COMMENTARY

Overcoming Impediments to Public Agency Acquisition of Brownfield Sites

Evans Paull

As Congress begins to entertain proposals to reauthorize the Environmental Protection Agency Brownfields Program, local governments will be paying particular attention to one issue: a proposed amendment to grant public agencies greater liability protection when they acquire contaminated property. Supporters contend that cities play a unique role in brownfield redevelopment—acquiring, cleaning up, and repositioning properties that are unlikely to attract private investment either because of depressed neighborhood conditions or because the properties are being held off the market by corporate mothballing practices. Current federal law offers minimal and confusing liability protection for these activities, and the result is that many cities pass over brownfield acquisitions for fear of engendering environmental liability. Those cities that proceed with brownfield acquisitions are rolling the dice in favor of community revitalization but also argue that federal law should be more protective. To rectify these issues, several states have adopted liability reforms that establish a more "causation based" liability scheme for local government acquisitions. A number of groups are advocating for similar reforms at the federal level. Acquisition of contaminated land by public entities is also often complicated by the complexities involved in eminent domain. First, if the acquiring agency lacks the authority to gain access to the site and cannot perform a site assessment prior to taking possession, fiscal concerns are heightened because cleanup costs will not be taken into account in determining fair market value. Secondly, the acquiring agency may not be allowed to deduct cleanup costs from fair market value, so the locality will, in effect, pay twice for cleanup costs. This article explores the statutory issues related to public agency acquisitions, focusing particularly on state reforms and exploring whether particular state liability reforms might serve as a model for a federal liability reform.

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Background

Brownfield redevelopment is one of the key elements of many community revitalization plans—by repositioning and redeveloping former industrial properties and areas, communities can capture new sources of economic growth without the negative consequences of disjointed sprawl development. The most environmentally responsible way to accommodate the new engines of growth is to locate the new uses right where the old industrial plants were established, with infrastructure in place and the workforce nearby. However, with an estimated 450,000–1,000,000 brownfields sites nationally, the task at hand faces numerous obstacles.

> Public acquisition of brownfields is a key part of many cities' economic redevelopment strategies. Through a variety of means, including tax liens, foreclosures, purchase, and the use of eminent domain, local governments can take control of brownfields and then promote positive reuse.

Economic development strategies often call for public acquisition in order to address at least four circumstances:

- *Upside-down sites*. Sites are referred to as *upside down*, when the cleanup and site preparation costs exceed the value of the land. Upside-down sites include those where

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land value is low because of marginal locations, neighborhood deterioration, area disinvestment, crime, and other factors. They also include sites where the costs of remediation and site preparation are exceptionally high; this is often the case with closed manufacturing plants where the buildings are not suitable for reuse for anything other than more manufacturing.

• *Mothballed properties*. Many contaminated properties are owned by entities, often large corporations, that are reluctant to address contamination issues and sell the properties. These entities prefer to hold onto ownership and minimize future liability exposure. The result for communities is that the properties continue to blight the landscape and thwart other redevelopment efforts. Acquisition through eminent domain is one potential solution for mothballed sites. Another is that, without taking possession, public agencies can be authorized to assess and clean up the site and seek cost recovery from the responsible party.

• *Land needed for assembly*. A third circumstance that may lead to public acquisition occurs when multiple small sites in an area are rundown, contaminated, and blighted. Private investment is unlikely because neighboring properties lower the potential for each individual property. In these circumstances, land assembly with the use of, or threat of, eminent domain may be the only tool that will achieve the desired redevelopment.

• *Blight, and public health and safety issues*. Communities that are negatively affected by brownfields often call for public acquisition of contaminated, blighted property to remove a negative, even while the reuse of the land may not be entirely clear.

While there is a solid rationale for acquisition strategies to address brownfields and mothballed sites, a series of obstacles tend to thwart public entities in the use of the most aggressive tools. While some of these obstacles—for example, environmental justice and community participation—can be addressed through process and administrative measures, the hindrances that are addressed in this article are those that are affected by state and federal legal/regulatory issues, primarily:[1] concerns related to environmental liability; and inability to account for cleanup costs within the condemnation process.

This report further describes these obstacles and explores how some states have enacted reform measures to assist public agencies in overcoming the barriers to using aggressive strategies to address brownfields and mothballed sites. In the case of liability issues, the article will also consider the state reforms to begin a discussion of proposed federal reforms.

Liability Concerns: Federal Liability Framework

For local governments acquiring contaminated and mothballed property, there are at least three potential exemptions and defenses to federal Superfund [Comprehensive Environmental Response, Compensation, and Liability Act (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 on-site hazardous substances and took "precautions against foreseeable acts or omission by any third party responsible for contamination."[2] 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 purchaser (BFPP) landowner liability protection. The Small Business Liability Relief and Brownfields Revitalization Act of 2002 [sect.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.

Just to clarify one potential source of confusion, the term *involuntary acquisition* means "involuntary" from the perspective of the acquiring public agency—it does not imply an acquisition that is involuntary *from the perspective of the property owner/seller* is a protected activity.

The complexity of Involuntary Acquisitions is addressed in greater depth in a 2006 report prepared by the National Association of Local Government Environmental Professionals (NALGEP).[3] 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:

- BFPP protection
  - Does not apply to properties acquired before the 2002 date of enactment.
  - Is an affirmative defense rather than an exemption; that is, the acquiring agency must show "by the preponderance of evidence" that it has met the eight requirements for obtaining BFPP protection.[4]
- The 101(20)(D) Involuntary Acquisition exemption
  - Does not apply to voluntary/negotiated purchase.
  - Does not apply to acquisition through eminent domain (or the threat of eminent domain).
  - May not apply to acquisitions by quasi-public economic development corporations; that is, quasi-public entities may not qualify as a "unit of state or local government."
- The 101(35) Involuntary Acquisition third-party defense
  - Does not address voluntary/negotiated 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 most frequent acquisition scenario: voluntary purchase under the threat of eminent domain.[5]
  - 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 quasi-public economic development corporations; that is, quasi-public entities may not qualify as a "government entity."

Finally, the foregoing protections apply only to CERCLA—if a site is under Resource Conservation and Recovery Act (RCRA) or Toxic Substances Control Act (TSCA) purview, the protections do not apply.

Effect on Local Government Acquisition Activities

In its 2006 report, *Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment*, NALGEP outlined the problem faced by localities:

> 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 Environmental Protection Agency (EPA) guidance materials, resulting in a reluctance to deal with brownfields, especially in small communities that lack in-house environmental law expertise."

The report also cites an example of a small town—Winona Lake, Indiana—that was unable to fund the cost of outside counsel to negotiate through what one local official termed the "Quagmire of regulations."

In relation to redevelopment sites in Cleveland and Chicago, federal enforcement authorities have indicated that the municipalities may be held liable for federal CERCLA expenditures at sites where the locality did not cause or contribute to the contamination but subsequently acquired a site or undertook public safety-related actions there. Although liability 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 liability concerns, are leading both Cleveland and Chicago to reevaluate their acquisition policies and generally pursue a more conservative course.[6]

The City of Louisville also reported that CERCLA liability concerns have led to a very conservative policy with respect to acquiring contaminated property and several redevelopment opportunities have been bypassed.[7]

The Wisconsin Department of Natural Resources reported that the EPA Enforcement Office has, on more than one occasion, expressed the opinion that Wisconsin's local redevelopment authorities may not have the same CERCLA protection as local government.[8]

The Town of Lexington, South Carolina, forwarded the following example to Northeast-Midwest Institute (NEMW):[9]

> 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 form 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 cannot 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 1990s was ruled ineligible for a Revolving Loan Fund (RLF) subgrant because it could not demonstrate All Appropriate Inquiry, and the 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.[10] Losing funding is one problem, but the liability is potentially more significant—when the EPA determines that a publicly owned site is ineligible, that decision is essentially the same as determining that the locality is a potentially responsible party.

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

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 next in this report 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. Most reforms establish a liability standard that is more "causation based" than "ownership based."

- *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. The NEMW has been advised that the reference to "civil immunity" protections in Wisconsin is meant to confer toxic tort protection. There are also references to protection against "common law" claims in the New Jersey and Pennsylvania statutes. 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, the NEMW has been advised that legislative history would have to 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 granted 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:

> 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.[11] (emphasis added)

Pennsylvania

Pennsylvania's Act 3 (1995) involves a broad liability exemption from state enforcement action for both public agencies and "economic development agencies" engaged in property acquisition for redevelopment purposes:

> An economic development agency[12] 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 . . . unless the agency . . . directly cause[s] an immediate release or directly exacerbate[s] a release.[13] (emphasis added)

Under a separate section entitled "Defenses to Environmental Liability," public agencies and economic development agencies are also given a third-party defense to common-law actions:

> Economic development agency can avoid liability under the environmental acts *or the common law equivalents*[14] by showing evidence that a release was caused by . . . the act of a third party. (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."[15]

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 a local government "acquires property through tax delinquency, bankruptcy proceedings, condemnation, . . . eminent domain, escheat, *for slum clearance or blight elimination*, . . . the LGU [Local Government Unit] is not responsible to investigate or clean up a hazardous substance discharge at the property, with respect to the state's Spill Law."[16] 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 property[17] (emphasis added). Wisconsin officials confirm that the intent of this language is to confer toxic tort protection to local government.[18]

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
- 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)

Conclusion

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 that they all define the protected acquisition activities more broadly than does 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.

While state-by-state reforms represent real progress in alleviating concerns and encouraging aggressive local gov-

ernment 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.

Proposed Federal Reform

A coalition of individual cities[19] and national organizations (National League of Cities, United States [US] Conference of Mayors, National Association of Counties, International Municipal Lawyers Association, and NEMW) have come together behind a proposal to improve and clarify public agency liability protections as one element of a legislative proposal to reauthorize the EPA Brownfields Program. The advocates are essentially attempting to establish a causation-based liability standard for publicly owned sites. The underlying precept is that, although it may make sense for ownership of *private* land to be linked to cleanup liabilities, the logic breaks down when public purpose is involved.

The coalition's letter asks Congress to adopt amendments that would

- Eliminate the term *involuntary* in describing the protected activities.
- Add a plain-language exemption for local governments that acquire contaminated properties for redevelopment purposes, as long as the governmental entities have not created or released the contamination.
- Modify and expand the current protections under the category of "rendering care and advice" to include actions taken by local government to address public health and safety issues at sites, so long as the governmental entity acts responsibly in doing so.

The letter concludes: "We encourage you (representatives to Congress) to consider improving liability protections so that governmental entities will not have to 'roll the dice' when pursuing activities that are so clearly benefitting the public—addressing public health and safety concerns, attracting jobs and investment to distressed communities, and repositioning vital assets for environmentally responsible economic growth."

Eminent Domain: Accounting for Cleanup Costs in the Condemnation Process

In 2005, when Congress was considering eminent domain reforms in the wake of the *Kelo v. New London* decision, the only measure Congress could agree on was a one-year ban on the use of certain federal funds to support projects involving the use of eminent domain.[20] However, Congress also recognized that brownfield sites presented unique circumstances, and an exception to the ban was adopted for sites that meet the federal definition of a brownfield. Some of states have also taken care to define allowable eminent domain activities to include brownfield acquisitions.[21]

This article does not attempt to review the larger issue that many states examined in the wake of the Kelo decision: When is it appropriate to use eminent domain? Rather, this report looks at the mechanics of using eminent domain on brownfield sites. In particular, the research calls attention to two potential problem areas.

Site access. First, the acquiring agency may not be able to access the site in order to perform a site assessment in the preacquisition time frame. Many states allow the acquiring agency to "inspect" the property, but an inspection would not ordinarily include sampling activities. Lacking critical environmental information, the acquiring agency faces one of two equally undesirable outcomes: Drop the acquisition plan for fear of the unknown, or proceed to buy the property at a "clean land" price and later bear the burden of the cleanup.

Deduction of cleanup costs from fair market value. Second, the counterpart to gaining site access is that there must also be an ability to account for cleanup costs in establishing fair market value. Aside from the obvious fiscal benefits of paying a true, uninflated land value, the ability to deduct cleanup costs has the benefit of conserving governmental funding for cleanup activities. Further, the principle involved is consistent with the "polluter pays" philosophy—the seller/responsible person, if they have not taken action to cleanup their property, should not be rewarded with a selling price that reflects clean land.

Court Decisions

Lacking specific state legislative authority to account for cleanup costs in condemnation proceedings, the courts have tended to split on the issue. Two articles have reviewed decisions in this area and both have found wide variations of interpretations.[22]

- Some decisions have tended to allow cleanup costs to be deducted directly from fair market value. The Connecticut Supreme Court held that "excluding contamination as evidence is likely to lead to a fictional property value."[23] One

review concluded that courts in California, Kansas, Tennessee, Florida, Georgia, and Colorado have agreed that remediation costs must be factored into valuation in condemnation cases.[24] A recent New Jersey decision allowed the City of Camden to pay $1 for the purchase of a contaminated site, based on the acquiring agency's commitment to clean up the substantial contamination at the site.[25]

- Other decisions have held that evidence of contamination is not admissible within the limited legal context of a condemnation hearing. For example, decisions in Illinois, Iowa, and a more distant decision in New Jersey maintain that due-process concerns require a separate proceeding to account for cleanup costs; that is, they require a contribution action lawsuit that would allow for apportionment among responsible persons.[26]

- A few decisions have allowed for cleanup costs but in a modified, limited fashion. For example, some courts have held that adjustments to fair market value can consider only the land values of comparable contaminated property.[27] In Illinois, the courts have held that evidence of contamination can be considered only to the extent that "an underlying illegal condition" has been demonstrated.

Brownfield redevelopment objectives would be handicapped if the courts consistently required a separate contribution action proceeding in order to account for cleanup costs. Contribution actions are too costly and time-consuming for the typical brownfield site, and the unfortunate result would be that the remediation costs would most often be borne by the public sector.

Considering the lack of consensus on the issue in the courts, a number of states have acted to establish both the right to enter the property prior to taking possession and the deduction of cleanup costs from fair market value.

States That Allow Site Access and Deduction of Cleanup Costs from Fair Market Value

Connecticut

Under PA 00-89,[28] adopted in 2000, the legislature required that the determination of the value of property taken by eminent domain by a municipal redevelopment agency take into account any evidence of its fair market value, including its environmental condition and the cost of environmental remediation, when the valuation is challenged. The act entitles the property owner to a setoff of such costs in any pending or subsequent suit to recover remediation costs for the property. Court decisions (e.g., *Northeast Connecticut Economic Alliance, Inc. v. ATC Partnership*) have upheld the law.

Connecticut also allows the condemning authority to obtain permission from a court prior to or during condemnation to conduct physical or environmental testing (sect. 48-13).

Illinois

In Illinois, the Eminent Domain Act governs the admissibility of evidence in eminent domain proceedings. The law states,

> Evidence is admissible as to . . . (2) any unsafe, unsanitary, substandard or other illegal condition, use or occupancy of the property, including any violation of any environmental law or regulation; and . . . (4) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy, including compliance with environmental laws and regulations.[29]

The courts have strictly interpreted that there must be a violation of law or regulation in order for cleanup costs to be accounted for in a condemnation proceeding.

Wisconsin

In Wisconsin, the right to enter the property is established, as follows:

> *75.377 Inspection of property subject to tax certificate*. A county may enter any real property for which a tax certificate has been issued under s. 74.57, or may authorize another person to enter the real property, to determine the nature and extent of environmental pollution, as defined in sect. 299.01(4).[30]

California

California law explicitly allows for the direct deduction of site investigation and cleanup costs from fair market value.[31]

Maryland

Baltimore City legal officials have indicated that Maryland law and case history allow for deduction of cleanup costs from fair market value, even though there is no explicit provision in the law. Thus, the main issue was not the cleanup deduction, but gaining site access.

In 2004, Maryland law was amended to specifically allow several localities, including Baltimore City, to gain access to sites being acquired under eminent domain:

> An agent or employee, or one or more assistants of the county, after real and bona fide effort to notify the occupant or the owner, if the land is unoccupied or if the occupant is not the owner, may enter on any private land to make test borings and soil tests and obtain information related to such tests for the purpose of determining the possibility of public use of the property.[32]

Virginia

Under Virginia's Brownfield Restoration and Land Renewal Act,

> Any local government or agency of the Commonwealth may apply to the appropriate circuit court for access to an abandoned brownfield site in order to investigate contamination, to abate any hazard caused by the improper management of substances within the jurisdiction of the Board, or to remediate the site.[33]

This provision is not limited to condemnation cases; however, because there is no corresponding authority for cost recovery, this authority is most often used in conjunction with eminent domain.

States that want to encourage their localities to aggressively address the most difficult brownfield sites would be well advised to examine their state laws related to eminent domain, site access, and deduction cleanup costs.

Defining Contamination as Meeting the Definition of Blight

One further issue at the intersection of brownfields and eminent domain was recently raised in an article in *Brownfields Renewal*. The author raises the following question: If a state limits the use of eminent domain to address "blight," does contamination automatically qualify the site as "blighted?"[34] The article suggests that states where this question is not specifically addressed in the statute should clarify that contamination is a qualifying factor for a blight determination.

Conclusion

A senior US House of Representatives Energy and Commerce Committee staff member, who is no longer in that position, was known to comment that the only thing wrong with the EPA Brownfields Program was that it needed more money. This put the staffer at odds with the National Brownfields Coalition (a coalition of twenty national organizations that support brownfield issues at the national level), which supported a platform of 16 nonfinancial reforms to improve the EPA program and modify liability standards, including the aforementioned proposal to establish a causation-based liability standard for public agency acquisitions.

The recession and resulting state and local fiscal distress serve to call attention to the limitations of what can be accomplished through public subsidy, and policy makers would be wise to examine ways to stimulate brownfield redevelopment through nonfinancial legal and regulatory reforms that help level the playing field between brownfield and greenfield development. This report suggests consideration of two areas that would encourage local governments to pursue public acquisition/redevelopment of brownfields: establishing a causation-based liability standard for local government acquisitions; and eminent domain reforms that would allow acquiring agencies to correctly account for cleanup costs.

Notes

1. Notably absent from this article is any discussion of incentives—note that other Northeast-Midwest Institute (NEMW) research has looked at the incentive side. See sources listed at the NEMW home page, http://www.nemw.org/index.php?option=com_content&view=article&id=94&Itemid=74.

2. CERCLA 107(b)(3), available at Cornell University Law School, US Code Collection, http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00009607----000-.html#b_3.

3. NALGEP, *Superfund Liability: A Continuing Obstacle to Brownfields Development*, 31 pp. (NALGEP, Washington, DC, 2006), available at http://www.resourcesaver.com/file/toolmanager/CustomO93C337F72956.pdf.

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

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

6. Personal communications, Mort Ames, Chicago Law Department; and Julianne Kurdia, Cleveland Law Department.

7. Personal communication, Susan Hamilton, Louisville Metropolitan Economic Development Department.

8. Personal communication, Darsi Foss, Wisconsin Department of Natural Resources.
9. Personal communication, Brad Cunningham, City of Lexington Law Department
10. Personal communication, Darsi Foss, Wisconsin Department of Natural Resources
11. NJ PL 1997, chap. 278 (S39), p. 39.
12. The definition of "economic development agencies" includes local government.
13. At *Pennsylvania Session Laws*, *Introduction to Pamphlet Laws*. See http://www.palrb.us/pamphletlaws/19001999/1995/0/act/0003.pdf.
14. The inclusion of "common law equivalents" can be interpreted as providing liability protection against toxic tort. A more in-depth review of legislative history would be required to provide a definitive interpretation.
15. Maryland Code Ann., Environment. §7-201(X)(2)(vii) (1996).
16. Wis. Stat. Ch 292.11(9)(e).
17. Wis. Stat. 292.26 (see http://www.dnr.state.wi.us/org/aw/rr/lgu/liability.htm#lgu), and A.J. Harrington and D. Marchik, *Environmental Liability Mitigation Strategies for Local Public Agencies*, 26 pp. (Godfrey & Kahn, S.C., Milwaukee, WI, 2005), available athttp://www.glc.org/wiconference/PDF/mw_913100_1.pdf.
18. Email to Evans Paull from Darsi Foss, Chief, Brownfields and Outreach, Wisconsin Department of Natural Resources, Bureau for Remediation and Redevelopment.
19. As of this writing, 39 cities are signed onto a letter requesting congressional action on public agency liability.
20. House budget bill for 2005: HR 3058.
21. Minnesota redefined allowable use of eminent domain to include acquisition of "environmentally contaminated areas." See S.F. No. 2750, 5th Engrossment—84th Legislative Session (2005–2006), posted on May 16, 2006, http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2750.5.html&session=ls84.
22. J. Fersco and J.J. Riley, *Condemnation: The Impact of Environmental Contamination on Property Valuation*, 6 pp. (Farer Fersko, Westfield, NJ, 2006), available at http://www.farerlaw.com/library/archive/litcon_jf_jjr_ciecpv.pdf; and J.D. Brusslan, "Eminent Domain and Environmental Contamination," *Illinois Real Estate Journal*, January 14, 2002, available at http://pages.ripco.net/~envnlaw/eminent.htm.
23. *Northeast Connecticut Economic Alliance, Inc., v. ATC Partnership*. See http://www.jud.state.ct.us/external/supapp/Cases/AROcr/256cr64.pdf.
24. Brusslan, "Eminent Domain."
25. *Camden Redevelopment Agency v. Barbara Aston Financing Corp.*, Docket No. CAM-L-1058-08, cited in P.E. Bross, "Contamination and Eminent Domain: Isn't This Blight?" *Brownfields Renewal*, June 2009, available at http://www.brownfieldrenewal.com/article-contamination_and_eminent_domain-784.html.
26. *Housing Authority v. Sudham Investors; and Department of Transportation of the State of Illinois v. Parr*. See M. Rikon, *Valuing Contaminated Property* (Goldstein, Goldstein, Rikon & Gottlieb, P.C., New York, 2008), available at http://www.ggrgpc.com/pubs/contaminated_property_97.html).
27. *Finkelstein v. Department of Transportation, Florida, 1995*. See http://www.brighammoore.com/samples/decisions/join_ventures_v_dot.pdf.
28. See OLR Amended Bill Analysis, http://www.cga.ct.gov/olr/ba2000/2000HB-05175-R010633-BA.htm.
29. Illinois sect. 735 ILCS 5/7-119.
30. "Wisconsin Constitution, Article I, Section 13: Just Compensation Clause," *Constitutional Highlights* 5, no. 1 (2005), available at http://www.legis.state.wi.us/lrb/pubs/consthi/05consthiV1.htm.
31. J. L. Hernandez and C. Wade Griffith, *A Practical Guide to Implementing the Polanco Act for Redevelopment Area Brownfields*, 12 pp. (Beveridge and Diamond, Los Angeles, 2001), available at http://beveridge.gbclients.com/media/news/news.349.pdf.
32. *Maryland Real Property* article §12-111, available at http://michie.lexisnexis.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp.
33. Virginia law sect. 10.1-1236, Access to abandoned brownfield sites.
34. Bross, "Contamination and Eminent Domain."

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