

**MOTHBALLED SITES AND LOCAL GOVERNMENT  
ACQUISITION:**

***HOW STATE LIABILITY PROTECTIONS, EMINENT DOMAIN REFORMS, AND COST  
RECOVERY AUTHORITY CAN SPUR LOCAL GOVERNMENT ACTION TO ACQUIRE AND  
REDEVELOP DIFFICULT BROWNFIELDS SITES***

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## EXECUTIVE SUMMARY

Brownfield redevelopment is one of the key elements of many community revitalization plans – by re-positioning and redeveloping former industrial properties and areas, communities can capture new sources of economic growth without the negative consequences of disjointed sprawl development. However, some brownfields properties face market impediments such that they are unlikely to be redeveloped by the private sector, despite the availability of incentives to cover part or all of site assessment and cleanup costs. Other sites may be marketable, but are unavailable or “mothballed - held off the market by property owners. Sites that are in either of these categories are feasible to clean up and redevelop only with the highest level of public intervention, i.e. public agencies taking possession of properties (usually through eminent domain), cleaning them up, making the properties “development-ready,” and then reselling them.

While there is a clear role for local government actions to address contaminated and mothballed property, there are a variety of factors that inhibit these strategies:

- ***Liability.*** Public agencies are reluctant to take title to brownfields properties because of potential liability issues related to state and federal enforcement action and exposure to lawsuits from other parties. In order to allay these concerns, a number of states (New Jersey, Pennsylvania, Wisconsin, Minnesota, and Maryland) have adopted liability protections designed to shield public agencies from increased liability exposure when they act to address brownfields and mothballed sites.
- ***Accounting for cleanup costs within the condemnation process.*** Eminent domain is a potentially powerful tool for addressing difficult brownfields sites, but there are two problem areas:
  - ***Site access under eminent domain.*** In eminent domain proceedings, if the acquiring agency lacks the authority to gain access to the site and is unable to 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.” Some states (Connecticut, Illinois, Maryland, California, and Virginia) have adopted specific authority for the acquiring entity to gain access to the site prior to taking possession.
  - ***Deduction of cleanup costs in eminent domain proceedings.*** Most state laws do not specifically allow for cleanup costs to be deducted from “fair market value” determinations within condemnation proceedings, and some courts have ruled against such deductions. Several states (Connecticut, Illinois, and California) have adopted specific authority to allow deduction of cleanup costs in eminent domain valuation proceedings.
- ***Enforcement and cost recovery.*** Enforcement and cost recovery are mechanisms often used at the state level to force recalcitrant property owners to address cleanup of sites, but these tools are only rarely granted to localities. A few states have added these powers to the local government tool kit, with very interesting results. Illinois authorizes localities to use certain enforcement powers with their tax lien and foreclosure processes. Wisconsin authorizes localities to use enforcement and cost recovery in connection with eminent domain.

California authorizes the broadest use of enforcement and cost recovery both within the eminent domain process *and* for properties that remain in private hands.

**Recommendations.** In reviewing state policies that encourage and reinforce local government action to address brownfields and mothballed sites, the Northeast-Midwest Institute (NEMW) recommends that states consider:

1. ***Liability exemptions for local government acquisitions.*** States should consider liability exemptions that clearly cover local government property acquisitions if the purpose of the acquisition is clearance and redevelopment of slums and blighted property. Quasi-public entities should have the same protections.
2. ***Reforms to account for cleanup costs within the condemnation process.*** States should review their eminent domain and urban renewal authorities, as well as case histories in their states, and determine whether there is a clear right for:
  - a. The acquiring agency to enter the property to perform a site assessment prior to taking possession.
  - b. Cleanup costs to be considered as part of the determination of “fair market value.”

If the law and case precedents do not clearly support these policies, states should consider amendments to add clarity.

3. ***Provisions for certain enforcement and cost recovery powers.*** Adding enforcement and cost recovery tools to the local government tool kit (assuming it already includes liability protections and reforms to account for cleanup costs within the condemnation process) allows local government to use a variety of mechanisms to address the most difficult brownfields sites. The evidence from California and Wisconsin is that this is a formula for success.

## BACKGROUND

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.<sup>1</sup> However, Congress also recognized that brownfields sites presented unique circumstances, and an exception to the ban was adopted for sites that meet the federal definition of a brownfield. Congress has not renewed the ban in subsequent years; however, a number of states have adopted restrictions on the use of eminent domain, and some of these states have also carved out exceptions for brownfields sites or have redefined “blight” to include contaminated properties.<sup>2</sup>

While using eminent domain for economic development remains controversial, there is a rather widely held view that, in order to address brownfields sites, local public entities need to be able to use the highest levels of public intervention. The circumstances that led to this conclusion include:

- ***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 land value is low due to 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 person (RP).
- ***Need for land assembly.*** A third circumstance that may lead to public acquisition occurs when multiple small sites in an area are run-down, 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.

While there is widespread political support for the use of eminent domain and other aggressive measures to address brownfields and mothballed sites, there are still a series of obstacles that tend to thwart public entities in the use of the most aggressive tools. The obstacles fall into three categories:

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<sup>1</sup> House budget bill for 2005 - HR 3058

<sup>2</sup> Minnesota redefined allowable use of eminent domain to include acquisition of “environmentally contaminated areas” <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2750.5.html&session=ls84>

- Liability concerns
- Inability to account for cleanup costs within the condemnation process
- Lack of cost recovery authority

This report further describes these obstacles and explores how some states have enacted reform measures to assist public agencies in overcoming the barriers of using aggressive strategies to address brownfields and mothballed sites. This paper examines only the legal and regulatory side of the equation; other Northeast-Midwest Institute research has looked at the incentive side.<sup>3</sup>

## LIABILITY CONCERNS - FEDERAL LIABILITY FRAMEWORK

For local governments that are acquiring contaminated and mothballed property there are at least 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.”<sup>4</sup> 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) land owner 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.

Just to clarify one potential source of confusion, the term “involuntary acquisition” means “involuntary” from the point of view of the acquiring public agency – it does not imply an acquisition that is involuntary from the point of view of the property owner/seller is a protected activity.

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<sup>3</sup> See: <http://www.nemw.org/Using%20TIF%20for%20brfids%20complete%20final.pdf>;  
<http://www.nemw.org/Brownfield%20local%20financing%20tools.pdf>; and  
<http://www.nemw.org/BFStateFinTools.pdf>

<sup>4</sup> CERCLA 107(b)(3) [http://www.law.cornell.edu/uscode/html/uscode42/uscode42\\_00009607----000-.html#b\\_3](http://www.law.cornell.edu/uscode/html/uscode42/uscode42_00009607----000-.html#b_3)

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).<sup>5</sup> 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, i.e. the acquiring agency must show “by the preponderance of evidence” that it met the eight requirements for obtaining BFPP protection.<sup>6</sup>
- The 101(20)(D) Involuntary Acquisition exemption:
  - Does not apply to voluntary purchase.
  - Does not apply *explicitly* to acquisition through eminent domain (or the threat of eminent domain).
  - May not apply to acquisitions by quasi-public economic development corporations, i.e. 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 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.<sup>7</sup>
  - 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, i.e. quasi-public entities may not qualify as a “government entity.”

Finally, the above protections apply only to CERCLA – if a site is under RCRA or TSCA purview, the protections do not apply.

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<sup>5</sup> NALGEP, “Superfund Liability, a Continuing Obstacle to Brownfields Development,” Available at: <http://www.resourcesaver.com/file/toolmanager/CustomO93C337F72956.pdf>

<sup>6</sup> 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.

<sup>7</sup> The NALGEP report cites the following case as one that ruled 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)

## 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. 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, NEMW 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:

*“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”<sup>8</sup> (emphasis added).*

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<sup>8</sup> NJ PL 1997, chapter 278 (S39) page 39

## 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<sup>9</sup> 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..."<sup>10</sup> (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<sup>11</sup> 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."<sup>12</sup>

## 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 is not responsible to investigate or clean up a hazardous substance discharge at the property,*" with respect to the state's Spill Law."<sup>13</sup> 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.'

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<sup>9</sup> The definition of "economic development agencies" includes local government.

<sup>10</sup> See: <http://www.palrb.us/pamphletlaws/19001999/1995/0/act/0003.pdf>

<sup>11</sup> 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.

<sup>12</sup> Maryland. Code Ann., Environment. § 7-201(X)(2)(vii) (1996)

<sup>13</sup> Wisconsin Statute Ch 292.11(9)(e), Wis. Stats.

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<sup>14</sup> (emphasis added). Wisconsin officials confirm that the intent of this language is to confer toxic tort protection to local government.<sup>15</sup>

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.

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.

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<sup>14</sup> Wisconsin Statute 292.26. See:[http://www.dnr.state.wi.us/org/aw/rr/liability/muni\\_1.html#8](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, [http://www.glc.org/wiconference/PDF/mw\\_913100\\_1.pdf](http://www.glc.org/wiconference/PDF/mw_913100_1.pdf).

<sup>15</sup> E-mail from Darci Foss, Chief, Brownfields and Outreach, Wisconsin Department of Natural Resources, Bureau for Remediation and Redevelopment, to Evans Paull.

## EMINENT DOMAIN – ACCOUNTING FOR CLEANUP COSTS IN THE CONDEMNATION PROCESS

The application of eminent domain powers to brownfields sites involves 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 pre-acquisition 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 the process of 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 found wide variations of interpretations.<sup>16</sup>

- Some decisions have tended to allow cleanup costs to be directly deducted from fair market value. The Connecticut Supreme Court held that “excluding contamination as evidence is likely to lead to a fictional property value.”<sup>17</sup> One review concluded that courts in California, Kansas, Tennessee, Florida, Georgia, and Colorado have agreed that remediation costs must be factored in to valuation in condemnation cases.<sup>18</sup>
- Other decisions have held that evidence of contamination is not admissible within the limited legal context of a condemnation hearing. For example, New Jersey, Illinois, and Iowa decisions maintain that due process concerns require a separate proceeding to account for cleanup costs; i.e., they require a contribution action lawsuit which would allow for apportionment among responsible persons.<sup>19</sup>
- Other 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

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<sup>16</sup> Jack Fersco and John J. Riley, “Condemnation: the Impact of Environmental Contamination on Property Valuation,” [http://www.farerlaw.com/library/archive/lit-con\\_jf\\_jjr\\_ciecpv.pdf](http://www.farerlaw.com/library/archive/lit-con_jf_jjr_ciecpv.pdf); and James D. Brusslan, “Eminent Domain and Environmental Contamination” <http://pages.ripco.net/~envnlaw/eminent.htm>

<sup>17</sup> *Northeast Connecticut Economic Alliance, Inc., v. ATC Partnership*

<sup>18</sup> James D. Brusslan, “Eminent Domain and Environmental Contamination” <http://pages.ripco.net/~envnlaw/eminent.htm>

<sup>19</sup> *Housing Authority v. Sudham Investors; and Department of Transportation of the State of Illinois v. Parr*

land values of comparable contaminated property.<sup>20</sup> 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.”

Brownfields 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 brownfields 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,<sup>21</sup> 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 (*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 (Section 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.*"<sup>22</sup>

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 *s. 299.01 (4)*.<sup>23</sup>

<sup>20</sup> Finkelstein v. Department of Transportation, Florida, 1995

<sup>21</sup> See: <http://www.cga.ct.gov/olr/ba2000/2000HB-05175-R010633-BA.htm>

<sup>22</sup> Illinois Section 735 ILCS 5/7-119.

<sup>23</sup> <http://www.legis.state.wi.us/lrb/pubs/consthi/05consthiV1.htm>

**California.** California law explicitly allows for the direct deduction of site investigation and cleanup costs from fair market value.<sup>24</sup>

**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.*<sup>25</sup>

**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."*<sup>26</sup>

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. See the discussion below for information about three states that do also grant cost recovery authority.

**Missouri.** In a conference call to review this report, a Kansas City official stated that Missouri law allows deduction of cleanup costs, but that gaining site access is problematic.

## **STATE PROGRAMS THAT CONFER ENFORCEMENT AND COST RECOVERY TOOLS TO LOCALITIES**

At least three states have taken another step beyond liability protection and condemnation powers and given local government authority to enter private property, conduct a site assessment, perform a cleanup, and seek cost recovery from the responsible person.

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<sup>24</sup> Beveridge and Diamond, "A Practical Guide to Implementing the Polanco Act for Redevelopment of Brownfields," 2001. <http://www.legalelite.com/articles/a-Jhern-polano.pdf> .

<sup>25</sup> Maryland Real Property article § 12-111.

<sup>26</sup> Virginia law section [10.1-1236](#). *Access to abandoned brownfield sites*.

## California – Polanco Act

California’s Polanco Act (California Health and Safety Code [“HSC”] section 33459 *et seq.*)<sup>27</sup> was enacted in 1990 to facilitate direct local government action to clean up areas contaminated, or suspected of being contaminated, by hazardous substances in soil or groundwater. According to a Beveridge and Diamond guide:<sup>28</sup>

*The Polanco Act gives redevelopment agencies the authority to either order, or actually undertake, the investigation and cleanup of brownfields within redevelopment project areas. It also provides redevelopment agencies, owners and occupants, and their lenders, with immunity from being required by state or local environmental agencies to do further environmental work on properties that have already been cleaned up pursuant to the Polanco Act environmental oversight process.... For properties where contamination is known or suspected, the Polanco Act then authorizes redevelopment agencies to either compel the owner to investigate and clean up the contamination or undertake the investigation and cleanup itself, and recover cleanup costs from the owner – without regard to whether the agency also acquires the property by eminent domain.*

Generally, the steps, prescribed in the Act, include:

- 1. The area must be a “redevelopment area” as authorized under state law.*
- 2. The redevelopment agency may require the owner (or tenant) to provide the agency with “all existing environmental information pertaining to the site.” If this information is insufficient, the agency can compel the owner to conduct standard Phase I and Phase II site assessments.*
- 3. The redevelopment agency may then compel the owner to first, develop a cleanup plan; and, second, carry out the cleanup plan. The owner is given only 60 days to submit a plan and an additional 60 days to agree to implement the plan before the agency may commence action on its own. Parallel notices may be sent to other owner/operators who may have contributed to contamination.*
- 4. If the responsible party does not meet the timeframe and does not enter into an agreement with the redevelopment agency, the redevelopment agency can perform the site assessment and cleanup itself or arrange for a third party to clean up the property. These activities must be carried out through a cooperative agreement with the state environmental agency (Department of Toxic Substances Control).*
- 5. The redevelopment agency may then sue the owner or other responsible parties to recover its investigation and cleanup costs and legal fees.*
- 6. The redevelopment agency, as long as it follows the procedures prescribed in the Polanco Act, is given immunity from the state’s environmental liability laws. Subsequent purchasers/owners are also granted immunity.*
- 7. All of the above steps may be taken by redevelopment agencies that are not acquiring the property.*

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<sup>27</sup> <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=hsc&group=33001-34000&file=33459-33459.8>

<sup>28</sup> Beveridge and Diamond, “A Practical Guide to Implementing the Polanco Act for Redevelopment of Brownfields,” 2001. <http://www.legalelite.com/articles/a-Jhern-polano.pdf>.

**Use with eminent domain.** While the above steps may be taken without the redevelopment agency taking possession of the property, cost recovery is time-consuming and expensive; the Polanco Act is often used in conjunction with eminent domain. In California, eminent domain specifically allows the acquiring agency to deduct the cost of site investigation and cleanup from the “fair market value,” thus providing a legal avenue for cost recovery without suing the owner and other RPs. California localities also report that having Polanco as a potential tool also helps bring recalcitrant property owners to the negotiating table.

**Site examples.** After a slow start in the 1990s, the Polanco Act is now a mainstream tool in California. Several court decisions have now reinforced Polanco Act authority,<sup>29</sup> and the state’s 2004 brownfields reforms also complement Polanco Act powers.

San Diego’s Centre City Development Corporation has been involved in numerous brownfields projects and routinely uses Polanco Act authority. One dramatic example was the development of the PETCO Park (home of the San Diego Padres) and East Village in San Diego. The 26-acre industrial area was heavily impacted by contamination, but use of Polanco meant that \$20 million out of the total \$21 million in cleanup costs was born by the owner/RPs.<sup>30</sup>

Emeryville has also used the Polanco Act on two brownfields sites. Emeryville’s Bay Street Project involves redevelopment of land, formerly used for chemical manufacturing and distribution, now being redeveloped as urban mixed use entertainment zone with 380,000 square feet of retail and 355 new residential units. The project was the first in California to use Polanco Act’s unique authority, as the City acquisition and cleanup was carried out through the Polanco-prescribed process. See: [EPA Region 9 Bay Street Success](#)

The City of Los Angeles is also making use of the Polanco Act’s cost recovery provisions to fund cleanup activities for the 232-acre Wilmington Industrial Park.<sup>31</sup>

In a conference call to review this report, a Stockton, California representative indicated that the City of Stockton is currently involved in a “friendly” Polanco Act case. In this case the owner/RP is volunteering to come under Polanco in order to facilitate insurance recovery.

Further examples come from the [California Redevelopment Association website](#):

- **San Diego** - In 1988 the Centre City Development Corporation, acting on behalf of the redevelopment agency, advertised for development proposals for the Marina Project Area. In the process of evaluation, it was discovered that a large underground toxic plume existed. Development was halted until an acceptable remediation process was agreed upon. Once the Act was signed into law in 1992 and implemented for the project, this area was transformed from an aging commercial/industrial district to a thriving, high-density residential neighborhood of the Centre City.

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<sup>29</sup> <http://www.envirolawyer.com/html/resources.html>; [Salvation Army Decision](#); [Emeryville Decision](#); [SDG&E Decision](#); [Dow Chemical Decision](#)

<sup>30</sup> See: [http://www.procopio.com/about/news\\_details.cfm?id=80](http://www.procopio.com/about/news_details.cfm?id=80); and <http://www.sddt.com/reports/2004/03/projectspermits/tk.cfm>

<sup>31</sup> See: <http://www.wilmingtonindustrialpark.org/pdf/2007-narratives.pdf>

- **San Leandro** - To speed up the construction of a new Post Office on a three acre property formerly used for trucking and fuel distribution, the redevelopment agency, U.S. Postal Service, and property owner, are working together with the Regional Water Quality Control Board (RWQCB) to clean up contaminated soil and groundwater. Under the terms of a OPA, the redevelopment agency expedited the preparation and implementation of an RWQCB-approved, Polanco complaint, work plan for site cleanup activities, funded by the site owner.
- **Redwood City** - The use of the Act by the redevelopment agency was the key element that broke a "development stalemate" at a former gas station and asphalt manufacturing facility site. Through the cooperative use of the Polanco process by all project stakeholders, including the San Mateo County Health Services Department and the RWQCB, construction of the mixed-use residential and retail City Center Plaza development was completed in 1997.

### **Wisconsin – Local Government Cost Recovery Cause of Action**

Wisconsin's approach is similar to the California model for local government cleanup and cost recovery, but it applies only to properties that are being involuntarily acquired, not to properties that remain in private ownership. Thus, local governments can acquire properties through a variety of means (eminent domain, tax delinquency, escheat, or bankruptcy), perform site assessments and cleanups, and then seek cost recovery from the responsible person.

The cost recovery mechanism (Wisconsin Statute ch. 292.33)<sup>32</sup> must be used, first, against the person responsible for the discharge, and, second, against the last owner of the property. Cost recovery may not be used against certain parties, such as an entity that qualifies for an exemption under the Spill Laws. The amount that may be sought in a cost recovery action is limited to the causer's pro rata share of the hazardous substances present on the site. If the causer cannot pay for all the costs, then the last person in title is responsible for the "orphan shares."

Above, this report also discusses several states that specifically allow cleanup expenditures to be deducted from "fair market value" determinations in eminent domain proceedings. The Wisconsin cost recovery strategy has several advantages over cleanup deductions applied to eminent domain proceedings: it applies to several categories of sites that have been acquired by means other than eminent domain; and it allows the locality to pursue sites that could have negative land value (i.e. the cleanup deduction from fair market value approach leaves the acquiring agency at risk if cleanup costs exceed land value). This is because it allows the local government to remediate the property to residential clean up levels, and recovers the costs of doing so.

As of November, 2007 a number of different communities had approached private parties concerning this tool, and had reached a satisfactory settlement prior to officially using this cost recovery tool.<sup>33</sup>

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<sup>32</sup> Statute 292.33: <http://www.legis.state.wi.us/statutes/1999/99Stat0292.pdf> ; see also: [http://www.dnr.state.wi.us/org/aw/rr/liability/muni\\_1.html#6](http://www.dnr.state.wi.us/org/aw/rr/liability/muni_1.html#6)

<sup>33</sup> Wisconsin Legislative Fiscal Bureau, Contaminated Land and Brownfields Cleanup Programs, January, 2007, <http://www.legis.state.wi.us/lfb/Informationalpapers/63.pdf>

One example is, in Milwaukee's Menomonee Valley industrial area, the City acquired the 140-acre CMC/Milwaukee Roads Shops site, used the cost recovery program and has started redeveloping the site for new industry. Currently four new businesses, representing \$37 million in new investment and 210 jobs have located at the site.

### **Illinois - Municipal Environmental Lien Program**

The Illinois program is more limited than California or Wisconsin, as it applies only to properties that have been tax-delinquent for two or more years. Under the 1997 Municipal Environmental Lien Program – 65 ILCS 5/11-31-1(f), Illinois municipalities gained authority to test and/or clean up hazardous substances on abandoned, unsafe properties and to place a lien on the property for costs incurred. The law applies to abandoned properties that have been tax-delinquent for two or more years and are not owner-occupied. A municipality must also prove the property is unsafe, presenting an actual or imminent threat to public health and safety caused by the release of hazardous substances or petroleum products. Having obtained a court order, a city can test and/or clean up the site. Site cleanup, if necessary, must be done according to the Illinois state cleanup guidelines that apply to the most recent use of the site. The cost of the inspection, testing, and/or remediation, including court costs and related fees, can be filed as a lien on the real estate. This lien is superior to all prior existing liens, except taxes. The municipality can take control of the property by foreclosing on the lien.

The Municipal Environmental Lien program was cited as one of the cornerstones of Chicago's aggressive brownfields acquisition and redevelopment program in an ICMA report on Chicago's Brownfields Showcase Communities.<sup>34</sup>

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<sup>34</sup> <http://www.icma.org/upload/library/2003-07/{5A091F8B-7A90-413E-90DB-113D40EC6703}.pdf>