Brownfields Redevelopment: A Municipal Lawyer's Perspective

Presented by Mort P. Ames

City of Chicago Department of Law

September 12, 2011

City of Chicago Brownfields Program

Chicago Department of Environment

Chicago Department of Housing & Economic Development

- Chicago Brownfields Initiative began in 1993
- 57 sites remediated/redeveloped
- More than 1324 acres returned to productive use
- More than 30,000 jobs created or retained
- City costs are about $106,000 per acre, for approximately $140,000,000 total City costs
- Currently managing the cleanup of over 60 sites (975 acres)

To Be Covered

- What are brownfields?
- What are the harms they cause?
- What are the benefits of brownfields redevelopment?
- What special value does a local government bring to brownfields redevelopment?
- An overview of the brownfields redevelopment process from a lawyer's perspective.
- A discussion of liability for environmental cleanup costs.
- Potential federal statutory changes to provide greater protections from liability for municipalities engaged in brownfields redevelopment.

Brownfields Definition

A “brownfield site” 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.”

§ 101(39)(A) of federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601(39)(A)

Examples of Brownfield Sites

- Spills and releases of hazardous substances
- Sloppy demolition



Examples of Brownfield Sites

Dirty operations before modern environmental regulations



Pre-demolition Dutch Boy / National Lead brownfield site

Examples of Brownfield Sites

Leaking underground storage tanks



Examples of Brownfield Sites

Illegal dumping on abandoned or poorly secured property



Harms Caused by Idle Brownfield Sites

- Neighborhood blight
- Negative impacts on public health & environment
- Threaten public safety
- Dampen economic development
- Undermine tax base




Demolitions are expensive, but they can sometimes be bid out for much less than expected due to the salvage value of metals in the building

Benefits of Brownfields Redevelopment

- Spurs economic development
- Creates jobs near labor sources
- Can play critical role in neighborhood revitalization
- Gets properties back on tax rolls
- Enhances public health and safety
- Improves the environment



Remediation of underground storage tank at AmForge brownfield site


445 N. Sacramento Blvd. brownfield site remediation



76th & Albany brownfield site and Gateway Industrial Park construction

Unique Value Local Government Can Bring to Brownfields Redevelopment

- "Upside-down" sites whose cleanup costs exceed value of property once remediated not attractive to private redevelopment, especially in current economy
- Local government can acquire and clear title of small contiguous parcels and consolidate them into large, attractive redevelopment packages
- Local governments can often tolerate time required for remediation better than private sector

76th & Parnell Brownfield Site
Before and After





International Harvester Brownfield Site
Before & After Exelon Solar Panel Redevelopment





Nation's largest urban solar power plant, with 32,000 photovoltaic solar panels on 41-acre former brownfield site at 120th & Loomis

Overview of Brownfields Redevelopment (A Municipal Lawyer's Perspective)

1. Prioritize sites
2. Site assessment / investigation
3. Develop remediation plan / redevelopment plan / cost estimate
4. Project financing plan
5. Land acquisition
6. Site cleanup

Example of Brownfields Remediation Timeline



Remediation Process and SRP Schedule

ID	Task Name	Duration	Start
1	**Site Screening**	**2 days?**	**Sat 1/1/05**
2	DPD - provide PINS	1 day?	Sat 1/1/05
3	DOE - produce memo	1 day?	Mon 1/3/05
4	**Phase I**	**63 days**	**Tue 1/4/05**
5	DPD - funding/site coordination	14 days	Tue 1/4/05
6	DOE - procure consultant	28 days	Tue 1/4/05
7	DOE - prepare report	35 days	Fri 2/11/05
8	**Phase II**	**70 days**	**Fri 4/1/05**
9	DPD - funding/site coordination	14 days	Fri 4/1/05
10	DOE - procure consultant	28 days	Fri 4/1/05
11	DOE - investigation/prepare report	42 days	Wed 5/11/05
12	**IEPA SRP Enrollment**	**56 days**	**Fri 7/8/05**
13	DPD - funding/site coordination	14 days	Fri 7/8/05
14	Developer - provide site plan	14 days	Fri 7/8/05
15	DOE - procure consultant	28 days	Fri 7/8/05
16	DOE - prepare report	14 days	Wed 8/17/05
17	IEPA - assign project manager	14 days	Tue 9/6/05
18	**Comprehensive Site Investigation**	**116 days**	**Mon 10/10/05**
19	DOE - investigation/prepare report	42 days	Mon 10/10/05
20	Developer - review report	14 days	Wed 12/7/05
21	IEPA - review and approve report	60 days	Tue 12/27/05
22	**Remedial Objectives Report**	**102 days**	**Tue 3/21/06**
23	DOE - prepare report	28 days	Tue 3/21/06
24	Developer - review report	14 days	Fri 4/28/06
25	IEPA - review and approve report	60 days	Thu 5/18/06
26	**Remedial Action Plan Report**	**102 days?**	**Mon 8/1/06**
27	Developer - provide final site plan	28 days?	Mon 5/1/06
28	DOE - prepare report	28 days	Mon 5/1/06
29	Developer - review report	14 days	Thu 6/8/06
30	IEPA - review and approve report	60 days	Wed 6/28/06
31	**Draft NFR Letter**	**22 days**	**Wed 9/20/06**
32	IEPA - provide draft NFR letter	1 day	Wed 9/20/06
33	DOE/DPD/Developer review draft NFR letter	14 days	Thu 9/21/06
34	IEPA - finalize NFR letter	7 days	Wed 10/11/06
35	**Remedial Activities**	**72 days**	**Fri 10/20/06**
36	DPD - funding	21 days	Fri 10/20/06
37	DOE - procure consultant	28 days	Mon 11/13/06
38	DOE - conduct remediation	28 days	Thu 12/21/06
39	**Remedial Action Completion Report**	**102 days**	**Tue 1/30/07**
40	DOE - prepare report	28 days	Tue 1/30/07
41	Developer review	14 days	Fri 3/9/07
42	IEPA - review and approve report	60 days	Thu 3/29/07
43	Final NFR Letter	1 day	Thu 6/21/07

1st Quarter Qtr 1 | 2nd Quarter Qtr 2 | 3rd Quarter Qtr 3 | 4th Quarter Qtr 4 | 1st Quarter Qtr 1 | 2nd Quarter Qtr 2 | 3rd Quarter Qtr 3 | 4th Quarter Qtr 4 | 1st Quarter Qtr 1 | 2nd Quarter Qtr 2

Project: Brownfields Process
Date: Mon 8/1/11

Task | Progress | Summary | External Tasks | Deadline
Split | Milestone | Project Summary | External Milestone

Page 1

Brownfields Cleanup
Key Concepts

- How clean is clean?
- Integrating end use into cleanup strategy

Systematic Use of Property Screen

In any municipal acquisition of real estate, but especially those based on tax delinquency or abandonment, and which involve parcels larger than standard residential size, your municipality should employ a property screen, always.

Sample of City of Chicago Property Screen Summary Sheet

CITY OF CHICAGO
PROPERTY SCREEN RESULTS
Results Do Not Substitute for Environmental Site Assessments
Results Expire 1 Year from Completed Date

Compiled By: EDI
Verified By: Zachery Clayton
Completed Date: 4/20/2011

Project Name: 22nd and State property screen
Property Site Address(es): 2113 S STATE ST

PIN Number(s): 17-22-317-004-0000
17-22-317-006-0000
17-22-317-028-0000
17-22-317-029-0000

Database Search Summary (Place mark in box if records attached):

Database Searched	On-Site	Neighboring	Database Searched	On-Site	Neighboring
Chicago Department of Environment			**Illinois Environmental Protection Agency**		
Underground Storage Tanks (UST)		X	Site Remediation Program		
Complaints & Inspections	X	X	Leaking UST (LUST)		X
Enforcement		X	IRID		
Pollution Prevention			State Sites Unit		
Permits			**US Environmental Protection Agency**		
Manufactured Gas Plants			Enviromapper		
Brownfields			CERCLIS		

Environmental work anticipated to be conducted:

[X] Environmental Site Assessment
[X] Sampling Investigation
[X] Site Clean-Up/Remediation
[ ] **DO NOT ACQUIRE**

If anticipated work exceeds $250,000, project site is considered a high environmental liability and risk for acquisition. Anticipated work will incur...

[X] Less than $250,000
[ ] Equal to or greater than $250,000

Comments: This properties coul be impacted from urban fill and orphan USTs. Adjacent Leaking undeground storage tank could have a negative impact on the property. Clean-up costs would be dependent on final land use (i.e. a comprehensive NFR should be obtained if residential is planned).

A Word on the Use of Insurance to Address Risk of Cleanup Cost Overruns

- Conventional environmental “cost cap” insurance often cost-prohibitive
- Explore isolating the one or two things whose discovery or occurrence would have most impact on cleanup costs, and obtain insurance targeted at that specific risk, not at the overall cost of the cleanup

Local Government-Developer Partnerships & Risk Shifting

- Escrow Account
- Agreed Cleanup Plan
- Milestones/Withdrawals
- Developer Risk Assumption
- Developer Profit
- Developer-Cleanup Contractor Partnership
- State Regulatory Oversight



Municipal Cost Recovery Actions Against Former Owners and Operators / Insurance Recovery Actions

- Municipality acquires the brownfield site, cleans it up, and then seeks to recover its costs from the people or entities who were involved in the contamination of the site.

- Often there are no viable entities to sue. However, even if they are out of business, they may have had insurance coverage which did not exclude environmental liability (pre-1984). Litigation strategy is then to step into the shoes of the company with respect to its insurer, get those rights assigned to the municipality, and then bring a claim under that liability insurance.

CERCLA Liability Primer

- CERCLA is a strict liability statute that holds potentially responsible parties ("PRPs") jointly and severally liable, without regard to fault, for cleanup costs incurred in cleaning up hazardous contamination.

- Under CERCLA § 107, a local government may be considered a PRP if it is the owner or operator of the contaminated property.

- *But see Burlington Northern & Santa Fe R.R. Co. v. U.S.*, 129 S.Ct. 1870 (2009) and *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 643 F.Supp.2d 461 (S.D.N.Y. 2009)

CERCLA Liability Exemptions and Protections

1. Involuntary Acquisition by a Local Government Exemption, CERCLA § 101(20)(D)
2. Bona Fide Prospective Purchaser Affirmative Defense, CERCLA §§ 101(40) and 107(r)(1)
3. Third Party or Innocent Landowner Liability Affirmative Defense, CERCLA §§ 107(b)(3) and 101(35)(A)
4. Cleanup in Compliance with State Cleanup Program Enforcement Bar, CERCLA § 128(b)

Proposed Amendments to CERCLA to Improve Liability Protections for Municipal Governments Engaged in Brownfields Redevelopment

- The National Brownfields Coalition has taken the lead in advocating amendments to CERCLA to strengthen protections from liability for local governments engaged in brownfields redevelopment.

- These amendments are supported by the National League of Cities, National Association of Counties, U.S. Conference of Mayors, Northeast-Midwest Institute, National Association of Local Government Environmental Professional and IMLA, the cities of New York, Los Angeles, Chicago, Cleveland, Dallas, Pittsburg, Phoenix, Baltimore, San Francisco, Portland, Charlotte, Des Moines, Duluth, Tacoma, and many others.

- http://redevelopmenteconomics.com/national_brownfields_coalition

Proposed Amendment to CERCLA § 101(20)(D)

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

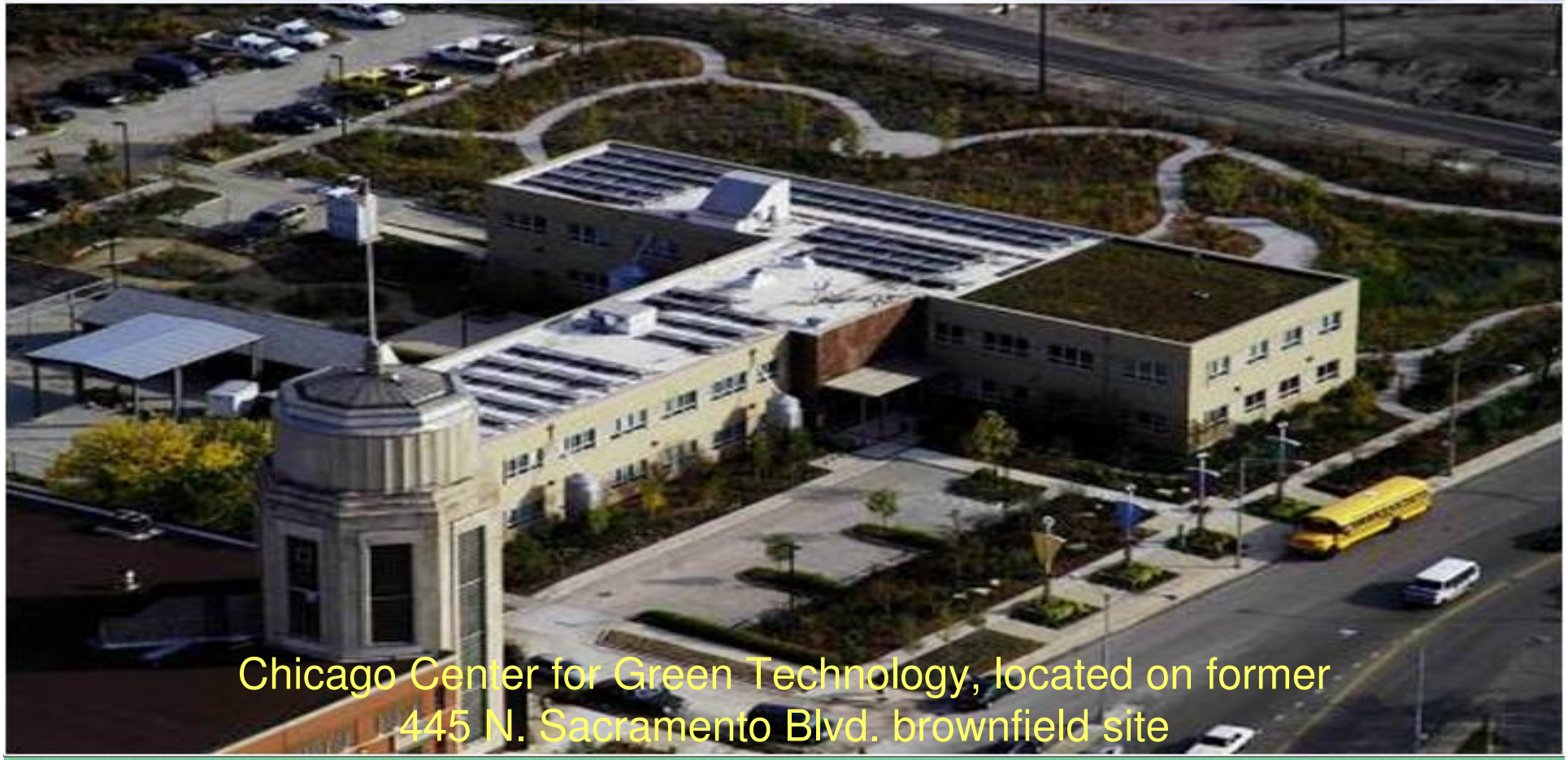
b. ~~other~~ circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.; or

ii. which owns or controls a Brownfield site, as defined by section 101(39), for the purpose of expansion, redevelopment, or reuse.

Proposed Amendment to CERCLA § 107(d)(2)

"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, including regulatory actions, 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."

Questions?



Chicago Center for Green Technology, located on former 445 N. Sacramento Blvd. brownfield site

Contact Information

Mort P. Ames

Senior Counsel

Aviation, Environmental, Regulatory & Contracts Division

City of Chicago Department of Law

30 N. LaSalle St., Suite 1400

Chicago, IL 60602

tel. (312)744-6904

mames@cityofchicago.org