowlby was not informed about this meeting or told her permits were being reconsidered. The next day, the city building inspector gave Bowlby a letter informing her of the Board's new ruling and told Bowlby she was to immediately close her business because the Board had determined that it did not conform to the City's laws and regulations. The reasons in the letter were: (1) that Bowlby had misled the Board as to the location of her business; (2) that the location posed a safety concern because the busy intersection was not safe for children; (3) that the land was zoned C-2 and intended for larger businesses; (4) that the portable toilet next to Bowlby's business was an eyesore and a health hazard; and (5) that the overall look of the business was offensive and inappropriate for the eastern entrance to the city.

The Aberdeen Zoning Ordinance required that all appeals of Board decisions were to be made to the mayor and Board of Aldermen, and thereafter to the courts. Bowlby, instead, brought suit against the City and the Board in a Section 1983 suit in federal court, claiming, among other things, that her business was taken without just compensation, in violation of the Fifth Amendment Takings Clause, and that her business was closed without notice or a hearing, in violation of the Fourteenth Amendment Due Process Clause. The City defendants filed a motion to dismiss. The district court granted the motion based on Rule 12(b)(6), relying on the U. S. Supreme Court's decision in *Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in that Bowlby's takings claim was not ripe because she did not first seek just compensation in a state court for the taking of her business. As Bowlby's equal protection claim would not exist but for the taking, that, too, was unripe. The Board had not violated Bowlby's due process rights because there had not been a final deprivation by the state, since Bowlby had not appealed the decision to revoke her permission to operate her business. Bowlby appealed, arguing that she had a property interest in being allowed to operate her business, and that the Board's revocation of her business permits without prior notice or a hearing violated her Fourteenth Amendment right to procedural due process.

The U. S. Court of Appeals for the Fifth Circuit agreed and reversed the dismissal of Bowlby's due process claim, finding that business permits, along with other "privileges, licenses, certificates, and franchises . . . qualify as property interests for purposes of procedural due process." Once the Board had issued permits for Bowlby to operate her business at a designated intersection, she had a property interest in those permits, and by extension, in operating at the location identified in those permits. Once issued, a license or permit could not be taken away by the State without due process. Bowlby was due predeprivation process.

Exhaustion of state remedies was not required before a plaintiff could bring suit under § 1983 for denial of

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