Buffalo Environmental Law Journal

Volume 3 | Number 1 Article 3

4-1-1995

Recycling Industrial Sites in Erie County: Meeting the Challenge of Brownfield Redevelopment

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RECYCLING INDUSTRIAL SITES IN ERIE COUNTY: MEETING THE CHALLENGE OF BROWNFIELD REDEVELOPMENT*

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* This is an updated version of a report originally released in May, 1994, which was prepared in cooperation with Richard M. Tobe, Erie County Commissioner of Environment and Planning. The authors were members of the Spring, 1994 Environment and Development seminar. This updated version is still in the form of a report. A fuller historical and analytical treatment of many of the issues presented here can be found in the forthcoming article, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and the Prospects for Change*, 43 BUFF.L.REV. _ (1995), written by Julia A. Solo, one of the authors of this report. We want to acknowledge substantial contributions made to this report by earlier drafts of that article. We received many helpful comments on drafts of the original report and particularly wish to thank Barry Boyer, Peter Pitegoff, John Sheffer and Rich Tobe.

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I. THE BROWNFIELDS PROBLEM

The owner of a newspaper in Cleveland looked at several downtown properties for a new production plant. The company chose an abandoned rail yard on the shores of Lake Erie. Calling the site "perfect" for its needs, the company spent $60,000 on an environmental assessment, only to learn that the cost of cleanup would be prohibitive. The "perfect" site was abandoned and the new plant, along with its 400 jobs, will open soon, in the suburbs.[1] A Chicago metal-stamping firm wanted to expand in the city, but could not find a large enough urban site without possible environmental problems. It, too, moved to the suburbs and forty urban jobs were lost.[2]

An electrical contractor in Detroit wanted to expand his existing building onto a neighboring parking lot. He was not, nor had he ever been, the owner of the parking lot, but his bank refused to make the necessary expansion loan. Traces of oil, antifreeze and fuel had dripped onto the lot over the years and the bank was afraid that it could be held liable for the cleanup of hazardous waste if it held a security interest in the property. Instead of expanding in the city, the contractor moved his entire business to an undeveloped rural area, taking ten jobs away from urban workers.[3]

Planners and officials in Buffalo and Erie County complain that they cannot even get business owners to look at urban sites, let alone invest in the purchase, cleanup and re-use of these sites. Developers, business owners and manufacturers are all afraid of what they will find when environmental tests are conducted on these "brownfield" sites. The term "brownfields" does not refer

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1. William Tucker, *Industry Goes Where the Grass is Greener: Superfund Sparks Flight to Suburban Location*, WASH. TIMES, Nov. 30, 1993, at A9.

2. Richard M. Daley, *Wastelands Transformed*, N.Y. TIMES, Jan. 4, 1994, at A15.

3. Keith Schneider, *Rules Easing for Urban Toxic Cleanups*, N.Y. TIMES, Sept. 20, 1993, at A12.

simply to great expanses of abandoned urban wastelands. The brownfields problem includes small plots of urban land such as former parking lots and gas stations. Many such sites are only minimally contaminated but still are passed up for redevelopment. What has led to this unfortunate situation? And, more importantly, what can be done?

In 1825, Buffalo became the terminus of the Erie Canal and the gateway city to the West. By 1850 it was a dominant port and thriving center of commerce. A century later, in 1950, Buffalo had grown into a major manufacturing center and transportation crossroads. Today, just as in numerous other manufacturing cities across the nation, many of those factories have been torn down or sit dilapidated on acres of once useful land, leaving aesthetic and economic blight in the urban core. Many of these abandoned sites are contaminated with hazardous waste, though the degree of contamination varies greatly. Other sites, including former parking lots and gas stations, although perhaps not contaminated, are ignored by developers and manufacturers because of the possibility that contamination may be found on the site. Under federal and state environmental laws, new owners risk being required to incur the high costs associated with a hazardous waste cleanup. This is so even if they did not have anything to do with the actual contamination of the property.

These environmental laws seek to clean up the serious problem of hazardous waste contamination and put the cost of such clean up on those who caused it - that is, "make the polluters pay." Unfortunately, one unintended consequence of these laws is to discourage the recycling and redevelopment of urban industrial property. The fear of redevelopment is felt not only by large industry, but, more importantly, by small business owners seeking either to start-up or to expand. This is an extremely undesirable result viewed from both a regional development and environmental perspective.

Environmental laws are not the only reason that urban industrial land sits idle, but they clearly are a major factor and thus a contributor to the well known problems of our urban areas. The tax base in urban centers has decreased dramatically, triggering a cycle of negative economic consequences. Many former industrial

sites are located in low income and minority communities. Failure to clean these sites perpetuates the existence of health hazards in depressed urban regions. Because of the difficulty in redeveloping urban industrial sites, rejuvenation of economies in these areas through job creation is also significantly hampered.

Instead of minimally contaminated old industrial and commercial sites being used for new purposes, developers have located new factories, offices and warehouses in the suburbs, creating intense development pressure and changing the nature of many communities. The cost of providing the necessary infrastructure to support these new developments is strapping the municipalities and counties in which they are located. The problem of infrastructure cost is exacerbated by the fact that existing infrastructure is already in place in the industrial areas where abandoned and minimally contaminated sites are found. These infrastructure costs are increasingly being recognized as serious regional concerns.

Significant negative environmental effects also result from industrial and commercial unwillingness to redevelop the urban core. More rural land is being used for industrial purposes than would be necessary if industries were encouraged to "recycle" urban industrial properties. The direct effect is that more total land is "industrialized", even though numerous former industrial sites sit idle and waste away. If laws could be implemented to encourage the cleanup and re-use of former industrial property, then less total land would be impacted. Indirectly, industrialization of outlying rural and suburban lands creates a greater need for people to drive to outlying areas to work. This has the negative environmental effect of promoting greater air pollution and requiring increased infrastructure development. By making "greenfields" more valuable for industrial purposes, there is also the potential for negative economic impact on agriculture, the number one industry in New York State.

The abandonment of the industrial core (the so-called brownfields) and the use of open space in suburban and rural areas, greenfields, constitute a significant environmental and economic problem in Erie County. The ideal solution would be to take advantage of the existing infrastructure and recycle brownfield sites

for new industrial and commercial uses, leaving more greenfields for agricultural, recreational and residential use.

Significant barriers, however, stand in the way. As a result, the development and despoiling of outlying greenfields continues while hundreds of brownfield sites in the core metropolitan area continue to decay and trigger further urban blight. This report attempts to identify barriers to the recycling of minimally contaminated brownfields, and examines different possible means to the removal of those barriers. The pressing need for law and policy makers to address the need for brownfield redevelopment is underscored by the recent number of regional conferences and reports on the issue.[4] The reports are useful in understanding both the scope of the problem and the breakdown of issues which need to be addressed in order to begin to solve the it. The coordination and cooperation of the different conferences and working groups addressing the issue of brownfield redevelopment is essential.

Indeed, we do not consider this report to be a definitive or final one. It is but a first step in what must be a long, coordinated effort by public agencies, private industry, community groups and environmental advocates to recognize the full reach of the problem and seek acceptable solutions. It is a difficult and complex problem for which there are no easy answers. Still, this report hopes to demonstrate that the brownfield issue is far too important to be ignored and that successful means of addressing it can, and in fact, must be developed.

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4. This report has referred to the following reports in its research of the Brownfields redevelopment issue:

(1) Cuyahoga County Plan. Comm'n, Brownfields Reuse Strategies (1993).

(2) Brian Hill and Joanne Denworth, Report on Reuse of Industrial Sites Roundtable (Pennsylvania Environmental Council, 1993). [hereinafter Cuyahoga County Report].

(3) *Profiles of State Voluntary Cleanup Programs* prepared for GE by Stateside Associates, August 25, 1993.

Subsequent to the release of the original version of our report another report specifically addressing the issue in New York has been written. Staff Report to the Chairman, New York State Joint Legislative Commission on Toxic Substances and Hazardous Wastes, *The Voluntary Cleanup of New York's Contaminated property: Barriers and Incentives* (Oct. 1994).

This report helps define the problem, discusses some possible strategies that might be used to attack it and suggests the possibility of many others. All of these approaches require further study and detail to be actually implemented. This report is, therefore, an agenda for further action, action that must become part of an overall policy. To be effective, this policy must reflect a full understanding of the brownfield problem and the need for a comprehensive strategy to ameliorate it.

II. BARRIERS TO REDEVELOPMENT OF BROWNFIELD SITES

Although many barriers[5] exist to the redevelopment of brownfield sites, the major ones are financial and legal. Many former industrial and commercial sites are contaminated with hazardous waste generated in the past. Some are uncontaminated and others only mildly contaminated, but developers are put off by the risk of liability. Cleanup costs are perceived as prohibitive, or at least indeterminable, with no assurance that any cleanup effort will be acceptable to future regulators.

The specific barriers to the recycling of brownfields include:

Risk of liability for past contamination

As discussed later, in Section III, federal environmental law, most notably the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)[6] has the effect of imposing strict, joint, several, retroactive and perpetual liability on virtually all owners of contaminated property. Liability for cleanup of hazardous waste is not dependent on fault, causation

5. The list in Section II of this report is by no means an exhaustive list of the barriers to urban industrial redevelopment. Those included are the *major* barriers addressed in this report.

6. 42 U.S.C. §§ 9601-75 (1992).

or contribution to contamination. Penalties for failure to comply with payment orders can result in fines of up to $25,000 per day. Although CERCLA affects only severely contaminated sites, its liability scheme is so drastic that it has affected the way developers regard even mildly contaminated sites. Under the federal Superfund Law the owner of contaminated property is also considered to be a responsible party for purposes of hazardous waste cleanup. The New York law is similar in that liability in New York is not contingent upon fault or contribution to the hazardous waste contamination on a particular piece of property.

High cost of site assessment and cleanup

The liability associated with industrial land creates a risk of incurring enormous cleanup costs to return that land to productive use. The land itself may be inexpensive, but cleanup operations can be prohibitively expensive and unpredictable. Even the cost of doing an environmental audit and determining what type of remediation is required entails significant costs. Given the high costs of cleanup and the lack of a fixed dollar limit on clean-up expenses, developers are willing to pay a premium for the economic security associated with a previously undeveloped site. Even if the greenfield sites are initially more expensive to buy, projected costs are fixed and predictable, making the financial investment seem more prudent. In addition, delay is a serious concern to developers. Cleanup requirements add another layer of concern about how quickly a property can be developed.

Uncertain cleanup standards

As explained in Section IV, the broad discretion of state regulators leaves developers unclear as to the standard to which they will be held. Where regulators are empowered to require a cleanup to pre-contamination levels or to permit deviations from state determined minimum levels, the extent of the final cleanup cannot be determined prior to considerable negotiations with DEC. This uncertainty interferes with the rapid estimation of costs associated with a site cleanup, and an inability to place minimally

contaminated urban sites in competition with comparable greenfield sites. Because of the uncertainty, developers are unwilling to consider cleaning up even vastly devalued urban sites for new uses.

Lack of available public funding for assessment and cleanup

As discussed in Section VI, public money is often unavailable to assist with the cleanup of brownfield sites. Within the appropriate framework of an economic development plan, incentives could be offered on a modest scale. Even something as minor as a state or municipality assisting with the cost of the environmental audit and creation of a remediation plan could be quite important.

Public perception

The atmosphere of confusion and fear that has sometimes prevailed in the past stands firmly in the way of future brownfield redevelopment. Community leaders, investors, developers, environmental groups and the general public all share legitimate apprehensions that must be addressed and resolved if the recycling of industrial property is to take place. Environmental contamination presents numerous frightening possibilities which cannot be predicted with certainty. There are complex legal and scientific issues to understand. A lack of information and communication, an unfortunate history of environmental misdeeds and a deep public skepticism all contribute to the erection of a nearly impenetrable barrier. In addition to implementing substantive legal changes, progress toward safe and prudent redevelopment necessitates that perceptions be brought into line with changes that are taking place and that accurate information be made available.

Lender Liability

Lenders are extremely wary of the risks associated with brownfield redevelopment. They have three main fears: the prospect of their own liability for contamination found on land in

which they hold a security interest; the potential devaluation of collateral; and the resulting insolvency of the borrower. Lender liability as an issue unto itself is not addressed in this report.[7] Much of the lender liability problem in the brownfields area would be alleviated by removing liability from innocent new purchasers.

III. LEGISLATIVE BACKGROUND

Any potential solutions to the problem of encouraging brownfield redevelopment must fit within the framework of existing, pending and proposed federal and state law. It is important to note that federal and state liability overlap. Release from liability under *one* of these does not eliminate potential liability under the other. This is one of the significant aspects of both the legal liability and perception problems.

A. *Federal Legislative Background*[8]

The liability scheme under the federal Superfund statute is very broad and has been a point of great debate since the

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7. John D. Finley, a student in the Fall, 1994 Environment and Development seminar at the University at Buffalo Law School did research on this issue and some discussion of this problem is contained in "Testimony of the Environment and Development Seminar [Fall 1994] University at Buffalo School of Law" presented at the Hearings on Voluntary Environmental Cleanup and Economic Development before the Legislative Commission on Toxic Substances and Hazardous Wastes held in Buffalo, New York on November 18, 1994.

8. Most of this section has been taken from earlier drafts of Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and the Prospects for Change*, 43 BUFF.L.REV. _ (1995), written by Julia A. Solo. The text and footnotes are either substantially or exactly the same as portions of the published version of that article.

legislation's initial passage in 1980.[9] Generally, liability is associated with the land. Hazardous waste facilities are defined broadly as "any building, structure, installation, equipment. . . well, pit, ditch, landfill, storage container. . . or site where a hazardous substance[10] has been deposited, stored, disposed of or placed, or otherwise come to be located."[11] Courts have also interpreted "facility" broadly to include "virtually any place at which

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9. KATHERINE N. PROBST & PAUL R. PORTNEY ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS, Resources for the Future 6-11, 33-41, 44-48 (Resources for the Future Report, Wash. D.C., 1992). ORIN KRAMER & RICHARD BRIFFAULT, CLEANING UP HAZARDOUS WASTE: IS THERE A BETTER WAY xvi, VI.A., (Insurance Information Institute Press, 1993) (proposing abolition of retroactive liability).

Interestingly, even Senators present at the time of the bill's passage expressed concern about the retroactive nature of the liability structure and the negative effects which would result to industry, small businesses and the economy. Frank P. Grad *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980* 8 Col.J.Env.L. 1, 14 (1982); S. Rep. No. 848, 96th Cong. 2d Sess. at 108-15 (1980).

10. CERCLA, at 42 U.S.C. § 9602, designates hazardous substances as those designated by EPA or those found in any of four other environmental laws. § 9601(14) states "The term 'hazardous substance' means (A) any substance designated pursuant to § 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated hazardous waste designated pursuant to § 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to § 3001 of the Solid Waste Disposal Act . . . (D) any toxic pollutant listed under § 1317(a) of title 33, (E) any hazardous air pollutant listed under § 112 of the Clean Air Act . . .and, (F) any imminently hazardous chemical substance of mixture with respect to which the Administrator has taken action pursuant to § 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, or synthetic gas usable for fuel, or mixture of natural gas and such synthetic gas." CERCLA's definition of hazardous waste includes over 700 substances. Goodrich v. Murtha 958 F.2d 1192 (2d Cir. 1992).

11. CERCLA § 101(9)(B); 42 U.S.C. § 9601(9)(A)&(B); *see* New York v. Shore Reality Corp., 759 F.2d 1032, 1043 n.15 (2d Cir. 1985).

hazardous wastes have been dumped, or otherwise disposed of" including roadsides, drag strips and real estate subdivisions.[12]

Numerous parties, including almost any party which has owned or operated the site since its initial exposure to contamination, or transported waste to the land, may be held liable for the full cost of cleaning up any hazardous waste release associated with the site.[13] Responsible parties, generally referred to as Potentially Responsible Parties (PRPs),[14] include: (1) present owners and operators of a facility where hazardous wastes were released or are in danger of being released; (2) the owners or operators of a facility at the time the hazardous wastes were disposed of; (3) the person or entity that arranged for the treatment or disposal of substances at the facility; and (4) the person or entity that transported the substances to the facility.[15] Inclusion of

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12. United States v. Nepacco, 810 F.2d 726, 743 (8th Cir. 1986);United States v. Ward 618 F. Supp. 884, 895 (D.C.N.C. 1985); *see also* United States v. Conservation Chemical Co., 619 F. Supp. at 162, 185 (D.C. Mo. 1985); New York v. General Electric Co., 592 F. Supp 291, 296 (N.D.N.Y.1984); United States v. Metate Asbestos Corp. 584 F. Supp. 1143, 1148 (D. Ariz. 1984).

13. *See* 42 U.S.C. §9607(a); Florida Power and Light Co. v. Allis Chalmers, 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Fleet Factors Corp., 901 F.2d 1550, 1553-1554 (11th Cir. 1990).

14. Milton Russell, E. William Colglazier & Mary R. English, Hazardous Waste Remediation: The Task Ahead, at 29 (Waste Management Research & Education Institute, Univ. of Tenn., Dec. 1991).

15. The statute, 42 U.S.C. § 9607(a)(1992), reads :
(a) Notwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) of this section--
(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

present owners in the scheme imposes liability on parties which may be in no way associated with hazardous waste, particularly with leaking waste. The present owner of property may well have purchased it long after waste was disposed or contamination leaked onto the property.

The liability scheme under CERCLA is strict, joint, and several.[16] It is not specifically set forth in the statute, but has

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(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for. .
(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and(D) the costs of any health assessment or health effects study carried out under section 9404(i) of this title. *See generally,* Florida Power and Light Co. v. Allis Chalmers, 893 F.2d 1313, 1317 (11th Cir., 1990); United States v. Fleet Factors Corp., 901 F.2d 1550, 1553-1554 (11th Cir. 1990).

16. Frank P. Grad *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980* 8 COL.J.ENV.L.1 (1982); *see e.g.* New York v. Shore Reality Corp., 759 F.2d 1032, 1042 (2d Cir., 1985); United States v. Hooker Chems. and Plastics Corp., 680 F. Supp 546 (W.D.N.Y., 1988). The liability scheme under CERCLA is also retroactive. Liability is and has been imposed on parties who disposed of contamination years prior to the passage of Superfund. This is so regardless of whether they used disposal methods which were legal and authorized at the time. *See e.g.*, United States v. Monsanto Co., 858 F.2d 160, 174-75 (4th Cir. 1988) *cert. denied,* 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987); United States v. Hooker Chems. & Plastics Corp. , 680 F. Supp. 546, 556-57 (W.D.N.Y. 1988); United States v. Shell Co., 605 F. Supp. 1064, 1069-73 (D. Colo. 1985).

There may be a change in the retroactive liability aspect of Superfund. On March 21, Sen. Rover C. Smith (R-N.H.) and Rep. Bill Seliff (R-N.H.) "announced [that] they planned to introduce superfund legislation that would

been interpreted by many courts over the past thirteen years, and the legislative history has been analyzed repeatedly.[17] Fault is not considered with respect to liability.[18] A similar type of strict liability has historically been imposed on industries engaged in ultra hazardous activities.[19] The strict, joint and several liability standard aims to fulfill the policy objectives of "promot[ing] fairness, economic efficiency, risk-spreading, and deterrence [to all parties engaged in the ultra-hazardous activity]."[20]

The idea behind the liability scheme of CERCLA is to spread the risks and costs between all parties associated with the hazardous waste industry, and to simplify the government's ability to require cleanups at the least possible cost to the government.[21]

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absolve potentially responsible parties of lability for activities conducted prior to 1980." *Elimination of Retroactive Liability proposed by Republicans in Reform Bill* BNA Management Briefing, March 22, 1994.

17. *See, e.g.* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied* , 111 S. Ct. 1390 (1991); U.S. v. Monsanto Co. , 858 F.2d 160, 167 n.11 (4th Cir. 1988); New York v. Shore Reality Corp., 759 F2d 1032, 1042 (2d Cir. 1985); United States v. Hooker Chems. and Plastics Corp. 680 F.Supp. 546 (W.D.N.Y. 1988); Violet v. Picillo, 648 F. Supp. 1283, 1290 (D.R.I. 1986).

18. *See* Lynda J. Oswald, *Article: Strict Liability of Individuals under CERCLA: A Normative Analysis,* 20 B.C. ENVTL. AFF. L. REV. 579, 585, 590 (Summer 1993).

19. "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, *although he has exercised the utmost care to prevent the harm.*" RESTATEMENT (SECOND) OF TORTS § 519(1) (emphasis added).

20. Lynda J. Oswald *Article: Strict Liability of Individuals Under CERCLA: A Normative Analysis,* 20 B.C. ENVTL. AFF. REV. 579, 592 (Summer 1993).

21. However, Superfund cleanups and lawsuits tend to move slowly, partially because of the efficiency or lack thereof of large federal bureaucratic agencies, and partially because of the extent to which PRP's challenge their liability in court. These challenges often place great delays on cleanups. Transaction costs, including court fees between insures, PRP's and the government, greatly increase

The severity of the liability scheme creates an incentive to financially secure responsible parties to cooperate with one another and undertake the cleanup on their own.[22] And because each of the four classes of defendants have historically profited from the production or handling of the waste, the scheme can be seen as enforcing the "polluter pays" principle.

While the liability scheme may be equitable with respect to PRP's engaged in an abnormally dangerous activity,[23] its equity is strained with respect to others. Current owners as well as purchasers and developers who wish to acquire property *subsequent* to contamination will also be buying themselves into CERCLA's strict liability component.[24] This is true regardless of whether the new owner contributed to the waste or participated in the dangerous activity. Whether or not the liability scheme achieves its ends (i.e. economic efficiency, fairness, deterrence, risk spreading), it does have the unanticipated effect of discouraging

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the cost of cleanup. *See* KATHERINE N. PROBST & PAUL R. PORTNEY, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS, at 12 (Resources for the Future) (Wash. D.C., 1992).

22. *See* Olin Corporation v. Consolidated Aluminum Corporation 807 F. Supp.1133, 1141 (S.D.N.Y., December 1, 1992)("CERCLA provides an incentive for PRP's to voluntarily remediate hazards, but, prospectively it also provides a deterrent to the unsafe release of hazardous materials."); Andrew Ratzkin *Superfund is up to Environmental Task,* THE CHRISTIAN SCIENCE MONITOR June 22, 1993 at 19 ("CERCLA has been a wild success in grabbing corporate America by the lapels and enlisting its considerable resources in the remediation of environmental hazards. . . CERCLA effects self-policing and private-party cleanup that doesn't cost the government a dime.")

23. RESTATEMENT (SECOND) OF TORTS § 519(1) (explaining rationale behind strict liability).

24. Reed Rubenstein & Mary Field, *Clean Up Superfund or Write Off Urban Redevelopment,* CONN. L. TRIB., May 3, 1993 at 20; *See generally Superfund Liability May Add To Urban Sprawl, Congress Told* LIABILITY WEEK, No. 17, Vol. 8, April 26, 1993; *See* Ellman v. Woo, No.90-0718, 1991 U.S.Dist. LEXIS 18750, at *1 (E.D. Pa. 1991).

redevelopment of commercial and industrial sites which do not present a significant threat to human health or the environment.

In 1986 Congress passed the Superfund Amendment and Reauthorization Act (SARA).[25] The most notable difference between CERCLA and SARA, for purposes of this discussion, is the innocent landowner defense to liability.[26] The innocent landowner defense[27] is a defense to CERCLA liability for landowners who purchased land after its contamination and who did not contribute to the contamination in any way.

The innocent landowner defense applies only to owners who "*unknowingly* acquired contaminated property. . . and who undertook [']all appropriate inquiry['] at the time of acquisition."[28] According to the statute, the purchaser would need to have had "no reason to know that any hazardous substance" existed or was present on the property at the time of purchase in order to be released of liability.[29] Therefore, if an environmental audit

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25. Sub. L. No. 99-499, 100 Stat. 1613(1986) (codified at 42 U.S.C.§§ 9601-9675 (1988)).

26. The "Innocent Landowner Defense" can be found at § 107(b) of CERCLA, 42 U.S.C. § 9607(b).

27. 42 U.S.C. § 9607(b).

28. SUSAN COOKE, ET. AL., EDS., THE LAW OF HAZARDOUS WASTE: MANAGEMENT CLEANUP, LIABILITY, AND LITIGATION, Vol. 2, 12-17 at § 12.05[2][p] (emphasis added); *see* CERCLA § 107 (3)(b).

29. The full defense is a combination of 42 U.S.C. 9601 (35)(A)(i) stating that "at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release of threatened release was disposed of on, in, or at the facility" and 42 U.S.C. 9607(b)(3)(a) & (b) which states that the release was "caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant. . .if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that

conducted prior to purchase revealed any contaminants, the purchaser would be buying into the liability associated with such contaminants.[30]

This defense provides a mechanism to ensure full discovery of any contamination problems at the time of a sale of property. As a practical matter, such information is almost always known at the time of sale. Many states (but not including New York) require that any finding of contamination on a site must be listed on the deed so that a sale cannot occur without the purchaser knowing about such contamination. Most lenders also require that an environmental audit be conducted on the property prior to agreeing to a purchase,[31] partially because of their own fear of future liability.[32] It is, therefore, almost impossible to purchase urban industrial land without first having been notified of any chemical contaminants on the property. Once the buyer has been notified of contamination, the innocent landowner defense is no longer available.[33] Predictably, the innocent landowner defense has very rarely been allowed by the Environmental Protection Agency (EPA) and has been strictly interpreted by the courts.[34] It does not address the real brownfields problem of recycling industrial land that is known to have some contamination.

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could foreseeable result from such acts or omissions"; *see also* Stephen M. Feldman *CERCLA Liability, Where It Is and Where It Should Not Be Going: The Possibility of Liability Release for Environmentally Beneficial Land Transfers*, 23 ENVTL. L. 295, 304 (1993).

30. *See* United States v. Monsanto Co., 858 F.2d 160, 168-169 (4th Cir., 1988).

31. Gary Hector, *A New Reason You Can't Get a Loan*, FORTUNE, Sept. 21, 1992 at 107.

32. Kelley v. Envtl. Protection Agency, 15 F.3d 1100, 1103 (D.C. Cir. 1994); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied* 498 U.S. 1046 (1991).

33. *See* CERCLA § 107(b); 42 U.S.C. § 9607(b)(1992).

34. *See* Feldman, *supra* note 29, at 304.

The innocent landowner defense is basically an "ignorance" defense. It serves to protect parties who had nothing to do with causing the contamination, but distinguishes parties who found out that contamination existed on the property prior to purchase from those who did not find out. The defense is available only to those who had no knowledge of the contamination prior to purchase.[35] What is the rationale behind the idea that an ignorant non-culpable party is more "innocent" than a knowledgeable non-culpable party? In light of the unanticipated effect of discouraging redevelopment of brownfield sites, the federal government has begun to question the necessity of holding non-culpable parties liable under CERCLA. Evidence of this new thinking is indicated by the 1989 promulgation of EPA Regulation 34,235.[36]

Regulation 34,235 sets forth criteria by which potential purchasers of contaminated land may be released from liability. The regulation authorizes the EPA to enter into covenants not to sue with potential purchasers if:[37]

> (a) [an] enforcement action is anticipated by the Agency at the facility; (b) a substantial benefit, not otherwise available, will be received by the Agency for cleanup; (c) the Agency believes that . . new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with the remedy; (d) [d]ue consideration has been given to the effect which . . . new development is likely to have on the health risks to

35. 42 U.S.C. § 9601(A)(1) ("at the time the defendant acquired the facility, the defendant *did not know and had no reason to know* that any hazardous substance which is the subject of the release or threatened release was disposed on, in, or at the facility." *Id.* (emphasis added)).

36. 54 Fed. Reg. 34235, III (C), August 18, 1989.

37. Feldman, *supra* note 29, at 301 n. 31, 317 n. 110 (citing Memorandum from Edward E. Reich and Jonathon Z. Cannon to U.S. EPA Regional Administrators, Regional Counsels, and Waste Management Division Directors (June 6, 1989)).

> those persons likely to be present at the site; and (e) [t]he prospective purchaser is financially viable.[38]

The EPA seems reluctant to allow property to escape liability and appears unwilling to do so unless the agency will realize a substantial benefit.[39] The agreement is only applicable to property which has been scheduled for cleanup by EPA under Superfund.[40] As of 1993, EPA had entered into only four such prospective purchaser agreements.[41] Given this low number, it seems unlikely that EPA promulgated this regulation with the intention of stimulating the redevelopment of urban industrial property.

Current Superfund legislation officially expired on September 30, 1994,[42] and an initial reauthorization bill was introduced, but not voted on in 1994.[43] Taxes collected from the chemical industry to finance the Superfund are authorized only

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38. 54 Fed. Reg. 34235 § III C (a)-(E); *See also*, Feldman, *supra* note 29, at 317 note 110, quoting from memorandum from Edward E. Reich & Jonathon Z. Cannon to U.S. EPA Regional Administrators, Regional Counsels, and Waste Management Division Directors (June 6, 1989).

39. Feldman, *supra* note 29, at 317 - 319.

40. 54 Fed. Reg. 34235, § III C. (a), Aug. 18, 1989.

41. Feldman, *supra* note 29 at 318, n. 112.

42. 26 U.S.C. §§ 59(A), 4611, 4661, 4662; *see also Urban Superfund Sites to be Targeted First*, Superfund Week, No. 30, Vol. 6, Issn. 0892-2985 (August 6, 1993); Bradford C. Mank, *The Two-Headed Dragon of Sting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?* 19 B.C. ENVTL. AFF. L. REV. 239, 245 (1991); *Clean Up Authority Extended for Three Years, Tax Authority for Four Years in Budget Bill*, 21 Env. Rep. (BNA) 1243 (Nov. 2, 1990).

43. H.R. 3800, 103rd Cong., 2d Sess. (1994).

through December 31, 1995.[44] The Clinton administration's proposal for Superfund reform[45] supports community involvement in the cleanup process through the establishment of citizen information and access offices in each state, and community work groups representing the economic and racial makeup of the communities. The proposal also addresses issues of environmental justice and recognizes that often urban residents are faced with "cumulative [health] risks from multiple sources other than Superfund sites."[46] For that reason, the Clinton proposal would support prioritization of site cleanup based not only on the specific danger of the Superfund site itself, but also on an integrated evaluation of the danger from the site and the other environmental and health dangers faced by the local residents.

The Clinton proposal also supports state voluntary cleanup programs (discussed in Section IV) and, in order to foster those programs, recommends the adoption of national cleanup levels and non site-specific remedies. Liability with respect to a number of responsible parties is also discussed.

Most notably, the proposal recommends that EPA provide an exemption from liability to prospective purchasers of contaminated property. The exemption is contingent upon the prospective purchasers not aggravating the contamination. In instances where prospective purchasers would be released from liability, either the purchasers would have to agree to clean up the site, or the government would have to clean it. It appears that as long as a prospective purchaser of a site "conducted a site audit . . . and . . . inspection . . . provided proper notification of releases

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44. 26 U.S.C. §§ 59A, 4611, 4661, 4662; *Urban Superfund Sites to be Targeted First*, Superfund Week No. 30, Vol. 6; ISSN: 0892-2985 (August 6, 1993); *Clean Up Authority Extended for Three Years, Tax Authority for Four Years in Budget Bill*, 21 Env. Rep. (BNA) 1243 (Nov. 2, 1990).

45. *Summaries of Clinton Administration Proposal for Superfund Reform*, released by EPA [Feb. 3, 1994]. Toxics Law Rep. (BNA) (Feb. 4, 1994) [hereinafter *Clinton Proposal*].

46. *Clinton Proposal*, at 1020.

of hazardous substances, exercised due care and took reasonably necessary steps to address the release or threatened release of hazardous substances and to protect human health and the environment, and provides cooperation, assistance and site access to those responsible for response actions,"[47] a liability exemption would be available. Prospective purchasers must not be affiliated with liable or responsible parties in any way.

Speculation and uncertainty surround the interpretation of the due care clause in the above proposal. It is also unclear who would actually clean up the sites if they are not federal Superfund sites. If there is only a small amount of low level contamination at a site, the states may not wish to expend funds on its cleanup, particularly if there is a backlog of more contaminated sites to clean first.

Only time will tell if, and in what form, the Clinton administration proposal will be reintroduced in the 104th Congress. Its most significant feature is its recognition that a redevelopment problem exists in urban centers, a problem that is exacerbated by and must be addressed in changes to federal Superfund legislation. There will be uncertainty for a while on the federal level, but the possibility of some significant support for a brownfield redevelopment strategy exists. Still, as of now, a large part of the problem of redevelopment of industrial lands remains due to the very broad and strict liability scheme set up by the original federal Superfund statute.

B. New York Legislative Background

New York's inactive hazardous waste disposal site legislation found in the Environmental Conservation Law (ECL)[48] differs in significant respects from CERCLA. An "inactive hazardous waste disposal site" subject to the ECL is "any area or structure used for the long-term storage or final placement of

47. *Clinton Proposal* at 1024.

48. N.Y. ENVTL. CONSERV. LAW § 27-1301 (Consol. 1992)

hazardous waste...,"[49] for which no permit is in effect. Because the statute applies only to hazardous wastes, and not all hazardous substances as are defined under CERCLA, its applicability is somewhat narrower than CERCLA.

The commissioner of the Department of Environmental Conservation (DEC) may, after notice and an opportunity for a hearing, order "the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site"[50] to develop and implement a remedial program for the site. Thus only the administrative agency can take action against a responsible party; no cause of action in favor of private parties is created by the statute.

The statute does not by its terms define who is a responsible person other than the owner of a site. It merely provides that the commissioner shall determine who is a responsible person "according to applicable principles of statutory or common law liability."[51] The DEC has interpreted this language to authorize imposition of liability on the same categories of persons who are liable under CERCLA, and has by regulation defined responsible party to include these categories.[52]

The ECL authorizes the commissioner to order the owner and/or any person responsible for hazardous waste disposal to develop and implement an "inactive hazardous waste disposal site remedial program" when "hazardous wastes at [the] site constitute a significant threat to the environment."[53] In 1992, the department promulgated a new Part 375 with a modified definition

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49. N.Y. ENVTL. CONSERV. LAW § 27-0903 (Consol. 1992).

50. N.Y. CONSERV. LAW § 27-1313(3)(a) (Consol. 1992).

51. N.Y. ENVTL. CONSERV. LAW § 27-1313(4) (Consol. 1992).

52. 6 NYCRR § 375-1.3(u).

53. N.Y. ENVTL. CONSERV. LAW § 27-1313(3)(a) (Consol. 1992)

of significant threat to the environment.[54] The regulations, after listing a series of environmental impacts and factors to be considered by the commissioner now expressly state that "the mere presence of hazardous waste at a site or in the environment is not a sufficient basis for a finding that hazardous waste disposal at a site constitutes a significant threat to the environment."[55]

The statute also allows the department itself to develop and implement a remedial program for a site, and then seek reimbursement from a responsible person. The DEC could do this, for example, when a party fails to obey an order of the commissioner, where the commissioner is unable to determine who is a responsible person or locate such a person, or where there is an imminent danger to the environment or public health under ECL § 27-1313(5).

The New York State Superfund program, like the federal program, includes exacting liability provisions and rigorous cleanup standards. The focus of Superfund at both state and federal levels has been the most contaminated sites. This focus has had the unanticipated effect of leaving many brownfield sites abandoned and has caused companies to develop greenfields instead. New York's use of high cleanup standards and unyielding liability provisions has contributed to the growing brownfields problem. New York has, however, made recent efforts to encourage development of certain contaminated properties. At the request of then Governor Mario Cuomo, a pilot program was developed by the New York Urban Development Corporation (UDC) in cooperation with the DEC. The goal of the program was to match five sites suitable for industrial or commercial use with potential developers who would be willing to pay for the cleanup and whose business would have a positive economic impact on the community. Once an appropriate match was made, the potential developer would present a remediation plan for DEC approval. The end result would be a consent decree that protects the

54. N.Y. ENVTL. CONSERV. LAW § 27-1313(3)(b) (Consol. 1992).

55. 6 NYCRR § 375-1.4.

company from future liability for the contamination cleaned up under the remediation plan. Contamination caused or discovered after execution of the consent decree would not be covered by the agreement. Financing for the cleanup would be the exclusive responsibility of the developer. However, a business expansion loan, infrastructure investment loan/grant combination and/or grants for the study of the nature and extent of contamination might be available through the UDC.[56]

The pilot program sought to demonstrate the opportunities available under New York's current legislative scheme. Success of the program would clearly be a significant accomplishment for the companies involved as well as the affected communities. It further suggests that there may be informal mechanisms already in place to facilitate the development of industrial sites where a company is willing to undertake a cleanup in order to acquire a site. However, it is less clear that the success of a program which affects a small number of sites on a special basis can lead to the kind of broader change of perception that will induce companies to consider the possibility of developing former industrial sites in the regular course of business. A company's decision to clean up a former industrial site for commercial or industrial redevelopment must be an economic one based on as much certainty as possible. Clear procedures are necessary so that potential developers can accurately and efficiently determine the cost of redeveloping a site. Legislative codification of this policy would give industry a measure of security in its dealings with DEC.[57]

The New York State Senate Legislative Commission on Toxic Substances and Hazardous Wastes drafted legislation that

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56. *See* Letter to Edward Farrell, of the New York State Conference of Mayors from Mary Musca, Vice President for Policy and Planning with the New York State Urban Development Corporation (April 6, 1994). For a discussion of the four actual test projects that were used, *see* Robert S. Berger, Brownfields: The New York Approach, 6 ENVTL. LAW IN NEW YORK 1, at 13-14 (January 1995).

57. DEC has recently developed its own voluntary cleanup plan. N.Y. DEC Organization and Delegation Memorandum #94-32. For a discussion of this plan, *see* Berger, *supra* note 57.

was introduced in the State Senate that would formally set up what is commonly referred to as a voluntary cleanup program.[58] This program, like many others across the nation, would create procedures through which a company could assess the contamination at a given site and submit a remediation plan to DEC. If the plan is sufficient, DEC would agree that, upon satisfactory completion of the proposed cleanup, it would certify the site and enter into a covenant not to sue the company for contamination covered by the remediation plan. This legislation would formally codify what can be achieved through the type of informal negotiations with DEC contemplated in the UDC pilot program, but would apply to a much broader range and number of properties.[59]

IV. LESSENING THE UNCERTAINTY OF BROWNFIELD REDEVELOPMENT: LIABILITY AND CLEANUP STANDARDS

A. *General Dimensions of Liability*

The liability scheme under federal environmental legislation (most significantly CERCLA, 42 USC § 9607(a)) and New York State environmental law (most notably Title 13 of the New York Environmental Conservation Law § 27-1313) is one of the major inhibitors to redevelopment of industrial and commercial property. Under both sets of laws, any person owning or operating a facility or a business of any type can be held one hundred percent liable for the cost of any necessary cleanup. Also, under CERCLA and New York State statutes, the liability is strict, and, therefore, liability can be imposed regardless of who caused the contamination.

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58. S.B. 7787, 215th Gen. Assembly, 2d Sess., 1994 New York Laws.

59. For a discussion of the actual proposed legislation, *see* Berger *supra* note 57, at 14-15.

Liability can be discussed on a number of different levels. As noted above, all parties owning or operating a site can, in most instances, be held liable for contamination found on the land, whether or not they contributed to the contamination. However, in some limited situations there are exceptions. For instance, municipalities which acquire land through tax foreclosure, will not, under federal law, be held accountable for cleanup of hazardous substances. Redevelopment of urban industrial areas could perhaps be instigated more easily if municipalities, under appropriate circumstances, could pass this exemption on to business owners willing to undertake the cleanup. Unfortunately, there is no corresponding municipal exemption under New York law. The feasibility of incorporating municipal liability exemptions into state law, and of passing on exemptions through lease or purchase, will be thoroughly discussed in Section V.

The liability associated with industrial land creates a risk of enormous cost for potential developers. The price of even a small cleanup can run into the millions. Developers will inevitably hesitate before purchasing land that could be contaminated, even if there is only the slightest risk that they will be held liable. Even the cost of doing an environmental audit and determining what type of remediation is required entails great expenditure.

In order to promote cleanup and reuse of land in industrial urban areas, it is essential to implement changes in the liability scheme. Of course, any changes must be fair and must not negate the basic "polluter pays" principle.

B. Voluntary Cleanup Programs

Liability. The primary examples of liability exemptions for non-municipal, current owners or prospective purchasers of contaminated property can be found in programs throughout the United States generally referred to as voluntary cleanup programs. Though the term "voluntary cleanup" is used commonly, voluntary cleanup programs vary greatly from state to state.

Their basic purpose is to promote redevelopment through legislative changes which encourage current owners and prospective purchasers to clean up contaminated property. Most voluntary

cleanup programs focus on property which is only mildly contaminated and which is not on either the federal National Priority List or a state listing. A small number of programs give special preference to property located in depressed urban areas. Priority is frequently given to new uses which will create the greatest number of jobs and have the largest potential to increase tax revenue.

In addition to possible financial incentives, discussed in detail in Section VI, most state voluntary cleanup programs offer some form of liability release to new owners who have successfully completed an approved cleanup. Depending on the form and inclusiveness of the liability release, the voluntary cleanup program may have different degrees of success.

State governments, however, are unlikely to issue a covenant not to sue or a release of liability to anyone, even a new purchaser, until the contamination is cleaned up. In order to determine that the land is, in fact, clean, or as clean as the government requires it to be, unified and definitive cleanup standards should be implemented. Clearly delineated cleanup standards will also help in creating a realistic remediation plan. Cleanup standards will be discussed in detail in the following part of this section.

It is essential to remember that amendments to New York's environmental law will not change the liability structure under federal law. Under CERCLA, new owners could still be held liable for future cleanup costs, whether or not they contributed to the contamination. CERCLA is actually only likely to affect the most severely contaminated sites in the nation. The federal law would be unlikely to have any actual effects on new owners of mildly contaminated urban property, even if the proposed federal amendment is not enacted.

There are two major reasons for this. First, the sites focused on for purposes of this report are minimally contaminated sites. Such sites would, in most cases, not be listed on the state registry. In other words, the level of contamination at the sites would not be severe enough to have qualified the property for state action. Federal action is usually taken at more severely contaminated sites than those on state listings. The sites with

federal priority are listed on the National Priority List. Because the sites which are the focus of this report would have made it to neither the state nor the federal priority list, chances are slim that they will ever be the target of a federal Superfund action. Therefore, the federal liability scheme should actually have minimal effect on developers, and a change in the state liability scheme should spark development of the urban centers.

The second reason the federal liability scheme should not pose a great threat to potential developers of urban industrial land, is that under a proposed state voluntary cleanup plan, a site would have to be cleaned before being re-used. The chance of a remediated site being targeted under Superfund is extremely small. Over a thousand severely contaminated sites have been on the National Priority List for years, and, due to constraints of time and money, the federal government is having difficulty dealing with even those. There simply is no time for the federal government to seek out minimally contaminated and previously cleaned sites.

A threat posed by CERCLA's drastic liability scheme is fear of its magnitude. Once pilot programs and projects get started in which businesses are actually encouraged to redevelop in urban areas, the perception of the danger of CERCLA liability for these properties may begin to dissipate. New York state's pilot program, for instance, is one way to dispel some of the fear and negative public perception about redevelopment.

There is, of course, a chance that federal Superfund reauthorization will incorporate liability releases for prospective purchasers. As explained in Section III liability releases for prospective purchasers of commercial property are included in the Clinton Administration's reauthorization bill.

In order to preserve the underlying purpose behind state and federal environmental laws, protection of public health and the environment, this report recommends that liability releases be given only in situations where the interested purchasers are willing to clean up the properties, or where the properties will be cleaned by some combination of state, local and private money. Releases of liability should only be given in situations where the proposed new use of the property will not contribute to or exacerbate the previously existing problem. If some small traces of contamination

are found on the property, but the property still conforms to all state standards of safety, the new owner could be released from potential future liability for previously existing waste even without a cleanup being implemented. Again, this should be dependent upon the new use not exacerbating the condition of the property. Although some proposals suggest privatization of state regulatory oversight duties, this report does not support the placement of the responsibility for determining whether a developer has fulfilled its cleanup duties in the hands of a private party. The DEC should approve any cleanup before allowing a release from liability.

Many legislatures in other states have enacted various forms of liability releases under their voluntary cleanup programs for new owners or prospective purchasers of contaminated property. The theories behind such legislative changes are to promote reuse of industrial land, to ensure a more equitable liability structure, and, in some cases, to promote urban redevelopment and job creation in depressed areas.

There are three basic types of liability releases that have been offered by other states. For any of them to be implemented in New York, some coordination between the DEC and private business owners would be required. Each of the liability releases is similar, but represents a different level of relief.

No Further Action Letter. If a private party is interested in a certain piece of industrial property, that private party or possibly the state, as part of a financial incentive program, could undertake a site assessment. If remedial action is required on the property, the state would give a specific indication of the level of remediation necessary for issuance of a no further action letter.

A no further action letter is granted only after cleanup has been done, or if the state determines that no cleanup is required. It does not release the new owner from liability, but does guarantee that the state will not open or reopen the site, barring discovery of new information unknown at the time of letter.

Where an approved cleanup has been completed, a no further action letter is simply a promise by the state not to require further remediation. This means that if cleanup standards change, the new owner will not be required to redo the cleanup. Also, if

new cleanup technologies are developed, the new owner should not have to fear disruption of normal business caused by further remediation.

A no further action letter does not guarantee that no further action will be required if new wastes are discovered on the property or if waste is found to be leaking onto a different part of the property than that previously cleaned.

Covenant Not to Sue. A covenant not to sue is granted after cleanup. It provides protection from future state suits for contamination found on the property, but does not cover conditions that were unknown at sign off.

A covenant not to sue is one step beyond a no further action letter. A covenant not to sue would probably be somewhat more effective than a no further action letter in terms of public perception. New owners are likely to feel more comfortable with the knowledge that the state will not reopen a suit or make them parties to a suit in the future.

Such a covenant only covers the cleanup actions already taken on the site. The best covenants would protect the new owners from state suits for any waste previously existing on the property. Covenants not to sue may require that the new or potential purchaser of the property indicate the intended new use of the property. The state would then have to approve of the intended use before offering the covenant. In that respect, the state is assured that the new use will not exacerbate the previous contamination. Certain restrictions could be placed on the deed to the property limiting future uses of the site.

Certificate of Release. Certificates of release are essentially the same as covenants not to sue. The name is not as important as the idea of limited liability for a new owner who proposes to reuse an industrial site for a productive purpose and who takes approved actions to clean up a site. A covenant not to sue or a certificate of release would be offered only in a situation where there was a substantial degree of state oversight of the cleanup. Neither would be offered until the state has inspected the site and approved the cleanup.

In no further action letters, covenants not to sue and certificates of release, the protection is only offered for circumstances known about at the time of cleanup. This important limitation is incentive for the new owners or purchasers to discover and remediate all known conditions on sites, rather than try to cover them up, because they will be guaranteed protection only for contaminants initially discovered.

Liability Release. A liability release may be granted prior to cleanup. It may be use-dependent, so as not to exacerbate existing contamination. It is conditional on an intention to clean and reuse the site and granted only to parties having no connection whatsoever to parties responsible for the contamination at the site (PRPs). This form of liability release may be passed along to subsequent owners or operators on the property.

The most comprehensive liability release plan is a voluntary response program currently in place in Minnesota. New owners or prospective purchasers can obtain financial assistance in connection with a site assessment. They can then submit a plan to the environmental commissioner announcing the cleanup proposed for the site and the proposed new use of the property. After the commissioner approves the plan, the private party undertakes the cleanup. After the cleanup, new parties will be released from all liability, providing they are in no way connected with the responsible parties. The release and any deed restrictions will run with the land, and, therefore, apply to all subsequent owners and lessees as well as to lenders.

The adoption of any of these forms of liability relief would assist New York to encourage businesses, both industrial and commercial, to recycle industrial property without jeopardizing the health and safety of local residents or of the environment. Adoption of a liability release plan would have the most long term and comprehensive effect. In any event, the relief from liability should run with the land and insulate later purchasers.

No further action letters, covenants not to sue and liability releases can be created or granted in a number of different ways, as there are no standard definitions of these terms. Legislators can incorporate desirable portions of each release into one bill. For

instance, if New York was willing to grant covenants not to sue after cleanup, they may wish to have the covenant run with the land, as liability releases often do.

All three types of releases are generally granted to prospective purchasers and certain owners of industrial property who take on remediation of that property. Therefore, cleanup to some specified standard is required. A full discussion of the need for the adoption of practicable and ascertainable cleanup standards is required in order to complete a discussion of voluntary cleanup programs and their effectiveness in removing uncertainty and inducing urban industrial redevelopment.

C. Cleanup Standards

Cleanup standards are the most complicated and contentious issue in relation to voluntary cleanups in general and New York in particular. New York's present cleanup standards are some of the most stringent in the nation. They are based on the condition of the property prior to the contamination of the site and are often referred to as prior use standards.

Clean-up standards in New York State are found in the remedy selection regulations of N.Y. COMP. CODES R. & REGS. tit. 6, section 375-1.10 (1992) [N.Y.C.R.R.]. The goal of the program is "to restore [the] site to pre-disposal conditions, to the extent feasible and authorized by law."[60] The minimum requirement is the elimination or mitigation of "all significant threats to the public health and the environment presented by hazardous waste disposed at the site through the proper application of scientific and engineering principles."[61] The regulations require that the remedial design be selected based on several factors. Stringent federal cleanup standards are integrated into the state requirements. Section 375-1.10(c)(1)(iii) states "the terms 'standards and criteria' and 'guidance' include both those of this State and those of the

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60. 6 N.Y.C.R.R. § 375-1.10(b) (1992).

61. *Id.*

United States to the extent that they are more stringent than those of this State." There is a specific preference for "[a] site specific remedy that permanently and significantly reduces the volume, toxicity, and/or mobility of the hazardous wastes."[62] The following is the "hierarchy of remedial technologies:"

(i) destruction, onsite or offsite
(ii) separation/treatment, onsite or offsite
(iii) solidification/chemical fixation, onsite or offsite and
(iv) control and isolation offsite or onsite.

The remedial program must "conform to standards and criteria. . . unless good cause exists why conformity should be dispensed with."[63]

The effect of the New York standards is to provide the DEC with the widest possible discretion to either require an extensive cleanup or a more limited cleanup. The DEC attempts to remediate the contamination at a given site to the maximum standard - the condition prior to contamination. A PRP will generally attempt to convince DEC to require the minimum standard - the point where the site no longer represents a "significant threat to the public health and the environment."

The DEC should certainly have significant discretion to demand extensive cleanups from unwilling participants in the cleanup process, who act to avoid fines and equitable sanctions. Different cleanup standards may be appropriate for those who are not responsible for contamination at the site, but who might be willing to undertake a cleanup in order to use the land. A private developer needs a very clear indication of what a cleanup will require and some assurance that the requirements will not change after work has begun. The DEC has significant discretion to approve appropriate remedies. However, without more specific guidelines it is very difficult for a potential developer to anticipate to what standard it will be held. This uncertainty is aggravated by

62. 6 N.Y.C.R.R. § 375-1.10(c)(1)(iii)(5).

63. 6 N.Y.C.R.R. § 375-1.10(c)(1)(i).

the diverging interests of the DEC and the prospective developer (i.e. clean vs. cost). It directly interferes with the feasibility of the use of the property by the prospective developer. Bargaining positions seldom provide a reliable indication of the actual final negotiated cost. The more disparate the bargaining positions the more uncertainty associated with the transaction and the higher the cost. It is very important that a developer be able to accurately forecast the costs associated with a proposed property in order to compare that property to competing alternative properties, typically, available greenfield sites. Time is also an important element; any time that a business must wait to purchase and use a property represents a cost of acquiring that property.

In order to encourage the redevelopment of contaminated land, many states have tried to lower the costs associated with indefinite cleanup standards. The goal is generally to narrow the ground between the DEC or its equivalent and the prospective developer through legislation. The practical result is not dirty sites but more predictability for potential developers. Such new standards recognize that site specific criteria such as future land use and proximity of potential sources of drinking water are always appropriate factors in choosing a remedy. The goal of returning sites to their pre-contamination condition is not entirely abandoned. States have simply recognized that environmental agencies look to certain criteria in choosing an appropriate remedy in light of potential exposures and available technology. To suggest that those criteria should be limited to the pre-contamination condition of the site misleads not only the public but potential developers whose assistance in the cleanup and redevelopment of contaminated sites is indispensable.

Legislation affecting cleanup standards in many states offers a choice of standards. Legislation has been introduced in Pennsylvania that would significantly change cleanup standards for voluntary cleanups in that state.[64] Under the proposed Pennsylvania legislation a developer would have three sets of standards from which to choose.

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64. S. 972, Leg. Sess., 1994 Pennsylvania Laws 1.

Background Levels. Background Levels represent the more stringent standard. Background levels are defined as the greater of "background as represented by the results of analyses of representative samples; or the achievable practical quantitation limit." The Practical Quantitation Limit is the "lowest level that can be reliably attained within specified limits of precision and accuracy under routine laboratory conditions."[65] If these levels are yet insufficient to satisfy applicable statewide health standards, which would be minimum health standards developed by the Pennsylvania Department of Environmental Resources, those more stringent standards would need to be met. For example, conditions at a site could make even the presence of an otherwise benign contaminant dangerous, especially where drinking water is involved. Every cleanup would have to "result in reducing the risk to public health and the environment."[66]

It would be necessary to provide notice of intent to use these standards to the Department of Environmental Resources, the local municipality and the local public. Use of these standards would avert the necessity for deed restrictions; the property would be deemed clean for any future use.

Statewide Health Standards. Statewide Health Standards which would be developed by the Department of Environmental Resources in order to "protect ground water and prevent contaminated soil from exposing the public to harm."[67] These standards are connected to use and exposure and can lead to deed restrictions. The public notification requirements are the same for these standards as for background levels.

Site Specific Standards. Site Specific Standards are set on a case by case basis only after a detailed site investigation is performed. Resulting cleanup standards are tied directly to the

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65. *Id.*

66. *Id.*

67. *Id.* at 2.

future use of the site and the actual exposure risks. Such standards typically involve deed restrictions that limit the future use of the property to protect against recontamination or disruption of marginally contaminated soil. Application of these standards typically requires considerable negotiation with the Pennsylvania Department of Environmental Resources [DER] which has the discretion to alter standards at the specific site where there are grounds for doing so. A large number of cleanups require application of this standard to address problems of feasibility.

Whichever of these three standards is chosen, the local community must be given the opportunity to participate at each step in the process. Typically a local advisory committee would be set up which would have access to documents and would have the opportunity to participate in public meetings.[68]

The proposed Pennsylvania cleanup standards represent only one attempt to redefine cleanup standards for those companies willing to take on a cleanup voluntarily. Legislation adopted in Massachusetts,[69] Michigan, Texas and Ohio, specifically permits the use of different standards for residential and industrial uses.[70] The Ohio legislation specifically authorizes development of property with residual contamination within certain limits where remediation is technically infeasible.[71] Such contamination would be recorded on the deed. Because permitting certain minimal levels of contamination to remain on a property is also the practical

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68. *Id.*

69. *See* Deirdre C. Menoyo, *State Program Launched to Encourage Redevelopment of Contaminated Sites*, MASSACHUSETTS LAWYERS WEEKLY, Oct. 10, 1994, at 41 and Mark A. Cohen, *Interest High in Program to Promote Polluted-Land Sales; But Some Say 'No-Sue" Covenant Not Enough*, MASSACHUSETTS LAWYERS WEEKLY, Dec. 26, 1994, at 1.

70. Stateside Associates, PROFILES OF STATE VOLUNTARY CLEANUP PROGRAMS, CLEANUP STANDARDS (1993) (Updates were provided by Mark Anderson of Stateside Associates; for further information he can be reached at (703) 525-7466).

71. *Id.*

effect in the many states which use site specific risk assessment standards, appropriate deed restrictions are necessary.

It is important to distinguish these modified cleanup standards from the standards to which companies who were in some way involved in the contamination of a property, or "polluters", are held. States that have changed cleanup standards for voluntary cleanups have not done so in order to permit culpable companies to escape their responsibility under the law. They have merely recognized that companies who willingly cleanup contamination for which they are not responsible should be treated differently than companies who reluctantly conduct a cleanup as a result of a costly adversary process.

This is especially true where consent decrees are entered into by PRPs who elect to clean contamination as an alternative to incurring the cost of a state financed cleanup. Such consent decrees, as a practical matter, permit clean up of sites to an economically and technically feasible level. The question is whether goals that are set to provide the state with the legislative authority to negotiate an appropriate level of remediation for a reluctant party should be the same as those designed to encourage a company to volunteer to undertake a cleanup that might otherwise never occur under the adversary system. Such sites include those that never make the National Priority List (NPL) or the state registry as well as those that have made a priority list but are not of a high enough priority to receive funding due to budget constraints. Under the present system certain minimally contaminated sites may never receive the funding necessary to effect an actual cleanup.

V. LIABILITY EXEMPTIONS FOR MUNICIPALLY OWNED PROPERTY

Special consideration should be afforded property acquired by municipalities and indeed it is already treated differently under federal law. Often this may be property abandoned by an owner who stopped paying property taxes and allowed the property to be

acquired by tax foreclosure. Foreclosure may be the result of the fact that the property cannot be sold because the cost of cleaning it up exceeds its value. Or, the property may be relatively clean, but the fear of possible liability still reduces its value to a negative net worth. This is an important part of the brownfields problem and one in which municipalities could play a special role because they have some limited immunity from liability. If this immunity could somehow be passed on to a prospective developer pursuant to an appropriate scheme that does not compromise any fundamental goals, a major obstacle to recycling some of this land could be overcome. Indeed, with the appropriate restrictions it even might be legitimate to extend such an arrangement to land that a municipality acquires by eminent domain for the specific purpose of brownfield redevelopment.

The discussion of this possible role for municipally owned land needs to be broken down into its separate components, with a discussion for both federal and state law. The first issue is whether there is any municipal exemption for ownership of land acquired by different means. The second question is whether there is any method by which any such exemption could be passed on to an innocent prospective developer.

A. Municipal Ownership Alternatives

Involuntary Acquisition by Tax Foreclosure. At the federal level, CERCLA currently provides immunity to municipalities which acquire ownership or control of a piece of property involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.[72] No further action, therefore, needs to be taken to ensure municipal immunity under circumstances of involuntary acquisition and federal law appears generally to include tax foreclosure in the involuntary category.

Quite a different situation exists, however, at the state level. The law of New York merely allows the municipal owner to apply

72. 42 U.S.C. § 9601(20)(D) (1982 & Supp. IV 1986).

for financial assistance for the clean up of hazardous waste, if certain provisions apply. There is no release from liability. However, the municipality can get financing from the 1986 Environmental Quality Bond Act for seventy-five percent of the cleanup.[73] There are various additional requirements beyond mere municipal ownership to receive the funding, though, including the presence of a significant threat to health. The applicable state regulation states that a municipality may apply for financial assistance if the site represents a significant threat and the municipality acquired title to the property either involuntarily or before it was listed on the registry.[74] The difference between New York's and the federal Superfund's statutory scheme is this exemption from liability. Whereas New York is willing to help finance the cleanup, it preserves municipal liability making state law more stringent than CERCLA in this regard.

Superfund laws of some states exempt municipalities from liability, following the lead of the federal government. For example, Minnesota has passed the Minnesota Environmental Response and Liability Act[75] which specifically exempts municipalities from liability.[76] There is also legislation in Wisconsin which specifically exempts a municipality from liability.[77]

The Minnesota Environmental Response and Liability Act[78] details and discusses hazardous waste, hazardous waste facilities, liable parties, property owners, cleanup funds, removal and remediation. According to the legislation, "the state, an agency

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73. N.Y. ENVTL. CONSERV. LAW § 52-0303 (Consol. 1993).

74. 6 NYCRR § 375-3.2(b).

75. MINN. STAT. ANN. § 115B.01 (West 1987).

76. MINN. STAT. ANN. § 115B.03 Subd. 4(a) (West 1994).

77. WIS. STAT. ANN. § 144.76(9)(lm.a.) (West 1994).

78. MINN. STAT. ANN. § 115B.01 - 115B.24 (West 1994).

of the state, or a political subdivision that may be considered an owner of tax forfeited real property is not a person responsible for a release or threatened release from a facility in or on the property."[79] This seems to exempt the state or municipality from liability for tax foreclosed land.

Wisconsin has legislation dealing specifically with tax delinquent contaminated land as well. For the most part, the Wisconsin act pertains specifically to municipally held land, providing that a municipality is not liable for the damages caused by the release of a hazardous substance on property, whenever acquired, if the property is acquired:

(a) through tax delinquency proceedings or as the result of an order by a bankruptcy court; or

(b) from a municipality that acquired the property through tax delinquency proceedings or as a result of an order by a bankruptcy court.

These provisions specifically exempt the municipality.[80]

Tax foreclosure proceedings are the most common type of involuntary acquisition. In New York, there was some uncertainty over whether a taxing body is required to take tax delinquent land by foreclosure after a statutory period of time or whether it is at the municipality's discretion. However, the apparent practice of New York counties and municipalities is to indefinitely delay taking title to land about which they have environmental concerns since there seems to be no requirement as to when the taxing body must take title to the property after the redemption period. The New York State Legislature has ostensibly dealt with this issue by revising Title 11 of the Real Property Tax law, which became effective January 1, 1995. Of greatest importance is the expansion of the available exclusion for properties which municipalites consider unattractive foreclosure candidates. The revised exclusion of Section 1138 applies to any piece of real property which, "if the

79. MINN. STAT. ANN. § 115B.03. Subd.4(a) (West 1994).

80. WIS. STAT. ANN. § 144.76(9)(lm.a.) (West 1994).

tax district were to acquire the parcel, there is a significant risk that it might be exposed to liability substantially in excess of the amount that could be recovered by enforcing the tax lien."[81] Although this seems to be a plausible solution to the legitimate concern of municipalities, it fails to address the heart of the issue and may only exacerbate the brownfields problem in New York.

Clearly, the federal law under CERCLA provides immunity for municipalites which acquire title to property involuntarily.[82] The language of the federal statute equates tax foreclosure to an involuntary acquisition. However, as evidenced by the recent amendment to the New York State tax law, the current practice in the state raises the possibility that foreclosure of contaminated land may be viewed as a voluntary acquisition of title. Not only does this amendment symbolize the tragic, albeit unintended, policy results that occur when the overall scope of the brownfields problem is not recognized, but it also increases concerns that the New York State tax foreclosure process may be seen as a voluntary acquisition of property for which municipalites are not afforded the exemption provided under CERCLA.

The significance of the apparent discretion afforded to municipalities and the exclusion of inactive hazardous waste sites from the list of real property to be foreclosed is clear. If a municipality is not required to take known contaminated land, then it is unlikely to do so because the acquisition of such property may subject the municipality to clean-up liability by a state which has no municipal exemption. As a result, such property continues in legal limbo with little likelihood of being cleaned up and recycled. The first step in a coordinated brownfields approach is to change New York law to provide an appropriate exemption from liability for municipal property acquired by tax foreclosure.

Voluntary Acquisition by Eminent Domain. There is somewhat contradictory language embodied in the language of the

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81. N.Y. REAL PROP. TAX LAW § 1138(1)(d) (Supp. 1993).

82. 42 U.S.C. § 9601(20)(D) (1982 & Supp.IV 1986).

original federal CERCLA statute and that of the SARA[83] amendments as to whether voluntary acquisitions by a municipality still qualify for CERCLA immunity. Under the definitional terms and language of the original statute, a municipality is exempt only under involuntary situations.[84] However, under the language of the SARA amendments, property acquired by means of eminent domain pursuant to a legitimate brownfields clean up program is included in a special immunity provision.[85]

New York has no present immunity for a municipality that takes title to land through eminent domain. Other states have granted such immunity to municipalities. One state that has such a proactive program is Minnesota. In Minnesota, a state, agency of the state, or political subdivision that acquires property through an exercise of the power of eminent domain or through negotiated purchase after filing a petition for the taking of the property through eminent domain, or through adoption of a redevelopment or development plan, is exempt from liability.[86]

In New York, since a taking by eminent domain is a voluntary choice, a municipality that acquires property in this way is not even eligible for funding to remediate the site. Because eminent domain authority might be an appropriate tool to address part of the brownfields problem, the possibility of a municipal exemption for property acquired by eminent domain should receive further consideration.

B. Transferring Immunity

Sale. Under the terms of the federal law there appears to be no permissible transfer of immunity from a municipality to a

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83. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat.1613 (1986).

84. 42 U.S.C. § 9601(20)(D) (1.982 & supp. IV 1986).

85. 42 U.S.C. § 9601(35)(A)(ij)

86. MINN. STAT. ANN. § 115B.03. Subd.5 (West 1994).

purchaser simply by execution of a transaction between parties for the sale of land or property.[87] Without such immunity, the purchaser would be a liable party as an owner.

Some states have addressed the transfer of immunity issue. New York, though, is not among them. One state which allows the transfer of a municipal exemption is Minnesota. The Minnesota Environmental Response and Liability Act[88] states that a person who acquires property from the state, agency of the state or a political subdivision, is not a responsible party solely as a result of the acquisition of property if the property was acquired by eminent domain. This immunity is thus transferable to future purchasers. This is an example of what could be done in New York State, though it must be carefully considered to ensure that true polluters are paying their fair share and no unfair financial burden falls on municipalities.

Lease. Even if federal law does not authorize the transfer of municipal liability upon the sale of land to a purchaser, it may be possible to facilitate redevelopment of used industrial properties in Erie County by having the county acquire title to the property

87. The basis of this conclusion stems from the absence of any statutory language explicitly stating permission for such transfer, any case law which would indicate acceptance by the courts of such a transaction, and some contradictory case law which states that courts are unwilling to frustrate the intent of CERCLA, which this certainly might. *See e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d cir. 1985) (stating that the court "will not interpret section 9607(a) in any way that apparently frustrates [CERCLA's] goals, in the absence of a specific congressional intention otherwise"); United States v. Maryland Bank & Trust, 632 F. Supp. 573, 578-79 (D. Md. 1986) (interpreting section 107(a) (1) of CERCLA loosely and section 9601(20) (A) of CERCLA narrowly to bring the defendant within the definition of a "covered person"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (stating that "CERCLA should be given a broad and liberal construction. CERCLA should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.")

88. MINN. STAT. ANN. § 115B.01 (West 1994).

and execute a lease to the developers of the property. The premise behind such an arrangement is that the immunity afforded municipalities under the federal Superfund law might likewise prevent such law from reaching lessees of such property, thus shielding innocent developers from federal Superfund liability. While such a premise is attractive, it is untested. It is unclear, therefore, whether CERCLA liability would attach to such a lessee.

Under CERCLA, a lessee, in some situations, may be liable as an "owner or operator."[89] The fact that courts are more willing to interpret the language of CERCLA in favor of liability raises difficult problems with lessor/lessee arrangements between an immune lessor and a lessee entered into with the intention of avoiding CERCLA liability of the lessee. Under what circumstances will a lessee be considered an "owner" or an "operator" and what factors will a court look to in making such a determination?

Although the definition of "owner or operator" does not provide much guidance about who is an owner or operator, the definition does, in several places, mention control over a facility as a relevant criterion in a determination of owner or operator status.[90]

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89. *See*, Daniel E. Feder, *The Undefined Parameters of Lessee Liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): A Trap for the Unwary Lender*, 19 ENVTL. INST. 257, 276 (Winter 1988).

90. While case law and legislative history offer little guidance about such decisions, courts have held that under certain circumstances a lessee may come within the definition of an owner. such decisions, however, have been made without the formulation of a bright-line test for such instances. What is clear, though, is that the degree of control over a facility is critical in the court's determination of whether a lessee is an owner for purposes of CERCLA liability. In United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D. S.C. 1984), where a lessee was considered an "owner", the court again failed to establish any concrete standards for when a lessee will come within the definition of an owner under CERCLA, but two criteria for such ownership were apparent: 1) if an objective observer would conclude that, due to the lessee's activity on the facility, the lessee is the owner of the facility, or 2) if a lessee

Thus, evidence of the requisite degree of control necessary to establish owner/operator status of a lessee is often achieved through proof that the lessee has been involved in the disposal of hazardous waste on the facility. The innocent lessee poses a much different question. Indeed, if the land is the contaminated "facility," the lessee who controls a new building on the land may have little control over the land itself. And though the lessee has a contractual relationship with the owner, that owner is an immune party and, arguably, no liability could attach to the lessee. This issue deserves further investigation.

If a state municipal immunity were enacted in New York,[91] it should at least allow a transfer of immunity by lease. One possibility might be a provision which provides for such a form of immunity if the acquisition of the property by the municipality and the transfer of possessory interest to the lessee are done in conjunction with a special cleanup program which reserves monitoring and regulatory powers over the lessee to the municipality and is done in accordance with DEC criteria.

The best course of action for Erie County is to support state legislation that creates an appropriate exemption from liability for municipalities when title is acquired either voluntarily or involuntarily, including both tax foreclosures and eminent domain. It may be more realistic that an exemption will be granted merely to the involuntary transfers, but New York may choose to enact

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sublets a facility, then the court may treat the lessee as the owner of the facility for CERCLA purposes. As a practical guideline, however, in determining whether a lessee has sufficient control over a facility to be an owner under CERCLA there are the Generally Accepted Accounting Principles (GAAP) distinguishing between capital leases and operating leases. In the former, the lessee is deemed the owner of the leasehold property for accounting purposes, while in the later they are not. Most likely, even if courts do adopt the GAAP formulation of a capital lease, GAAP will permit the courts to engage in a case-by-case examination to determine if a lessee is in substance the owner of a facility.

91. A legislative proposal for municipal immunity was introduced in the State Senate. S.B. 7784, 215th Gen. Ass., 2d Sess. 1994 New York Laws. The precise language of this proposal is not necessarily what we would recommend.

legislation similar to Minnesota's, which also exempts voluntary title transfers through eminent domain. Any such legislation must ensure that municipalities are not expected to assume the financial responsibility for cleaning up property for which they had no role in polluting.

Next, there should be a provision which allows this immunity to be transferred to the private sector through sale or lease in order for redevelopment of the brownfield. Although complicated and untested, it may in fact be possible to transfer federal municipal immunity through the use of lease agreements. As with other immunity transfers, this situation will be simplest and least risky if the land is presently clean.

VI. ENCOURAGING BROWNFIELD REDEVELOPMENT THROUGH FINANCIAL INCENTIVES

Financial incentives are an integral part of encouraging economic development and bringing industry back to the cities. Although brownfield sites have traditionally been viewed as an environmental problem, they also must be viewed as a public economic development issue. The fear of purchasing these sites has resulted in stagnated development of urban centers across the state and across the country. Practically speaking, the benefits of doing business in the city have been outweighed by the risks attached to purchasing brownfield sites. Governmental financial incentives are, therefore, necessary to recycle urban industrial land. As such, they meet a policy objective that is crucial to the long term environmental and economic health of the entire region surrounding such an area.

A proactive approach must be taken in order to tip the scales of the risk-benefit analysis back toward urban redevelopment. As previously discussed, relieving potential purchasers from the weight of uncertain liability is one step toward balancing this equation. Environmental assessment and even minimal clean-ups will, however, remain a cost to potential developers. Adding financial incentives to the benefits side of brownfield purchases may be the key to inducing redevelopment of

New York's urban centers.

The catalytic effect of financial incentives has been emphasized by many other states with urban redevelopment goals.[92] Voluntary cleanup and land recycling bills, such as those proposed in Michigan, Pennsylvania and New Jersey, include a combination of releases from liability and financial incentives for redevelopment.[93] The important point is that the problem must be addressed in a comprehensive fashion, as part of an overall brownfield redevelopment strategy that recognizes voluntary cleanup programs as only one component.

Some states that enacted liability release provisions later found it necessary to interpret or amend their laws to include financial incentives for voluntary cleanups.[94] For example, Michigan law already provides for covenants not to sue in appropriate cases.[95] However, there are various Michigan legislative proposals to include financial incentives for environmental investigation and assessment.[96]

New York no longer can afford to watch its urban centers decay while other states are attracting businesses, removing the barriers to redevelopment and rejuvenating the industrial heartland of their cities. The seeds of what could be an effective overall strategy have already been planted in the state legislature and the governor's office.

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92. *See* MINN. STAT. ANN. §§ 115B.01-.24(West 1994); MINN. STAT. ANN. §§ 116T.551-.557 (West 1994).

93. H.R. 4720, 87th Leg., Regular Sess., 1993 Michigan Laws; S.972, 178th Gen. Assembly, Regular Sess. 1993 Pennsylvania Laws; S.1036, 205th Leg., 2d Sess., 1993 New Jersey Laws.

94. MICH. COMP. LAWS § 299.614 (1992).

95. MICH. COMP. LAWS § 299.614a(3).

96. S.659, 87th Leg., Regular Sess., 1993 Michigan Laws; H.R. 4720, 87th Leg., Regular Sess., 1993 Michigan Laws.

The recent pilot program[97] to redevelop abandoned industrial sites puts New York back on the right track toward fighting this type of urban blight. This program recognizes that combining relief from inappropriate liability with requirements of positive economic impact and job creation is the best approach. Perhaps most important is the realization that for any program to be successful, it must include incentives for recycling the land.

Specifically, the initial proposal discussed possible assistance from the Urban Development Corporation for business expansion loans, infrastructure investment loan/grant combinations and/or grants to assess the nature and the extent of contamination. Although no money was allocated to cover cleanup costs, the initiative does address two of the major barriers to redevelopment: (1) the cost of environmental assessments; and (2) the uncertainty associated with potential cleanup costs on contaminated property. This recognizes the important role that financial assistance can play in a brownfield redevelopment strategy. This is a useful and cost effective incentive approach because the perceived risk of redevelopment is high, while the actual contamination may be low, requiring only minimal cleanup costs.

Because the key to a successful brownfield redevelopment program lies with its combination of solutions, the key to financial incentives may lie with a combination of sources. While the pilot program proposal mentioned some possible incentives and sources of funds, a combined incentive and financing approach would have to be utilized in order to sustain a long term program.

New York should include enhanced incentives as part of its strategy for redevelopment of sites located within the most economically challenged areas of the state. For example, depending on the location of the site, the "positive economic impact" approach could be utilized long term by offering differing levels of low-interest to no-interest loans combined with grants and tax abatements. In this respect, designation as a "distressed community", an "enterprise community" or an "enterprise or empowerment zone" could mean the ability to offer greater

97. *See* discussion, *supra* notes 57-58.

incentives to companies that agree to bring job opportunities into the community.

An example of this approach is a proposed Michigan law providing that grants will only be issued to developers if the property has "demonstrable economic development potential" and is located in an "eligible community."[98] The bill looks to such factors as population density, unemployment rate and those previously recognized in Michigan's Neighborhood Enterprise Zone Act.[99] The most depressed economic communities, therefore, can get priority status for redevelopment funds.

The Ohio Urban Jobs and Enterprise Zones Act of 1982[100] provides for tax abatement agreements which state that "a company will not have to pay the full amount of new taxes on a new investment for a designated time period if it commits to job creation or retention. Tax abatement can be for 75% on real and/or personal property for up to ten years in an unincorporated area and 100% on real and/or personal property for up to ten years in municipalities."[101]

Minnesota uses a variety of priorities to determine eligibility for grant money from its Contaminated Site Cleanup and Development Account. These include: (1) the highest potential for increasing tax base of local taxing jurisdictions relative to the fiscal needs of the jurisdictions as a result of developments that will occur because of completion of response action; (2) the social value to the community of the cleanup and redevelopment of the site; and (3) the amount of commitment of municipal or other local resources to pay for the cleanup costs.[102]

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98. H.R. 4720, 87th Leg., Regular Sess.1993 Michigan Laws.

99. MICH. COMP. LAWS § 207.772 (1993).

100. OHIO REV. CODE ANN. §§ 5709.61-5709.66 (Anderson 1993).

101. Cuyahoga County Report, *supra* note 4, at 40; OHIO REV. CODE ANN. § 5709.62(C) and § 5709.63(A) (Anderson 1993).

102. MINN. STAT. ANN. § 116J.555 (West 1992).

New York State must continue its recognition of the validity and necessity of using economic development funds as part of an overall approach to the brownfield problem. The following is a synopsis of selected possible funding sources, financial incentives and implementation mechanisms. One focus of these incentives rests on allowing interested companies to assess the nature and the extent of contamination, if any, that exist on a proposed redevelopment site. In turn, this will offer companies an early and clear layout of the necessary cleanup and cleanup costs required for redevelopment of a proposed site.

A. Environmental Funds

Environmental Bond Acts. In New York State, the primary funding source for environmental cleanups is the Environmental Quality Bond Act (EQBA). As a funding source, bond acts are not structured for long term use. Instead, such acts offer a short term funding mechanism for specific projects and are subject to voter approval. As of April 1, 1993, $296.8 million of New York's 1986 Environmental Quality Bond Act funds were obligated for investigation and remedial activities at 552 sites.[103] Although a balance of $803.2 million (73 percent of the total 1.1 billion) remains, the rate of obligation of funds is projected to increase dramatically over the next few years because many sites are reaching the more expensive construction phase.[104] Further, the DEC projects that the EQBA funds could be fully obligated sometime in the late 1990's.[105]

For this reason, it is not likely that money will be allocated for early assessment of sites not already on the state registry. However, an estimated cost of cleanup for low-level contaminated sites, such as those classified on the registry as level 4 or level 5

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103. N.Y.S. DEPT. OF ENVTL. CONSERV., NEW YORK STATE HAZARDOUS WASTE SITE REMEDIAL PLAN at 17-18 (1993).

104. *Id.* at 29.

105. *Id.* at 29-30.

sites, may be achieved without much greater commitment from DEC.[106] Moreover, some of the unclassified 2a sites may, upon further investigation, be found to require a minimal cleanup, the cost of which could be assessed with EQBA funds.

Consequently, there may be some cases where prospective innocent purchasers might voluntarily come forward and agree to perform the cleanup as long as the contamination is minimal and the cost can be assessed before purchase. In these cases, bond act monies would be conserved, since the company rather than DEC would be paying for the actual cleanup.

B. Revolving Loan Funds

State Revolving Loan Funds. The designated purpose of this type of fund would be to help provide funding to persons undertaking an environmental study of a site as part of a voluntary cleanup program and for implementing a DEC approved voluntary cleanup plan.[107] The proposed financial incentives would be in the form of low-interest loans and/or grants to cover a percentage of the costs incurred during completion of an environmental assessment.[108]

If grant money is to be used as a financial incentive, certain limitations should be attached. For example, grants rather than loans could be used to investigate and determine whether property within a distressed community, an enterprise community or zone, or an empowerment zone, contains environmental contamination. If the site was found to be contaminated, the grant money could also be used to characterize the nature and extent of the contamination and to estimate the cost of cleanup. As discussed in the UDC pilot program proposal, further requirements for grant

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106. For the definitions of site classifications, *see Id.* at 4.

107. Cuyahoga County Report, *supra* note 4, at 34-35.

108. See e.g. H.R. 972, 178th Gen. Assembly, Regular Sess. 1993 Pennsylvania Laws (establishes Voluntary Cleanup Loan Fund and Industrial Land Recycling Fund); MINN. STAT. ANN. § 116J.551-.557 (West 1992).

issuance, such as a positive economic impact on the community and job creation, could be mandated.

A plan to allow the Urban Development Corporation to assist companies with business expansion loans or an infrastructure investment loan/grant combination could be applied over the long term by using a revolving loan fund program. The monies received as repayment of outstanding loans would be deposited back into the revolving fund and any interest earned by monies in the fund would remain in the fund.

County Revolving Loan Funds. A county revolving loan fund could be created by combining many different sources available to a county from both federal and state programs.[109] For example, the Cuyahoga County Working Group proposed the establishment of such a fund with capitalization from sources such as "Community Development Block Grants (CDBG) and Urban Development Action Grant (UDAG) repayments, and from local revenue sources, such as real estate transfer fees, the general fund, reserve accounts, as well as grants and borrowing from the Ohio Water Development Authority (OWDA), State Revolving Loan Fund, and other sources."[110] The primary purpose of the fund would be "to expedite projects by trading public dollars for a shortening of time required for development...it would be the primary mechanism for short term, dynamic redevelopment situations, as well as medium and longer term projects which are important to strategic local objectives."[111]

For Erie County purposes, although UDAG funds may no longer be an available source of funds in New York, the utilization of money from other sources should be further investigated. For example, the permissible uses of CDBG funds may require further

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109. We recognize that there may be a problem with creating such a county loan fund in New York because of the prohibition on gifts and loans in the New York State Constitution. N.Y. CONST. art. VIII, § 1 (1986).

110. Cuyahoga County Report, *supra* note 4 at 20.

111. *Id.* at 28.

interpretation by HUD. Specifically, a finding that environmental assessments could fit under either the "special economic development activities"[112] or "basic eligible activities"[113] clauses of the CDBG program. This could allow for partial allocation of those funds into a revolving loan fund program.

Since environmental assessments are already required under the CDBG program, this use of funds may not be problematic. However, consideration should be given to the fact that there is a 20 percent spending cap on CDBG "planning" funds and a 30 percent cap on funds used to reduce "slum or blight." Possibly, if funds were targeted for potential purchasers agreeing to bring jobs to the county, these caps would not apply because the funds could be designated as project/program delivery costs. Thus, the CDBG program is a potential funding resource that should be investigated further.

Funds from the Regional Economic Development Grant and Industrial Infrastructure Development Programs [114] may also be used to capitalize a county revolving loan fund. After the fund is capitalized, the terms and conditions of any loans and/or grants could be established and administered at the county level.

C. *Tax Abatements*

Generally, this type of incentive allows for the full or partial exemption from taxes (tangible personal property and/or real estate) on new investment. The Cuyahoga County Report recommended that the tax abatement authority in Ohio statutes "be extended to include tax abatement for increased real estate value due to environmental remediation and subsequent redevelopment. Additionally, tangible personal property taxes on redeveloped

112. 24 C.F.R. § 570.203 (1994).

113. 24 C.F.R. § 570.201 (1994).

114. N.Y.ECON.DEV.LAW., Art.11 and 13 (McKinney).

brownfield sites should be eligible for abatement."[115]

Minnesota law already provides for redevelopment project tax abatements. The governing body may exempt from all local taxes "up to 50 percent of the net tax capacity of development which represents an increase over the net tax capacity of the property, including both land and improvements, acquired for the development at the time of its original acquisition for redevelopment purposes...The tax exemption shall not operate for more than ten (10) years." [116]

Similarly, the New York Real Property Tax Law presently allows for certain types of tax exemptions. For example, it provides that for an economic development zone exemption, "the base amount of the exemption shall be the extent of the increase in assessed value attributable to such construction, alteration, installation or improvement..."[117] The law also provides "Business Investment Exemptions" for cities with a population under one million.[118] As noted in the state law, certain exemptions and their duration may be affected by local law, ordinances or resolutions and should be investigated further.[119] Still, brownfields redevelopment seems particularly suited to tax abatement consideration because it specifically addresses property that otherwise is unlikely to have a full tax assessment value or, even any assessment value at all.

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115. Cuyahoga County Report, supra note 4, at 31. Ohio has recently enacted a very broad tax abatement provision in conjunction with its new voluntary cleanup statute. OHIO REV. CODE ANN. § 3746.D1-.99 and § 5709.87 (Baldwin 1994). We are not endorsing this particular legislation as a model for New York.

116. MINN.STAT. ANN. § 469.043 (West 1994).

117. N.Y. REAL PROP. TAX LAW, § 485(e)(2)(McKinney 1995).

118. N.Y. REAL PROP. TAX LAW, § 485(b) (McKinney 1995).

119. *See e.g.,* N.Y. REAL PROP. TAX LAW § 485(b)(7)-(12) and § 485(e)(1-a) (McKinney 1995).

D. *Tax Increment Financing*

The Cuyahoga County Report describes tax increment financing as a "method of financing capital improvements through bonded debt repaid with revenue from increased tax assessment occasioned by the new infrastructure development...The funds are raised by diverting part of the regularly assessed property taxes to special project accounts."[120] Basically, the revenues would go to the area's general fund and then, as the taxes increased, the funds would be transferred to special funds for financing infrastructure improvements.

This type of financing has been used for a specifically defined geographical area. As noted in the Cuyahoga County report, one city created a tax increment financing district including some possibly contaminated area. The report states that, "the City assumed liability and then reduced property values in these areas to reflect market value after discovery of contamination. Once the tax increment is initiated and funds collected to pay for a portion of the costs, property value and economic activity will increase."[121]

The statutory authority in New York will have to be researched further in order to assess the viability of this type of financing. Certainly, this seems to be a much longer term approach to financing than was anticipated in the original proposal for the UDC pilot program. Yet it is precisely the type of creative approach that needs to be explored in the larger context of a comprehensive brownfield strategy.

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120. Cuyahoga County Report, *supra* note 4, at 38.

121. *Id.* The Cuyahoga County report identifies the city as Kansas City, but it should be Wichita, Kansas. *See* Kathleen M. Martin, *Siting on Contaminated Property: Development and Cleanup through Public Private Cooperation* 7 NAT. RES. & ENV. 20, 21-22 (Winter 1993).

VII. PROPOSALS FOR BROWNFIELD RECYCLING IN ERIE COUNTY

1. Erie County should develop an inventory of Brownfield sites and actively pursue inclusion of the most suitable sites in pilot programs and other remediation initiatives.

2. State legislative changes which would offer appropriate liability releases to prospective purchasers of minimally contaminated Brownfield sites should be developed and supported.

3. State legislative changes encouraging certainty in New York State cleanup standards should be developed and supported.

4. State legislative changes granting liability exemptions for land secured by municipalities through tax foreclosure and possibly eminent domain should be developed and supported.

5. State legislative changes sanctioning the transfer of municipal immunity to an innocent purchaser should be developed and supported.

6. The practicality and possibility of lease arrangements with innocent developers for municipally owned property should be further investigated.

7. Erie County should consider creating a county-level revolving loan fund and other financial devices to be used as a catalyst for brownfield redevelopment. Such funds could be designated for specific purposes, such as preliminary environmental assessments or for assistance to small businesses.

8. Allocation of economic development funds for support of brownfield redevelopment should be encouraged.

9. A coordinated and cooperative effort by economic development agencies and environmental groups working together on brownfield redevelopment should be facilitated.

10. A local brownfields redevelopment program should be established. Initially, this could be as simple as designating one existing official to coordinate communication and facilitate implementation of proposals. As soon as possible, funds should be sought to create a new office or position charged with this responsibility. It could perhaps be done in the form of a graduate internship or similar cooperative effort with the local academic community.

11. Contacts with other brownfield redevelopment programs and initiatives around the country should be continued and expanded to ensure the full exchange of information and ideas.

12. A series of meetings, conferences or seminars for business leaders, insurers, educators, environmental groups, the media, lenders, government agencies, community groups and the general public should be organized. These could assist in the exchange of information and the correction of misperceptions. A regular newsletter could be published and circulated to all concerned or interested parties.

13. As soon as is feasible, Erie County and the City of Buffalo should sponsor a task force with as diverse representation as possible to address the problem of building a regional consensus on how to approach the brownfields problem in this area. This model has been successfully used in Cleveland and is being employed in Chicago. The unique local dimensions of the problem must be carefully evaluated.

These proposals are made to address some of the specific problems discussed in this report. They are broad in scope and general in nature, but can be enlarged upon or adapted as the need arises. Not included are proposals that deal with substantive barriers that weren't discussed in this report. Additional proposals could address subjects such as: insurance protection (public or

private) against landowner liability;[122] development of a local registry of sites identified as suitable for redevelopment; development of a land banking program; and establishment of a collection of resource materials to be kept in a central local depository (such as the Buffalo and Erie County Public Library).

Like the contents of the rest of this report, this list of proposals is meant to be a starting point for further discussion and a catalyst for further action. The brownfields problem is a complex one that calls for careful answers. There are no quick fixes, no simple solutions. The job of reversing the decline of the urban core and recycling potentially useful industrial sites is a job that calls for extensive coordination and communication from all segments of the community, particularly business owners, government officials and environmentalists.

These and other proposals should be discussed and considered on an ongoing basis. The authors of this report want it to be clear that the proposals presented here are meant only as a starting point, one that will lead to active brownfield recycling as a continuing process in Erie County.

VIII. THE CHALLENGE AHEAD

This report has addressed many of the barriers to re-use of minimally contaminated industrial sites. The recycling of such industrial sites is essential for long term protection of the environment because it ensures that land which has already been used for industrial purposes will be cleaned and used again. Failure to adequately implement a successful brownfield re-use strategy will result in land which not only sits idle, but which never is properly cleaned, thereby exposing urban residents to more

122. Since the original presentation of this report a member of the Fall, 1994 Environment and Development seminar, Eric M. Falkenberry, has conducted research on the subject of insurance, much of which is contained in "Testimony" supra note 7.

environmental risks than they would be exposed to if the land were successfully put back into use.

Strategies for the re-use of industrial sites must also serve as an essential component in the economic redevelopment of the depressed urban core. Redevelopment of industrial areas can provide jobs for urban residents as well as increase the tax bases of areas where property values have plummeted. Finally, brownfield redevelopment initiatives can save municipalities and counties money by ensuring that the infrastructure already in place in most urban and industrial areas will be put back to active use.

A number of other cities, particularly Chicago and Cleveland, already have numerous municipal and regional planners as well as legislators, working together to create legislation and petition for federal funding to research and resolve the brownfield crisis. The state of Minnesota has been addressing and legislating brownfields redevelopment initiatives for a number of years. The state of Wisconsin has drafted comprehensive legislation which specifically focuses on abandoned and tax delinquent industrial sites in municipal areas. Even the federal government is now fully acknowledging that Superfund legislation has had a negative impact on urban industrial areas. It appears to be willing to provide financial assistance to localities that work toward creative and sustainable solutions.[123] It would be a shame, and a surprise, if New York State and the City of Buffalo missed the opportunity to benefit from the current state of affairs and fell behind their Great Lakes counterparts.

This report serves only as a first step in addressing the legal barriers to redeveloping the growing number of abandoned and decaying properties in Western New York. The report has not fully addressed all problems associated with brownfields redevelopment, and further study of specific issues, such as lender liability, is necessary in the quest for a long term solution.

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123. EPA has developed a Brownfield Economic Redevelopment Initiative. Three cities have already received funds for demonstration projects and more will be chosen. See, Statement of EPA Assistant Administrator Elliot P. Laws at Conference of the National Council of Urban Economic Development on "Environmental Redevelopment" (Sept. 26, 1994).

Successful strategies can only be adopted by cooperation and effort on the part of government officials, city planners and environmental organizations. The City of Buffalo, Erie County, the New York State Legislature, the Department of Environmental Conservation and Region Two of the United States Environmental Protection Agency should all be targeting brownfields redevelopment strategy. There is no "quick fix" to this problem, particularly if cleanups are to be conducted with the utmost attention to the health and safety of the public, and if money is not to be spent frivolously. The leaders who eventually find and implement working solutions to the brownfields crisis will need to be fully informed. They will have to rely on intense research and accurate analysis. They will need solid knowledge upon which to base the courageous decisions they have to make. The authors of this report, members of the Environment and Development Seminar at University of Buffalo School of Law, are committed to helping develop the necessary body of knowledge. This report, they hope, is a useful first step in the long journey ahead.