RESOLVED, That the American Bar Association recommends that Congress promote the
economic use of properties affected by environmental contamination, and reduce unnecessary
litigation, by enacting legislation providing that upon the affected property's entry into and
compliance with a State brownfields program, there should be no additional liability to the
federal government or any other person under the Comprehensive Environmental Response,
Compensation and Liability Act, as amended; provided that:

(1) the State brownfields program imposes cleanup standards that are protective of
human health and the environment;
(2) the State brownfields program ensures appropriate public notice and public
participation; and
(3) the State provides the financial and personnel resources necessary to carry out its
brownfields program.

FURTHER RESOLVED, That such legislation should authorize State brownfields programs to
take advantage of alternative state approaches to land use, institutional controls and zoning
regulations that facilitate property reuse.
The United States Environmental Protection Agency defines a "Brownfield" as a site where concerns over actual or perceived environmental contamination complicate the potential for redevelopment or reuse of the property. According to a report from the U.S. General Accounting Office (GAO), there may be as many as 450,000 brownfield sites across the country.

As used in this resolution, the phrase “State brownfields program” refers to the body of statutes and regulations that govern the voluntary remediation of contaminated property. These programs generally include the following elements: (1) clear cleanup standards that take into consideration future site use and are protective of human health and the environment; and (2) releases of liability in the form of statutory immunity, covenants not to sue, no further action letters, certificates of completion, or similar devices for persons meeting those standards. As of December 1998, forty-six states had implemented brownfields programs. The programs have been recognized as being among the most successful state environmental programs of the last decade. Pursuant to these programs, sites across the country are being cleaned up and redeveloped, creating new jobs and economic opportunities, limiting the development of so-called “greenfields,” and restoring state and local tax bases.

In 1994, the American Bar Association adopted a resolution advocating numerous changes to the federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). Even with the growing availability and use of State brownfields programs, the continuing threat of CERCLA liability remains a disincentive to the voluntary remediation of contaminated property. The current resolution seeks to remove that disincentive and encourage the further use and continued strengthening of State brownfields programs, by urging Congress to enact legislation releasing parties from federal CERCLA liability at properties addressed in compliance with State brownfields programs that meet certain minimum criteria necessary to protect public health and the environment.

This policy recommendation enables the American Bar Association to speak out in support of fair and effective brownfields redevelopment efforts. There is a growing appreciation of the practical benefits that State brownfields programs can bring to communities. Contaminated properties often lie unused or underutilized because of the potential liabilities relating to purchase and redevelopment. Contaminated properties do not provide sufficient support for the employment needs of the community, thereby worsening urban flight and the need to carve out yet more open space for suburban development, with the related infrastructure needs that such development requires. Satellite or suburban development also increases vehicular traffic and diminishes air quality. The redevelopment of our urban core — including redevelopment of brownfields — preserves open space, conserves resources, and makes far better use of public dollars.

The ABA should play a meaningful role in supporting laws and policies designed to enhance and encourage State brownfields programs. These programs have a salutary effect at all levels of government and, most importantly, in our neighborhoods. The development of property is a process driven by economics. The time it takes to study, assess and address remediation of problems prior to the development are, alone, sufficient to discourage most developers from attempting redevelopment of brownfield properties. The ABA should support all mechanisms that encourage prompt response to property developers, with clear statements regarding what
may or may not be required in order to achieve immunity from past acts, reducing risk and uncertainty, and encouraging the redevelopment of brownfields. Providing for the effective use of State brownfields programs is the best way for the ABA to accomplish this goal.

Standards Protective of Human Health and the Environment

One common element shared by State brownfields programs is that they establish clear cleanup standards that are based on risk and sound science. Many offer increased flexibility to site developers by providing a choice of different cleanup standards. In developing their State brownfields programs, state legislators and regulatory officials must assure the public that the standards developed will result in cleanups that are safe and protective of human health and the environment. By stating in the resolution that State brownfields programs must, at a minimum, include cleanup standards that are protective of human health and the environment, the ABA acknowledges that the programs being supported are those that ensure that properties will be cleaned up to appropriate standards and not those that would allow people to avoid addressing contaminated properties.

The states have chosen a variety of mechanisms to ensure that cleanups are safe and protective. Some have set risk-based standards after lengthy public rulemakings with input from public and private sector experts in the scientific fields of toxicology, hydrogeology, biology, chemistry, and engineering. Cleanup standards often are based on future land uses, allowing different cleanup levels for residential, non-residential and other uses. Some states have chosen to require that cleanup standards for brownfield sites be set based on the results of site specific risk assessments. This resolution makes clear that in making recommendation to Congress, the ABA is offering its support only for those State brownfields programs that ensure that the cleanup standards used are safe and protective of human health and the environment.

Public Notice and Public Participation

The most effective State brownfields programs take into consideration the need for meaningful public notice and participation. For some brownfields sites, especially those located in and around residential areas, proceeding without opportunities for the public to participate in the design and implementation of a brownfields project increases the risk that segments of the affected community will oppose the project and make it difficult or impossible to carry out. On the other hand, effective public involvement in decision making about brownfields initiatives often will lead to community support. Moreover, including the full range of concerns into the process of developing a plan for the economically beneficial reuse of contaminated property often leads to a better plan that addresses more of the community's needs than would occur without meaningful public participation.

State brownfields programs take different approaches toward providing opportunities for public involvement. Some require public involvement at all sites. Others have used public rulemaking proceedings to develop state cleanup standards. Still others encourage public
participation, but require it only at sites using risk-based cleanup standards. This resolution specifically supports State brownfields programs that provide for their citizens' appropriate public participation.

**Financial and Personnel Resources**

Most practitioners believe that economic development incentives are necessary to encourage redevelopment of brownfields sites. Incentives are needed to help offset the added costs associated with the projects, including environmental investigation and cleanup costs. There are many public funding sources for brownfields redevelopment that vary from state to state and site to site. In addition, under a federal 1997 Brownfields Tax Incentive, environmental cleanup costs for properties in certain target areas are fully deductible in the year incurred if certain other conditions are met.

States have adopted a variety of economic development incentives including tax increment financing, tax abatement programs, tax credits, and other state and local financing initiatives. Observers and some communities have presented additional ideas — generally at the local level — to improve brownfields project financing. These include revolving loan funds and funding pools, general obligation bonds and revenue bonds. Some communities have joined brownfields redevelopment projects with other public-works or publicly licensed projects to tie the more challenging brownfields project to an anticipated funding source in the form of revenues from the tied project. This resolution requires that the states provide the necessary financial and personnel resources to carry out their State brownfields programs.

**Land Use, Institutional Controls and Zoning Regulation**

Traditional real estate concepts such as assuring a clear but limited right of access to a piece of property, usually through easements or licenses, or restricting the use of land by a rezoning or use restriction, can play a major practical and legal role in the implementation of efforts to encourage and provide incentives to undertake voluntary use and reuse of brownfields sites. These concepts, in the environmental setting, are usually referred to as "institutional controls," which generally include legal, barrier or institutional restrictions, constraints or mechanisms that limit human activities at, or access to, real property. In the environmental context, this means restrictions must ensure that the actual uses of contaminated properties are maintained or restricted so that they can only be used in a fashion compatible with the assumptions underlying the "approved" level of cleanup.

As part of their State brownfields programs, a number of states have adopted statutes or regulations specifically providing for land use or similar controls to be established in the context of site remediation. These usually will address at least some of the legal impediments, often by specifically overriding otherwise applicable common-law limitations on long-term enforcement of "in gross" land use restrictions. These vary from state to state, to take into account differing approaches taken among the states to the implementation and enforcement of land use and zoning controls. Among the techniques adopted by states in these new legislative efforts are
statutory authorization for deed notices and what some states term "environmental protection easements," enforceable land use restrictions, and contingent releases.

The term "institutional controls" has been included in various of the proposals for CERCLA amendment, but at present the text of CERCLA does not define the term; the National Contingency Plan ("NCP"), 40 C.F.R. §300.430(a)(1)(iii)(D) refers to a possible use of "institutional controls such as water use and deed restrictions to supplement engineering controls . . . ." Furthermore, two sections of CERCLA refer to examples of such controls. In 42 U.S.C. §9620(h), dealing with the transfer of federal facilities, language now appears specifying that deeds to such properties must contain information about the type and treatment of hazardous substances handled at those sites. Deed notices, notices in sales contracts, and deed covenants are specified.

As is evident from EPA's Guidance Policy document on the consideration and role of land-use issues, EPA now looks to state or local government in EPA's assessment of the type of land use issues to be evaluated in connection with a CERCLA remedial decision, to be able to assure EPA that the type of institutional controls to be implemented as a part of the remedy are "in place, reliable, and will remain in place." 40 C.F.R. §300.51 (d)(3)(I)(1994). The Federal Register preamble to this land use guidance policy statement acknowledged that institutional control powers are generally ones reserved to the states, further commenting that "EPA may not have the authority to implement institutional controls at a site." 55 Fed. Reg. 8666, 8706 (1990).

This resolution encourages EPA to apply this same deference to state and local land use and institutional control decisions affecting brownfields sites.

Conclusion

In 1994, the ABA adopted a resolution advocating amendments to CERCLA. Although the legislation supported by the ABA has not yet been enacted to amend CERCLA, this brownfields resolution that supports State brownfields programs responds to state efforts to address some of the issues set forth in the earlier ABA resolution. By adopting this resolution, the ABA will assist in the reduction of unnecessary litigation and will ensure the economic revitalization of areas blighted by unused or underutilized brownfields.

Respectfully submitted,

Sheila Slocum Hollis, Chair
Standing Committee on Environmental Law

George M. Knapp, Chair
Section of Environment, Energy & Resources
Pam H. Schneider, Chair
Section of Real Property, Probate & Trust Law

Pamela C. Enslen, Chair
Section of Dispute Resolution

Larry C. Ethridge, Chair
Section of State & Local Government Law

August, 1999
1. **Summary of Recommendation(s).**

The resolution supports legislation providing immunity from federal liability when a property affected by contamination is being managed pursuant to State brownfields programs that meet certain standards.

2. **Approval by Submitting Entities.**

Approved by SCEL following March 10, 1999 conference call, approved by SEER at its Spring Council Meeting on April 25, 1999; approved by RPPTL at its Spring Council meeting on May 23, 1999; approved upon polling of Dispute Resolution Section leadership in late May 1999; approved by State & Local Government leadership decision on June 9, 1999.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

To our knowledge, no resolution on brownfields has been submitted previously to the ABA.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

The ABA has adopted policies calling for certain reforms to the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA, or Superfund) (2/94, 2/91 - innocent landowners, 2/90 - fiduciary liability). The present resolution is consistent with and complements the policies already adopted, and addresses a different aspect of contaminated sites, namely the emergence of State brownfields programs to enable appropriate re-use of properties that are or were contaminated.

5. **What urgency exists which requires action at this meeting of the House?**

Action at this meeting is especially timely because several relevant bills are pending in Congress, including those: H.R. 1300, "Recycle America's Land Act of 1999," (Boehlert, R-NY); H.R. 1391, "Brownfields Reuse and Real Estate Development Act," (Regula, R-OH); H.R. 1537,

6. **Status of Legislation.** (If applicable.)

See # 5, above; several bills have been introduced and are under consideration. A hearing was held on H.R. 1300 on May 12; H.R. 1391 has been referred to two House Committees including the House Commerce Committee; H.R. 1537, H.R. 1750 and H.R. 1756 have been referred to committees; S. 20 (which replaces S. 18 in the 105* Congress) was referred to the Senate Committee on Environment and Public Works; and S. 23 was referred to the Senate Committee on Finance. In addition, S. 1090, "Superfund Program Completion Act of 1999" (Chafee, R-RI) was considered at a hearing on May 25 at which much discussion occurred among Senators concerning the need for separate brownfields legislation and action.

7. **Cost to the Association.** (Both direct and indirect costs.)

None, outside of the usual costs to appear before congressional committees.

8. **Disclosure of Interest.** (If applicable.)

The resolution was drafted through the efforts of a working group representing several interested ABA entities: Standing Committee on Environmental Law and the Sections of Environment, Energy & Resources; Dispute Resolution; Litigation; Public Utility Law; Real Property, Probate & Trust Law; State & Local Government Law; and Tort & Insurance Practice. One member of the working group is both a member of SEER and Counsel to the House Commerce Committee, which, among other congressional committees, has jurisdiction over some brownfields matters.

9. **Referrals.**

Referred to chairs and staff directors of ABA Sections, Divisions and Forums in June 1999.

10. **Contact Person.** (Prior to the meeting.)

Meghan H. Magruder, Kirkpatrick & Lockhart LLP, 1800 Massachusetts Avenue, NW, Washington, DC 20036; Tel. 202-778-9420; Fax 202-778-9100

10. **Contact Person.** (Who will present the report to the House.)

(a) Meghan H. Magruder (above) or
(b) Sheila Slocum Hollis, SCEL Chair, Duane, Morris & Heckscher, 1667 K Street, NW, Suite 700, Washington, DC 20006; Tel. 202-776-7810; Fax 202-776-7801