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Brownfields Redevelopment and the Threat of CERCLA Liability

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Local governments nationwide face the harmful effects of brownfields in their jurisdictions, while at the same time recognizing the opportunities that such sites present for redevelopment and revitalization of neighborhoods. A brownfield is defined as "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."[1] These underdeveloped or abandoned properties often lie idle for years because of fear of environmental contamination, and uncertain cleanup costs. Meanwhile, they cause blight in their neighborhoods, drive down property values, and hinder economic development. The potential acquisition of these properties presents local governments with the opportunity to turn abandoned, contaminated properties into green space, transportation corridors, or facilities that enhance neighborhoods, promote economic development, and generate tax revenue. Development can occur through public construction, private investment, or public-private partnerships.

Local governments can acquire brownfields through voluntary sales, eminent domain, or involuntary means including tax liens and foreclosures. These acquisitions clear the way for them to conduct site assessments, remediate environmental hazards, and otherwise prepare the property for development. However, local governments are often dissuaded from such acquisition because of well-founded fear of environmental liability, particularly under CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act.[2]

Under CERCLA, suits by EPA, states, or private parties can impose cleanup liability upon any "potentially responsible party." Section 107(a) lists four categories of parties that may be held liable for the costs:

1. The current owner and operator of the facility;
2. A person who owned or operated the facility at the time of disposal of hazardous substances;
3. Any individual, corporation, or government who arranged for the disposal or treatment of hazardous substances; or
4. The transporter of the hazardous substances if that individual selected the disposal or treatment site.

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[1] *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(a)(A), 115 Stat. 2356, 2361 (2002).

[2] Comprehensive Environmental Response, Compensation, and Liability Act , 42 U.S.C. §§ 9601-9675 (2000).

Liability under CERCLA is strict,[3] joint and several,[4] and retroactive.[5] This means that any current owner of contaminated property may be liable for the entire cleanup cost associated with that property, unless the land owner qualifies for some form of liability protection. Potential liability exists regardless of whether the current owner contributed to the contamination or owned the property at the time the contamination occurred.

Under this liability scheme, local governments are treated the same as private parties.[6] Thus, local governments are understandably wary of acquiring title to brownfields out of fear of staggering cleanup costs and liability claims once they take ownership.

Recognizing these disincentives, Congress has enacted several provisions of CERCLA with the intent to protect local governments when they acquire property. Under the right circumstances, these provisions reduce or eliminate the liability to which a local government is exposed when it acquires or cleans up a brownfield. However, each such defense has stringent eligibility requirements. In many cases, eligibility for such defenses turns on how the property was acquired or the details of the acquisition. As a result, it is important for local governments to understand the scope and limits of these defenses before they settle on a course of action with respect to a particular property. Whenever possible, local governments should structure their brownfield-acquisition transactions to ensure that they will be protected by at least one of the available defenses or exclusions from liability.

The following overview examines the four primary exclusions and defenses to CERCLA liability that may shield local governments from liability for brownfield cleanup costs. Local governments should keep the scope and limitations of each exclusion and defense in mind when acquiring brownfields for redevelopment.[7]

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[3] *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 167-68 (4th Cir. 1988); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *New York. v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

[4] *United States v.Monstanto*, 858 F.2d at 171-73.

[5] *Id. at* 173-75.

[6] *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1198-1199 (2d Cir. 1992): "CERCLA expressly includes municipalities…within its definition of persons who can incur…liability under [§107]."

[7] Note: In addition to CERCLA, other federal and state environmental laws may apply to a brownfield acquisition. These laws are not discussed in this article, but should be considered as well.

1. Exemption for Involuntary Acquisitions by Local Governments

CERCLA's definition of "owner or operator" exempts from liability State or local governments that acquire ownership or control of brownfields "involuntarily." Section 101(20)(D) of CERCLA states: [8]

> 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.

This is an exemption from liability, rather than a defense, so it relieves the local government of the affirmative burden to prove a defense. It does not extend, however, to any state or local government that caused or contributed to a release of a hazardous substance at the site.

This exemption's applicability to local governments acquiring brownfields has generated confusion, mostly surrounding the meaning of the word "involuntarily." A key ambiguity is whether the transaction must be involuntary from the local government's perspective or from that of the prior owner. In other words, to qualify for this exemption, must a local government have a brownfield thrust upon it? Or does intentional acquisition of a property from an unwilling owner qualify the acquiring local government for the exemption? CERCLA gives a non-exhaustive list of some of the transactions that will be considered involuntary—including bankruptcy, tax delinquency, and abandonment—and the EPA has provided additional examples of what it views as involuntary:

- Acquisitions by government entities acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions by government entities pursuant to seizure or forfeiture authority.[9]

[8] 42 U.S.C. § 9601(20)(D).

[9] Environmental Protection Agency, THE EFFECT OF SUPERFUND ON INVOLUNTARY ACQUISITIONS OF CONTAMINATED PROPERTY BY GOVERNMENT ENTITIES 2 (Dec. 1995), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-involacquprty-rpt.pdf.

The EPA has attempted to clarify the term "involuntary" by providing the following test: An acquisition is involuntary if "[t]he government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property."[10]

This appears to exclude situations where the acquisition of the property is initiated by the local government. On the other hand, the EPA has acknowledged that involuntary acquisitions, including the examples listed in CERCLA, generally still require some sort of discretionary, volitional action by the government in order to "control or take title to the property." Thus, the EPA has explained that "a government entity need not be completely 'passive' in order for the acquisition to be considered 'involuntary' for purposes of CERCLA."[11] In other words, a local government can take some action in order to complete the transaction and still qualify for the Section 101(20)(D) exemption.

An important question for local governments is whether Section 101(20)(D) exempts them from liability when they acquire brownfields by eminent domain. A further question is whether Section 101(20)(D) applies when they acquire properties by a consensual sale against the backdrop of pending or threatened eminent domain proceedings. These questions are important because eminent domain is a key tool that local governments use to acquire and redevelop brownfields.

The National Association of Local Government Environmental Professionals (NALGEP) reports that, in discussions and interviews with local officials, 63 percent of respondents stated that they had used eminent domain on at least one occasion to acquire a brownfield property.[12] Respondents explained that the option of using eminent domain authority is particularly important in situations that are common to brownfield development, such as when owners are unwilling to transfer the property or to allow access for site inspections or where the local government cannot locate the owners of abandoned properties to pursue sales negotiations. Yet NALGEP found that the actual use of eminent domain authority in a litigated condemnation of property is rare. Instead, it is far more common for local governments to assert their intention to use eminent domain but ultimately to acquire the land through a negotiated sale. The local government's ability to assert its intention to acquire the property through eminent domain often provides landowners with an otherwise-absent incentive to enter into negotiations for the sale.[13]

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[10] *Id.* at 1.
[11] *Id.* at 3.
[12] National Association of Local Government Environmental Professionals, SUPERFUND LIABILITY: A CONTINUING OBSTACLE TO BROWNFIELDS REDEVELOPMENT 9 (2006), *available at* http://www.nalgep.org/publications/.
[13] *Id*. at 9-10.

In a 2003 guidance document, the EPA stated explicitly that it interprets the statute not to include eminent domain as an involuntary acquisition for purposes of the Section 101(20)(D) exemption (although it does include it for purposes of the affirmative defense discussed below).[14] Although not stated expressly, the EPA's position implicitly excludes consensual sales negotiated against a backdrop of condemnation proceedings.

Courts so far have agreed with this interpretation and have been unwilling to apply the Section 101(20)(D) exemption in these circumstances. In *City of Wichita v. Aero Holdings, Inc.*, the city purchased a contaminated property for public use. The purchase agreement contained a provision stating, "in lieu of condemnation," whose purpose was to memorialize that but for the negotiated purchase of the property, the city would have acquired the property using its eminent domain power.[15] The city argued that it was exempt from liability because it had acquired the property "by virtue of its function as sovereign."[16] The court rejected this claim, holding that neither the actual nor threatened use of eminent domain qualified as involuntary acquisition for purposes of Section 101(20)(D). The court explained that the city's purchase of the property after evaluating it and with knowledge that it was contaminated was clearly a volitional act.[17] Further, the court expressed its concern that if a city could place itself beyond the reach of CERCLA merely by threatening the exercise of eminent domain it would thwart Congress' intent to treat local governments the same as private parties.[18] The court went on to state that even the *actual* exercise of eminent domain power would not be considered involuntary, because in such circumstances the property is "acquired because of some characteristic desirable to the governmental entity and affirmative steps are taken to acquire the property for some specific use."[19]

Similarly, in *United States v. Occidental Chemical Corp.*, the court rejected the city's argument that, in purchasing contaminated property to build roads and a park, it was making an involuntary purchase because these are functions that a sovereign must perform. The court explained that "since all municipal purchases are made for the benefit of citizens, the city's construction of the word involuntary would cause the exception to swallow the rule."[20]

These cases demonstrate that a local government's use of its eminent domain authority to acquire a brownfield for redevelopment is unlikely to exclude the local government from liability under CERCLA. This exclusion appears to be

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[14] Environmental Protection Agency, QUESTIONS AND ANSWERS REGARDING FEDERAL BROWNFIELDS PROPERTY LIABILITY 4 (Nov. 2003), *available at* http://www.epa.gov/NE/brownfields/pdfs/qa6FINAL.pdf.
[15] *City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153, 1162 (D. Kan. 2000).
[16] CERCLA § 101(20)(D), *available at* http://epw.senate.gov/cercla.pdf.
[17] *Wichita*, 177 F. Supp. 2d at 1167-68.
[18] *Id.* at 1169.
[19] *Id.* at 1168.
[20] *United States v. Occidental Chem. Corp.*, 965 F. Supp. 408, 413 (W.D.N.Y. 1997).

limited to acquisitions that are not initiated by the local government and may therefore be of little use to governments that are actively seeking to develop a particular brownfield property.

2. Third-Party Affirmative Defense

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.[21]

In defining "contractual relationship," Section 101(35)(A)(ii) of CERCLA excludes transfers of title where "...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."[22] Read together with Section 107(b)(3), this language offers an affirmative defense to governments that acquire property through these means.

In order to avail itself of this affirmative defense, however, the local government must demonstrate both that it exercised "due care" and that it took precautions against foreseeable acts or omissions by any third party responsible for contamination.

Due care is a legal term defined by courts and is highly dependent on the specific facts of the case. Some examples of due care found in case law include identifying and assessing the contamination found at the site,[23] notifying state and federal environmental agencies,[24] taking steps to control and limit exposure to the contamination,[25] warning tenants and the public about the potential hazards and informing them of actions that can be taken to prevent exposure.[26] Courts have found a failure to exercise due care where the local government took no action upon learning of the contamination, failed to prevent the spread of the contamination, or failed to warn people of the potential hazards.[27]

Once again, the term "involuntary" creates some ambiguity. As quoted above, the EPA has provided some guidance on what is considered involuntary and has indicated that some affirmative acts by the government to effectuate a transaction will not invalidate this defense. However, this has not been fully tested by the courts.

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[21] 42 U.S.C. § 9607(b)(3).
[22] 42 U.S.C. § 9601(35)(A)(ii).
[23] *New York v. Lashins Arcade Co*., 91 F.3d 353 (2d Cir. 1996).
[24] *Interfaith Cmty. Org. v. Honeywell Intern., Inc*., 263 F. Supp. 2d 796 (D.N.J. 2003).
[25] *New York v. Lashins Arcade Co*., 91 F.3d 353.
[26] *Id.*
[27] *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996); *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290 (W.D.N.Y. 1996).

Although Section 101(35)(A)(ii) specifically mentions eminent domain, that provision—and the third-party defense established by it and Section 107(b)(3)—still leaves some ambiguity of which local governments must be aware when seeking to acquire brownfield properties. For example, it is not clear from the statute itself whether use of eminent domain to qualify for the third-party defense requires an actual judicial proceeding, litigated to completion. If so, that would seriously affect the usefulness of this defense in the most common acquisition scenario: voluntary purchase under the threat of eminent domain. The EPA has indicated that a voluntary purchase may qualify under this defense, stating that in an acquisition by eminent domain, "the property is taken *either by purchase* or condemnation" (emphasis added).[28]

The courts, however, have not necessarily taken this view. In at least one case, a court rejected a city's defense under this provision, because the city had threatened eminent domain, but ultimately reached an agreement with the owner and purchased the property.[29] The court explained, "[o]nly if the parties had been unable to agree would the City have been empowered to exercise its power of eminent domain… Since it was unnecessary for the City to exercise this authority and take this step, it is evident that the City did not obtain the Right-of-Way by resorting to its statutory power of eminent domain."[30]

A federal court in California, on the other hand, reached a different, more flexible conclusion in *City of Emeryville*.[31] In this case, the City commenced eminent domain procedures to acquire a contaminated property, but ultimately reached an agreement with the owner and successfully purchased the property. The court accepted the City's defense, stating that "the statute's plain language does not require any type of eminent domain proceeding. Rather, it uses the broader phrase 'exercise of eminent domain authority.' Additionally, the words 'by purchase or condemnation' encompass purchases and do not limit the defense to the result of a judicial proceeding."[32]

Thus, whether a purchase made under the threat of eminent domain will qualify a local government for the third-party defense will likely vary among jurisdictions and will depend on the specific circumstances surrounding the acquisition. Unfortunately, the dearth of case law interpreting this provision means that local governments in most jurisdictions have little guidance in assessing the likelihood of success of this defense in various situations.

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[28] Environmental Protection Agency, QUESTIONS AND ANSWERS REGARDING FEDERAL BROWNFIELDS PROPERTY LIABILITY 4 (Nov. 2003), *available at* http://www.epa.gov/NE/brownfields/pdfs/qa6FINAL.pdf.
[29] *City of Toledo v. Beazer Materials & Servs. Inc.*, 923 F. Supp. 1013 (N.D. Ohio 1996).
[30] *Id.* at 1020-21.
[31] *City of Emeryville v. Elementis Pigments, Inc.*, No. 99-03719, 2001 WL 964230 (N.D. Cal. Mar. 6, 2001).
[32] *Id.* at *8.

The third-party defense is potentially very helpful to local governments seeking to redevelop brownfields. It has the significant advantage over the liability exclusion in 101(20)(D) of explicitly including the exercise of eminent domain authority as an acceptable means of acquisition. However, if the transaction falls short of a full judicial proceeding, there is a risk that a court could find the acquisition to be ineligible for this defense.

3. Bona Fide Prospective Purchaser Defense

A third potential defense for a local government seeking to acquire a brownfield for redevelopment is the bona fide prospective purchaser (BFPP) defense, found in Section 107(r) of CERCLA.[33] Added by the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the brownfields amendments), this provision provides a defense that extends to certain purchasers of property known to contain hazardous materials. The BFPP language is significant because a BFPP may acquire property with knowledge of contamination, and, nonetheless, qualify for a defense to liability.[34]

The defense generally extends to entities, including local governments, if:

- All disposal of hazardous substances occurred prior to acquisition of the property;
- The owner made all appropriate inquiries into the potential presence of hazardous substances on the property prior to acquiring it (including interviews with past and present owners, reviews of historical sources of information, reviews of federal, state, tribal and local government records, and visual inspections[35]);
- The owner exercised appropriate care with respect to any hazardous substances on the property;
- The owner is not potentially liable for response costs and is not affiliated with a potentially responsible party through a family or financial relationship; and
- Other statutory requirements are met.

In many ways, the BFPP defense may be the safest way for a local government seeking to acquire a brownfield for redevelopment to avoid liability. However, the requirements for achieving BFPP status are onerous. The local

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[33] 42 U.S.C. § 9607(r).

[34] A BFPP is not liable under CERCLA for cleanup costs at a site. However, if EPA has unrecovered response costs incurred in cleaning up that property and the EPA response action increases the fair market value of the property, EPA may have a windfall lien on the property. *See* Environmental Protection Agency & U.S. Department of Justice, INTERIM ENFORCEMENT DISCRETION POLICY CONCERNING "WINDFALL LIENS" UNDER SECTION 107(R) OF CERCLA (2003), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.

[35] Innocent Landowners, Standards for Conducting All Appropriate Inquiries, Final Rule: 40 C.F.R. Pt. 312.

government seeking BFPP status must show, by a preponderance of the evidence, that it complies with all of the statutory requirements. In addition, in order to maintain its status as a BFPP, the local government must perform various continuing obligations, including complying with any land use restrictions and institutional controls established or relied on in connection with the response action.[36] The EPA believes that the statute requires BFPPs to comply with these land use restrictions and institutional controls even if they were not in place at the time the BFPP purchased the property.[37]

BFPP status requires careful monitoring of ongoing compliance with the statutory requirements, and requires careful oversight by the EPA regional offices as part of their exercise of enforcement discretion.

Since the BFPP provision is still relatively new, the courts have not yet provided any additional guidance from which to assess the limits and risks of this defense.

4. EPA Enforcement Bar for Eligible Response Sites

Section 128(b) of CERCLA provides special protections from EPA enforcement actions against a person who is currently cleaning up a brownfield site.[38] This provision limits EPA authority to take CERCLA enforcement actions against persons who are conducting or have conducted cleanups of brownfields in compliance with a State Voluntary Cleanup Program.

This provision offers a significant incentive to parties including local governments to volunteer brownfield clean-ups. State cleanup programs are very attractive for a number of reasons. First, properties that will have an industrial end use will often be held to a lower cleanup standard than properties that will have a residential end use. Second, many state programs allow anyone, including the prospective purchaser, the owner, or even the party responsible for the contamination, to initiate or participate in the cleanup process. Finally, many states offer financial incentives to entice developers.

The protection granted by section 128(b) is not absolute, however. EPA may bring an enforcement action at an eligible response site if (1) the State asks EPA to take a response action; (2) the contamination migrates across a state line or onto Federal property; or (3) the site presents an imminent and substantial endangerment to public health, welfare, or the environment and requires

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[36] 42 U.S.C. § 9607(r)

[37] *See* Environmental Protection Agency, INTERIM GUIDANCE REGARDING CRITERIA LANDOWNERS MUST MEET IN ORDER TO QUALIFY FOR BONA FIDE PROSPECTIVE PURCHASER, CONTIGUOUS PROPERTY OWNER, OR INNOCENT LANDOWNER LIMITATIONS ON CERCLA LIABILITY (2003), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.

[38] 42 U.S.C. § 9628(b)

additional response actions.[39] Thus, this provision does offer EPA some leeway in taking action at a brownfield property. It is not an absolute guarantee that no enforcement action will be taken. Nevertheless, as of now we are not aware of any instance where EPA has taken an enforcement action or response action over the objections of a state at a brownfield site being cleaned up under a state program.

Conclusion

Before entering into a transaction to acquire a brownfield for redevelopment, it is important to have a plan for defending against potential liability. The local government needs to consider the specific facts surrounding the potential acquisition of a property and the likely applicability of each possible defense to those facts.

The possible defenses available to a local government with respect to a prospective property may dictate whether and how the local government should pursue acquisition. For example, a local government acquiring a property through tax delinquency may feel confident in relying on the liability exclusion for involuntary acquisitions, but a local government acquiring a property through demolition lien foreclosure, which is not mentioned in the statute, will have to examine the situation more closely to make sure that its acquisition would meet the EPA's test of involuntariness. Similarly, a local government wishing to acquire a property through a negotiated purchase under the threat of eminent domain must determine whether its jurisdiction would treat such a negotiated purchase as sufficient to invoke the third-party defense. In many cases, a local government will conclude that achieving the status of a BFPP is the safest (or perhaps only) way to shield itself from liability, in which case the local government will want to work closely with its regional EPA office and ensure that it can and will take all actions necessary to obtain and maintain that status.

A group of stakeholders led by IMLA and the Northeast Midwest Institute is leading efforts to explore CERCLA revisions that would remove the barriers to local government redevelopment of brownfields. The group has drafted language that would remove much of the statutory ambiguity that now exists and would bolster liability protections for public agencies when they acquire contaminated land. Until such revisions are made, however, local governments wishing to acquire and redevelop brownfields must proceed with caution and explore their options carefully.

[39] 42 U.S.C. § 9628(b)(1)(B)