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NATIONAL BROWNFIELDS COALITION

Proposal to Remove Barriers to Local Governments Addressing Mothballed Brownfield Sites

Updated February 2012

Current situation and problem

Local governments throughout the country have long recognized the harm abandoned and underdeveloped brownfield properties can pose to their communities. Properties that lie idle because of fear of environmental contamination, unknown cleanup costs, and liability risks can cause and perpetuate neighborhood blight, with associated threats to a community's health, environment, and economic development.

Local governments' property acquisition authority, while generally used as a last resort strategy, is one of the key tools to facilitate the redevelopment of brownfields properties that have proven to be unattractive for private investment. Through a variety of means including tax liens, foreclosures, purchase, and the use of eminent domain, local governments can take control of brownfields in order to clear title, consolidate multiple parcels into an economically viable size, conduct site assessments, remediate environmental hazards, address public health and safety issues, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of environmental liability. The primary federal environmental liability law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was also amended to include liability defenses and exemptions that may protect local governments that "involuntarily" acquire brownfields.

A substantial number of local governments avoid acquiring brownfield sites because of fear of environmental liability for the cost of cleaning up contamination they had no role in creating or releasing. A secondary problem is that many potential brownfields projects on publicly owned sites have been ruled ineligible, in part, because the localities cannot satisfy the requirements to establish "involuntary acquisition."

Current liability protections fall short

For local governments that are acquiring contaminated and mothballed property there are three potential exemptions and defenses to federal Superfund (CERCLA) liability.

Exemption for involuntary acquisitions by local governments

The definition of "owner or operator" in CERCLA provides an exemption from liability claims for a property that has been involuntarily acquired by a local government. Section 101(20)(D) of CERCLA states:

The term "owner or operator" does not include a unit of state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.

Third-party defense

The third-party defense, as defined in section 107(b)(3) of CERCLA, states that there shall be no liability under CERCLA for "an act or omission of a third party other than an employee or agent of the defendant" or any person with a "contractual relationship" with the defendant. The defendant is required to prove that it exercised due care with respect to onsite hazardous

substances and took “precautions against foreseeable acts or omission by any third party responsible for contamination.”¹ Section 101(35)(A)(ii) of CERCLA elaborates on the third-party defense for

“...a government entity which acquired the facility by escheat, or through any involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.”

Bona Fide Prospective Purchasers (BFPP) liability protection

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Section 107(r) of CERCLA) provides a defense to liability available to entities, including local governments, if potential liability “is based solely on the purchaser’s being considered to be an owner or operator of a facility.” The defense is contingent on the purchaser demonstrating “by the preponderance of evidence” compliance with eight criteria, including “all appropriate inquiries,” “appropriate care,” and “no affiliation” standards.

The complexity of “Involuntary Acquisitions” is addressed in greater depth in a 2006 report Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment, prepared by the National Association of Local Government Environmental Professionals (NALGEP).²

The report documents the reluctance of local governments in acquisition of contaminated sites and reviews options for clarifying both federal law and regulatory guidance documents. As the NALGEP report indicates, local governments continue to be concerned that there are gaps and ambiguities that leave them vulnerable to potential enforcement action, as follows:

- The 101(20)(D) Involuntary Acquisition exemption:
 - Does not apply to voluntary purchase;
 - Does not apply to acquisition through eminent domain (or the threat of eminent domain);
 - May not apply to tax delinquency if the local government took affirmative steps in the delinquency process.
- BFPP protection:
 - Does not apply to properties acquired before the 2002 date-of-enactment;
 - Is an affirmative defense rather than an exemption, i.e. the acquiring agency must show “by the preponderance of evidence” that it met the eight requirements for obtaining BFPP protection.³
- The 101(35) Involuntary Acquisition third-party defense:
 - Does not address voluntary purchase;
 - While 101(35) does include eminent domain, it is unclear whether the protection requires a judicial proceeding, which means that it may or may not apply to the

1 CERCLA 107(b)(3) http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00009607----000-.html#b_3

2 NALGEP, “Superfund Liability, a Continuing Obstacle to Brownfields Development,” Available at: <http://www.resourcesaver.com/file/toolmanager/CustomO93C337F72956.pdf>

3 As one example of the difficulties associated with the BFPP requirements, the National Aquarium in Baltimore was initially turned down for a cleanup grant because the property owner was the City and the City was on the Aquarium board, which was interpreted as a violation of the “No Affiliation” requirement.

most frequent acquisition scenario: voluntary purchase under the threat of eminent domain;⁴

- The third-party defense is linked to demonstrating both that “due care” has been taken *and* that the acquiring entity “took precautions against foreseeable acts or omission by any third party responsible for the contamination;”
- May not apply to tax delinquency if the local government took affirmative steps in the delinquency process.

States that offer broader liability protections for public agencies

A number of states have recognized that federal liability protections for local government are both confusing and too restrictive, and, accordingly, have enacted more expansive protections. The differences between federal law and the laws of these states fall into four categories:

- **Coverage beyond “involuntary acquisitions.”** All six states cited below define the class of protected transactions more broadly than the “involuntary acquisitions” recognized in federal law or guidance. These states protect acquisition activities for “redevelopment purposes,” for “removal of slums and blight,” and/or for properties acquired under the threat of eminent domain.
- **Coverage of quasi-public entities.** Three states (Pennsylvania, Wisconsin, and California) explicitly exempt quasi-public development corporations.
- **Protection that goes beyond liability to the state.** At least three states (Wisconsin, Pennsylvania, and New Jersey) have included language that goes beyond liability relative to state enforcement action, offering protections against toxic tort and common law claims. Pennsylvania offers the broadest protection, specifically covering toxic tort, as well as property damage and common law. Wisconsin provides localities with “civil immunity” – this protection is meant to confer toxic tort protection. There are also references to protection against “common law” claims in the New Jersey statute. This language is subject to interpretation, and could include protections in the areas of nuisance claims, diminution of value, citizen suits, and toxic tort; however, staff has been advised that legislative history would have to be reviewed before one could draw conclusions related to what class of activities are protected.
- **Protections that cover additional authorities.** Several states specify coverage of other enforcement authorities, aside from the state version of Superfund.

New Jersey

New Jersey’s Brownfield and Contaminated Site Remediation Act of 1998 included reforms that give local public agencies broad protections for acquisitions carried out for redevelopment purposes. Protections also extend beyond state enforcement actions to common law. An excerpt follows:

⁴ The NALGEP report cites the following case as one that ruled that a judicial proceeding is required in order to get involuntary acquisition protection: *City of Toledo v. Beazer Materials & Servs., Inc.*, 923 F. Supp. 1013, 1020 (N.D. Ohio 1996)

“Any federal, state, or local governmental entity which acquires ownership of real property through bankruptcy, tax delinquency, ... eminent domain in which the governmental entity involuntarily acquires title by virtue of its function as a sovereign, or where the governmental entity acquires property by any means for the purpose of promoting redevelopment of the property, shall not be liable ... pursuant to common law, to the State, or to any other person for any discharge which occurred or began prior to that ownership”⁵ (emphasis added).

Pennsylvania

Pennsylvania’s Act 3 (1995, amended in 2009) involves the broadest possible liability exemption relative to both governmental enforcement actions and third party claims. Public agencies and “economic development agencies” engaged in property acquisition for redevelopment purposes are expressly protected:

“An economic development agency⁶ that holds an indicia of ownership in property as a security interest for the purpose of developing or redeveloping the property or to finance an economic development or redevelopment... shall not be liable under the environmental acts to the department or to any other person in accordance with:

a. Scope of limited liability:

- 1. An economic development agency shall not be liable in an action by the department as a responsible person unless the economic development agency... directly cause an immediate release or directly exacerbate a release...”⁷ (emphasis added).*
- 2. An economic development agency, its officers, agents, ...and employees shall not be liable, including, but limited to: for property damages, diminution of property value, stigma damages, natural resource damages, economic loss, bodily injury or death related to any regulated substances, currently or previously released from the property in any action by a person alleging liability of any kind pursuant to the environmental acts, unless the agency, its officers ... directly cause an immediate release or directly exacerbate a release...(emphasis added).*

Maryland

Under Maryland law, a state or local government is excluded from the definition of "responsible person," "except in the cases of gross negligence or willful misconduct."⁸

Wisconsin

Wisconsin offers a broad exemption to the requirements of the state’s spill laws (including the Underground Storage Tank laws) for both public entities and a variety of quasi-public development corporations. If local government:

“...[A]cquires property through tax delinquency, bankruptcy proceedings, condemnation, ... eminent domain, escheat, for slum clearance or blight elimination, ... the LGU is not

5 NJ PL 1997, chapter 278 (S39) page 3

6 The definition of “economic development agencies” includes local government.

7 See: <http://www.palrb.us/pamphletlaws/19001999/1995/0/act/0003.pdf>

8 Maryland. Code Ann., Environment. § 7-201(X)(2)(vii) (1996)

responsible to investigate or clean up a hazardous substance discharge at the property,” with respect to the state’s Spill Law.”⁹

To be eligible for the exemption the entity must not have “caused the discharge. The definition of “cause the discharge” is conditioned on a “due care” requirement, such that *“Failure to take appropriate action to restrict access to the property in order to minimize costs or damages that result from unauthorized persons entering the property”* would cause loss of protection.”

The acquiring entity is also provided “civil immunity” both before and after, but not during, the period of time that the entity owns the property¹⁰ (emphasis added). Wisconsin officials confirm that the intent of this language is to confer toxic tort protection to local government.¹¹

Wisconsin’s liability protections are also explicitly applicable to a variety of quasi-public development agencies:

- Redevelopment authorities created under Wis. Stats. §66.431;
- Public bodies designated by a municipality under Wis. Stats. §66.435(4);
- Community development authorities; and
- Housing authorities.

Minnesota

Minnesota’s statute confers liability protection to public agencies that acquire property through eminent domain, specifically defining the protected circumstances as including properties acquired under the threat of eminent domain. Public financing activities are protected, as well:

115B.02 Subd. 5. Eminent domain. (a) The state, an agency of the state, or a political subdivision is not a responsible person under this section solely as a result of the acquisition of property, or as a result of providing funds for the acquisition of such property either through loan or grant, if the property was acquired by the state, an agency of the state, or a political subdivision (1) through exercise of the power of eminent domain, (2) through negotiated purchase in lieu of, or after filing a petition for the taking of the property through eminent domain, (3) after adopting a redevelopment or development plan under sections ... (emphasis added).

These states have recognized the value of assuring local governments that, if localities aggressively and responsibly pursue a policy of acquiring mothballed or contaminated properties, they will not be exposing the locality to undue environmental liability. Of particular importance is the fact that they all define the protected acquisition activities more broadly than the federal involuntary acquisition provision. They define protected acquisition activities as encompassing “redevelopment” or “removal of slums and blight” or properties acquired under the threat of eminent domain.

9 Wisconsin Statute Ch 292.11(9)(e), Wis. Stats.

10 Wisconsin Statute 292.26. See: http://www.dnr.state.wi.us/org/aw/rr/liability/muni_1.html#8; and Godfrey & Kahn, S.C, “Environmental Liability Mitigation Strategies for Local Public Agencies,” 2005. Available at: http://www.glc.org/wiconference/PDF/mw_913100_1.pdf.

11 E-mail from Darci Foss, Chief, Brownfields and Outreach, Wisconsin Department of Natural Resources, Bureau for Remediation and Redevelopment, to Evans Paull.

While state-by-state reforms represent real progress in alleviating concerns and encouraging aggressive local government action, it should also be pointed out that local governments continue to be concerned about federal law. A better approach would be federal reforms that could be mirrored into state law.

Examples

In its 2006 report, *Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment*, National Association of Local Government Environmental Professional (NALGEP) outlined the problem faced by localities. The report states:

In NALGEP's interviews, several local governments stated that they never voluntarily acquire brownfield properties because of liability concerns. About a quarter of the respondents stated that they have avoided the acquisition of at least one brownfield property in the last five years due to liability fears." Many local governments explained that liability concerns continue to hamper local government acquisitions of brownfields despite the passage of the bona fide prospective purchaser protection in the 2002 brownfields amendments. It is time-consuming and confusing to wade through the applicable laws, regulations, and EPA guidance materials, resulting in a reluctance to deal with brownfields, especially in small communities that lack in-house environmental law expertise.

Many local governments have adopted policies that eliminate or severely limit city acquisition of contaminated properties. The City of Louisville reported that CERCLA liability concerns have led to a very conservative policy with respect to acquiring contaminated property and several redevelopment opportunities have been by-passed. Overly conservative municipal policies may serve to avoid risk, but such policies also mean that many brownfields sites that have redevelopment potential will continue to bring blight and public health risk to neighborhoods.

The above-referenced NALGEP report included a reference to a small town that passed on acquiring a brownfield site that, years later, is still impacting adjacent neighborhoods. In this case, Winona Lake, Indiana was unable to fund the cost of outside counsel in order to negotiate through what one local official termed the "Quagmire of regulations."

Cleveland and Chicago have each reported that federal authorities have taken a very narrow view of the CERCLA protections afforded local governments under either the involuntary acquisitions section or under the bona fide prospective purchaser section. Both Cleveland and Chicago have had to enter into lengthy negotiations with federal authorities in order avoid liability on sites where the city's only involvement was acquisition/ownership and activities undertaken to protect public health and safety – causing or contributing to contamination was not at issue. Although the issues at these sites either have been or are hoped to be resolved, the resulting uncertainty and associated risk, as well as the time and expense involved in addressing potential municipal liability concerns, is leading both Cleveland and Chicago to reevaluate their acquisition policies and generally pursue a more conservative course.

The Wisconsin Department of Natural Resources reports that EPA enforcement has, on more than one occasion, expressed the opinion that local Redevelopment Authorities may not have the same CERCLA protection as local government.

The Town of Lexington, SC forwarded the following;

The site is approximately 20 acres within the Town limits. An adjacent commercial property owner allegedly dumped items that polluted ground water, and subsequently polluted the Town's parcel through passive migration. The Town cannot prove it did not contribute to the pollution, so it cannot be removed from the list of Potential Responsible parties. This has eliminated us from the prospect of several grants, and has brought efforts to revitalize the area to a standstill...

There are many examples of sites that have been determined to be ineligible for EPA funding because the locality is unable to prove either All Appropriate Inquiry or Involuntary Acquisition. The State of Wisconsin reported that a small town that had acquired a key downtown site in the 1990's was ruled ineligible for an RLF sub-grant because it could not demonstrate AAI, and EPA determined that the acquisition did not qualify as an "involuntary acquisition." Following this precedent, Wisconsin advised numerous other communities that they do not qualify for EPA funding. Losing funding is one problem, but the liability is potentially more significant – when EPA determines that a publicly owned site is ineligible, that decision is essentially determining that the locality is a PRP.

The NALGEP report cites a Baltimore example. At the Allied-Signal (now Honeywell) plant, the City Law Department opposed building public infrastructure on the contaminated site. The developer eventually figured out a way to develop the property with all private streets, but the project was slowed significantly.

Proposed approach

Liability protection for state and local government

Two key provisions in CERCLA directly address the liability of local governments when they purchase property. Unfortunately, the two provisions are inconsistent, ambiguous, and confusing. A unified and simplified liability exemption for local government brownfield ownership would lessen confusion and provide the certainty needed to cleanup and redevelop brownfield sites.

Proposed legislative language

Amendment 1

The purpose of the proposed revision is to clarify that a unit of state or local government should not be liable under CERCLA as an owner or operator of a brownfield unless it caused or contributed to the release or threatened release of a hazardous substance from the facility, although liability to third parties under state or local law would be unaffected.

- 101(20)(D)** The term "owner or operator" does not include a unit of State or local government:
- i. which acquired ownership or control involuntarily through:
 - a. bankruptcy, tax delinquency, abandonment; or
 - b. ~~other~~ circumstances in which the government involuntarily acquires title by virtue of its function as sovereign; or
 - ii. which owns or controls a Brownfield site, as defined by section 101(39), for the purpose of expansion, redevelopment, or reuse.

The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. Nothing in this paragraph (D) is intended to affect the liability of a State or local government under applicable state or local laws.

Amendment 2

The purpose of the proposed revision is to clarify that units of state and/or local government which undertake public health- and safety-related work at CERCLA sites will not be liable under CERCLA, as long as there is no gross negligence or intentional misconduct involved. The “public health and safety” criterion is intended to expand the current exemption in §107(d)(2) for “actions taken in response to an emergency created by the release or threatened release of a hazardous substance” to a wider array of legitimate, but potentially less urgent, public concerns which may not involve hazardous substances.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (“NCP”) or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person, or for costs or damages as a result of actions taken in response to a threat to or endangerment of public health or safety at or arising from a facility. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.