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FUNDING OPPORTUNITIES FOR BROWNFIELD REDEVELOPMENT

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Abstract: Many financial tools are available to redevelopers of former industrial and commercial sites, commonly known as “brownfields.” Because the money is often tied to federal, state, or local government programs, time is usually a factor in such transactions. This Article explores the various financial mechanisms available to brownfield redevelopers, including government funding sources, insurance claims, and cost recovery from parties who are found responsible for the contamination.

INTRODUCTION

Not long ago, the discovery of contamination or the perceived impact of past industrial practices at a site would have left a seller with few options.¹ Even if a buyer was interested, traditional financing institutions were hesitant to lend money for such a transaction, and consequently, many brownfield sites were left abandoned.²

In today’s market and with today’s sophisticated real estate, environmental, and legal professionals, brownfield sites should be considered as real estate deals with manageable environmental issues.³ Envi-

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¹ See Jack Fersko & Ann M. Waeger, *Environmental Insurance in Brownfield Transactions: Issues and Answers*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 165, 165 (Todd S. Davis ed., 2d ed. 2002) [hereinafter BROWNFIELDS GUIDE].

² *Id.*

³ Robert A. Simons, *Creative Financing of Brownfields Sites*, in BROWNFIELDS GUIDE, *supra* note 1, at 96.

ronmental remediation should be viewed in the context of development potential, not development in the context of remediation.⁴

Obviously, however, the potential for excess costs—such as assessment, remedial plans, and cleanup⁵—means that many brownfield redevelopment projects have a financing gap as lenders will not finance beyond the market value of the property.⁶ This situation is where non-traditional funding sources must be found.

The public sector already plays a strong role in establishing and maintaining infrastructure, such as roads, sewers, drinking water, public safety, and community networks.⁷ Arguably, the public benefits when measures are taken to spur growth in areas where infrastructure is already established, instead of at locations where additional investment in infrastructure would be necessary.⁸ In addition to this societal benefit argument, many view the government as the essential contributor to brownfield financing gaps in order for such projects to be economically viable,⁹ or to stimulate interest from other private financial and technical resources.¹⁰

Brownfield success stories demonstrate that innovative funding on the federal, state, and local levels is necessary.¹¹ Public funding recipients, however, must understand what goes along with public funds: deadlines, paperwork, time, and the public record implications of submitting an application.¹² For those who have the time and patience to seek public funding, Part I of this Article examines federal funding sources, Part II examines state funding sources, and Part III examines alternative sources of brownfield financing. Part IV of this Article discusses the availability of insurance mechanisms, both past and present, that may provide financial support. Finally, Part V briefly examines the

⁴ *Id.*

⁵ See CHARLES BARTSCH & BARBARA WELLS, NORTHEAST-MIDWEST INST., FINANCING STRATEGIES FOR BROWNFIELD CLEANUP AND REDEVELOPMENT 1, 7 (2003), available at <http://www.nemw.org/BFFinancingredev.pdf>.

⁶ *Id.*; Simons, *supra* note 3, at 97.

⁷ See MATT KANE, NORTHEAST-MIDWEST INST., PUBLIC SECTOR ECONOMIC DEVELOPMENT: CONCEPTS AND APPROACHES 1, 11 (2004), available at <http://www.nemw.org/econ-development.pdf>.

⁸ *Id.* at 10.

⁹ See BARTSCH & WELLS, *supra* note 5.

¹⁰ SRA INT'L INC. & NORTHEAST MIDWEST INST., U.S. ENVTL. PROT. AGENCY, BROWN-FIELDS FEDERAL PROGRAMS GUIDE EPA-560-F-05-230 6 (2005), available at <http://www.epa.gov/swerosps/bf/index.html> (Follow "Federal Programs Guide" hyperlink) [hereinafter FEDERAL PROGRAMS GUIDE].

¹¹ *Id.* at 60.

¹² See Simons, *supra* note 3, at 102.

legal option of seeking contribution from other entities for the costs of assessment and cleanup.

I. FEDERAL FUNDING

The type and amount of federal resources vary as greatly as brownfield projects vary.¹³ Redevelopers should think broadly about projects, plan early, and determine the effect of their project on seemingly unrelated issues such as transportation, public health, green space, and job creation.¹⁴ These tangential effects may point the way toward funds that are not necessarily designated as “brownfield” funds but are nonetheless available.¹⁵

A. U.S. Environmental Protection Agency

The Small Business Liability Relief and Brownfields Revitalization Act provides, in part, for federal funding of assessment and cleanup at brownfield sites.¹⁶ The statute requires that twenty-five percent of the funds be used at petroleum-contaminated sites,¹⁷ with the remainder available for hazardous substance cleanups. Generally, the following sites are ineligible for any of the funds: facilities listed or proposed for listing on the National Priorities List; facilities subject to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) administrative or court orders or consent decrees; and property that is within the control, custody, or jurisdiction of the federal government.¹⁸ In addition, entities that are Potentially Responsible Parties (PRPs) at a site under CERCLA may not receive funding for that site.¹⁹

¹³ See FEDERAL PROGRAMS GUIDE, *supra* note 10, at 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended in scattered sections of 42 U.S.C. (Supp. IV 2004)).

¹⁷ FEDERAL PROGRAMS GUIDE, *supra* note 10, at 27.

¹⁸ U.S. ENVTL. PROT. AGENCY, PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS EPA-560-F-06-246 3 (2006), *available at* <http://www.epa.gov/brownfields> (Follow “Apply for Funding” Quicklink; then follow “Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants” hyperlink) [hereinafter PROPOSAL GUIDELINES]; *see* 42 U.S.C. § 9601(39)(B) (Supp. IV 2004).

¹⁹ PROPOSAL GUIDELINES, *supra* note 18, at 4. Potentially Responsible Parties (PRPs) are defined generally as owners or operators of facilities now and at the time that hazardous substances were disposed of; those who arranged for transportation, treatment, or disposal of the hazardous substances; and transporters. *See* 42 U.S.C. § 9607(a)(1)–(4) (2000). Thus, one may not be responsible for the contamination but still may be a PRP.

The U.S. Environmental Protection Agency (EPA) implements the statute and manages the grant program.²⁰ The fourth round of funding was announced in October 2006, and applications were due in December 2006.²¹ Three types of funding are available through this program: grants for environmental assessments (either for a specific site or for a community-wide project);²² grants to establish a revolving loan fund for brownfield efforts at the state or local level;²³ and cleanup grants.²⁴ In addition, EPA has other funding mechanisms and technical assistance grants, all of which are described below.

1. Assessment Grants

Assessment grants are available to governmental organizations, including state, tribal and local governments; regional council or redevelopment agencies; and quasi-governmental entities.²⁵ The assessments must be categorized as hazardous substance or petroleum, because there are two separate funds for the grants.²⁶ One may select a specific site for the funding, and answer questions to demonstrate that the site is eligible for funding.²⁷ In the alternative, if one seeks funding for a community-wide project, then the application must explain the rationale for how specific sites will be selected when the funds become available, and then eligibility must be demonstrated for each site before work begins on that site.²⁸ Assessment grant funds may be used to conduct planning for the area, take inventory of the sites, assess the sites, and support community involvement.²⁹

The maximum amount of money available for assessment grants is \$200,000 per site or per community-wide application for hazardous substances, and \$200,000 per site or per community-wide application for petroleum.³⁰ Applicants may request a waiver of this cap for site-specific applications and receive \$350,000 per site for hazardous substances and \$350,000 per site for petroleum, which waiver is based on

²⁰ See PROPOSAL GUIDELINES, *supra* note 18, at 1.

²¹ See *generally id.* (announcing that the total estimated funding is expected to be approximately \$72 million, which will be awarded to approximately 200 sites).

²² *Id.* at 6.

²³ *Id.* at 6, 9.

²⁴ See *id.* at 6, 10–11.

²⁵ *Id.* at 14; FEDERAL PROGRAMS GUIDE, *supra* note 10, at 27.

²⁶ See PROPOSAL GUIDELINES, *supra* note 18, at 8.

²⁷ See *id.* at 21.

²⁸ See *id.* at 7.

²⁹ *Id.* at 6; FEDERAL PROGRAMS GUIDE, *supra* note 10, at 27.

³⁰ PROPOSAL GUIDELINES, *supra* note 18, at 7.

anticipated levels of contamination, size of the site, or ownership status.³¹

2. Revolving Loan Grants

The revolving loan grant program has similar parameters, and the same eligible applicants as assessment grants.³² The maximum amount that an entity can request for this grant is \$1 million.³³ Several entities, however, can form a “coalition” and jointly request the total amount of money that they could have received individually.³⁴ For instance, two entities, such as a county and city, could jointly ask for \$2 million because separately they could each get \$1 million. Revolving loan funds may be used, sub-loaned, or sub-granted to clean up sites contaminated with hazardous substances or petroleum.³⁵ A revolving loan recipient must provide a twenty percent cost share, which may be in the form of labor, material, services, or money put toward eligible costs.³⁶

3. Cleanup Grants

The cleanup fund is available to the same recipients as the other grant programs, and also to non-profits.³⁷ The entity requesting the funding must own the property, or demonstrate that it will own the property by June 30, 2007.³⁸ The maximum award available is \$200,000 per site, and each applicant can request cleanup funds for up to three sites.³⁹ Cleanup funds require a twenty percent cost share, which may be in the form of services, labor, materials, or money.⁴⁰ A written American Society for Testing and Materials E1527-05 Phase I environmental site assessment must be complete by the time of application, and a Phase II must be complete or underway.⁴¹

³¹ *Id.* at 8.

³² *See id.* at 14.

³³ *Id.* at 9.

³⁴ *Id.* at 9–10.

³⁵ *Id.*

³⁶ PROPOSAL GUIDELINES, *supra* note 18, at 10.

³⁷ *See id.* at 14.

³⁸ *Id.* at 11.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 11.

⁴¹ *Id.* The American Society for Testing and Materials issues industry standards for various endeavors. *See* ASTM International, <http://www.astm.org> (last visited Apr. 10, 2007). EPA adopted ASTM 1527-05 as its method to deal with “all appropriate inquiry.” Environmental Protection Agency, Standards and Practices for All Appropriate Inquiry, Final Rule, 70 Fed. Reg. 66,070, 66,072 (Nov. 1, 2005).

In addition to direct funding, EPA may grant funds to states or tribes for their respective response programs.⁴² Up to \$400,000 may be spent per site, with a \$200,000 cap on both assessment and cleanup.⁴³ A state or tribe must either be a party to an EPA Memorandum of Agreement, or be in the process of entering into such an agreement.⁴⁴ In addition, the state or tribe must maintain a public record naming the sites at which response actions will take place in the coming year, and the ones for which a response action was completed in the prior year.⁴⁵

4. Targeted Brownfield Assessments

Another similar fund is available for Targeted Brownfield Assessments (TBAs), namely Phase I and Phase II assessments that meet “all appropriate inquiry” standards, and remedial action plans that establish available remedies and associated costs.⁴⁶ Generally, TBAs are not used on properties where the current owner is responsible for contamination.⁴⁷ Other program rules vary by EPA region, which manage the funds.⁴⁸

5. Clean Water State Revolving Loan Funds

One EPA funding mechanism that is underutilized—except notably in Ohio, New York, and New Mexico—is the Clean Water State Revolving Loan Fund.⁴⁹ This fund has considerable potential at sites where water quality is an issue.⁵⁰ The funds are funneled to states and other governmental or quasi-governmental entities to establish revolving loan programs, where loans can be made for as long as twenty years, as long as there is a method for repayment.⁵¹ Each lender provides its own priorities and eligibility guidelines,⁵² but the following activities are generally eligible for funding: Phase I and Phase II assessments; excavation and disposal of Underground Storage Tanks; capping wells; re-

⁴² FEDERAL PROGRAMS GUIDE, *supra* note 10, at 28.

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 29.

⁴⁷ *Id.*

⁴⁸ FEDERAL PROGRAMS GUIDE, *supra* note 10, at 29.

⁴⁹ *Id.* at 28.

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See id.*

removal and disposal of contaminated soil or sediments; and well abandonment.⁵³

B. U.S. Department of Housing & Urban Development

The U.S. Department of Housing & Urban Development also has several funding programs available for brownfields. These programs include Community Development Block Grant (CDBG) funding, section 108 loan guarantees, the Brownfields Economic Development Initiative (BEDI), and four additional programs.⁵⁴

CDBG funds may be used for site acquisition, assessments, preparation, clearance, demolition, building renovations, site remediation, and infrastructure costs,⁵⁵ although funding for the program has not kept pace with need.⁵⁶ CDBG funds are directly appropriated to over 1100 entitlement communities, and to non-entitlement communities through the state in which they are located.⁵⁷

Section 108 provides federally guaranteed loans for large economic development projects, public infrastructure, and housing.⁵⁸ These are directed like CDBG funds, and may be used for site acquisition, infrastructure, site clearance and improvements, any CDBG-eligible economic development activities, housing construction, and finance-related activities.⁵⁹

BEDI targets brownfield redevelopment projects and is intended to stimulate further public and private investment.⁶⁰ BEDI loans must be used in tandem with Section 108 loan guarantees.⁶¹ Although BEDI was specifically created for brownfield redevelopment projects, the funds are not easily available for small communities because they are tied to the section 108 program, which like CDBG heavily favors entitlement communities.⁶²

⁵³ *Id.* at 29.

⁵⁴ FEDERAL PROGRAMS GUIDE, *supra* note 10, at 39. The other four programs are the Empowerment Zones and Enterprise Community Initiative, Lead-Based Paint Hazard Control Grant Program, HOME Investment Partnership Program, and Office of Community Renewal Funds. *Id.*

⁵⁵ *Id.*; *see also* BARTSCH & WELLS, *supra* note 5, at 2–3.

⁵⁶ BARTSCH & WELLS, *supra* note 5, at 6.

⁵⁷ FEDERAL PROGRAMS GUIDE, *supra* note 10, at 39.

⁵⁸ *Id.* at 40.

⁵⁹ *Id.*

⁶⁰ *Id.* at 41.

⁶¹ *Id.*

⁶² BARTSCH & WELLS, *supra* note 5, at 6.

Other federal funding mechanisms for brownfield redevelopment projects include grants, loans, and technical assistance from the U.S. Army Corps of Engineers,⁶³ the U.S. Department of Transportation,⁶⁴ and the U.S. Department of Commerce's Economic Development Agency.⁶⁵

II. STATE FUNDING

States are using many different but effective approaches to meet the challenges posed by brownfield redevelopment projects.⁶⁶ Often, these approaches are linked to development programs to ensure that projects are completed from assessment to remediation to construction.⁶⁷ States may provide direct financing through grant or loan programs,⁶⁸ or may provide tax incentives such as abatements, credits, or rebates.⁶⁹ This section of the Article provides a snapshot view of what some states offer.

A. *Massachusetts*

The Massachusetts Brownfields Act was enacted in 1998 to encourage cleanup and redevelopment of brownfields in the Commonwealth of Massachusetts.⁷⁰ The Act includes financial incentives, as well as means of liability relief.⁷¹ Three mechanisms in the Act provide financial incentives—the Brownfields Redevelopment Fund (BRF), the Brownfields Redevelopment Access to Capital (BRAC) Program, and the Brownfields Tax Credit.⁷²

The BRF, a \$30 million fund administered by MassDevelopment, finances environmental site assessments and remediation.⁷³ Eligibility

⁶³ *Id.* at 3–4.

⁶⁴ *Id.* at 4.

⁶⁵ *Id.* at 3.

⁶⁶ FEDERAL PROGRAMS GUIDE, *supra* note 10, at 60.

⁶⁷ *Id.*

⁶⁸ *Id.* at 61.

⁶⁹ *Id.* at 60–61.

⁷⁰ Massachusetts Department of Environmental Protection, Summary of the Brownfields Act: Chapter 206 of the Acts of 1998, <http://www.mass.gov/dep/cleanup/bfhdout2.htm> (last visited Apr. 14, 2007) [hereinafter Summary of Massachusetts Brownfields Act].

⁷¹ Ned Abelson et al., *Massachusetts*, in BROWNFIELDS GUIDE, *supra* note 1, at 634, 634–35.

⁷² Summary of Massachusetts Brownfields Act, *supra* note 70.

⁷³ MassDevelopment, Financing: Brownfields Redevelopment Fund, http://www.massdevelopment.com/financing/lg_brownfields.aspx (last visited Apr. 14, 2007) [hereinafter MassDevelopment].

is contingent upon three factors: (1) projects must be located in “Economically Distressed Areas” and must create new jobs or contribute to the economic or physical revitalization of the area; (2) the funding must be necessary for the project’s financial feasibility; and (3) the eligible applicant cannot be subject to any outstanding environmental enforcement action within Massachusetts.⁷⁴ Grants are only given to municipalities; redevelopment and economic development authorities and agencies; and economic development, community development, and industrial corporations.⁷⁵ Loans are given to applicants that can provide matching funds.⁷⁶ The BRF’s Brownfields Site Assessment Program provides up to \$50,000 per project for an environmental site assessment.⁷⁷ For environmental cleanup, the Brownfields Remediation Program of the BRF finances up to \$500,000.⁷⁸ Funding is only available for cleanup that is part of a redevelopment project.⁷⁹

The BRAC Program is a \$15 million fund, administered by Mass-Business, that encourages private lending on brownfield sites.⁸⁰ BRAC backs private sector loans for site assessment and cleanup with environmental insurance to guarantee that cleanups are completed and loans repaid.⁸¹ Program assets pay for insurance premiums, excess deductibles, loan guarantees, and cleanup costs if a project is not completed.⁸² BRAC Program assistance is available for loans on any brownfield site in Massachusetts.⁸³ However, borrowers must borrow from Massachusetts lenders that signed a participation agreement with MassBusiness.⁸⁴

The Brownfields Tax Credit covers a portion of the costs incurred in the rehabilitation of contaminated property.⁸⁵ If the taxpayer uses an Activity and Use Limitation (AUL), the credit is twenty-five percent of the rehabilitation costs.⁸⁶ If an AUL is not used, a fifty percent credit is

⁷⁴ Summary of Massachusetts Brownfields Act, *supra* note 70.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ MassDevelopment, *supra* note 73.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Abelson et al., *supra* note 71, at 647.

⁸¹ Summary of Massachusetts Brownfields Act, *supra* note 70.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Massachusetts Department of Environmental Protection, Cleanup of Sites & Spills, Tax Incentives, <http://www.mass.gov/dep/cleanup/brtxinc.htm> (last visited Apr. 14, 2007) [hereinafter Tax Incentives].

⁸⁶ Summary of Massachusetts Brownfields Act, *supra* note 70.

given.⁸⁷ The credit is given after cleanup is complete, and can be carried over for five years.⁸⁸ The site for which the credit is received must be located in an “Economically Distressed Area.”⁸⁹ Credits are not allowed to be taken on funds from the BRF or BRAC Program.⁹⁰ The following taxpayers are eligible: corporate trusts, corporations included in a combined return, corporations, non-profit organizations, partnerships, S corporations, sole proprietors, and trusts.⁹¹ The taxpayer must own or lease the site for business purposes, and must not have owned or operated the site at the time of the contamination, or have caused or contributed to the contamination.⁹² The taxpayer must complete the cleanup by January 1, 2007.⁹³ If the taxpayer does not maintain a “permanent solution or remedy operation status” before property is sold or the lease terminated, the tax credit will be lost.⁹⁴

B. *New York*

New York State has an extensive array of programs and resources to foster brownfield cleanup and remediation within its jurisdiction.⁹⁵ The programs span numerous state agencies and entities.⁹⁶ Central to New York’s brownfield financing scheme is New York’s Superfund/Brownfield law. Enacted in 2003, this law contains three major financial incentives for brownfield redevelopment—the Brownfield Cleanup Program (BCP), the Brownfield Opportunity Areas (BOA) Program, and the 1996 Clean Water/Clean Air Bond Act’s Environmental Restoration Program (ERP).⁹⁷ These three programs are administered by the New York State Department of Environmental Conservation.⁹⁸ To further encourage brownfield redevelopment, partnerships exist with various other state agencies and entities, and provide additional financial incen-

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Tax Incentives, *supra* note 85.

⁹² Summary of Massachusetts Brownfields Act, *supra* note 70.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See generally N.Y. STATE DEP’T. OF ENVTL. CONSERVATION, BROWNFIELDS: TRANSFORM THE PAST, BUILD FOR THE FUTURE, FINANCIAL RESOURCES MANUAL (2003), available at http://www.dec.state.ny.gov/docs/remediation_hudson_pdf/brownmanual.pdf [hereinafter N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL].

⁹⁶ *Id.* at 2-3.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2-4.

tives in three areas: (1) grants, reimbursements, and contractual funding; (2) loans and loan guarantees; and (3) tax incentives.⁹⁹

The BCP provides financial incentives for brownfield redevelopment through tax credits, as well as liability release and technical assistance.¹⁰⁰ There are three components of the redevelopment tax credit: (1) site preparation credits; (2) tangible property credits; and (3) on-site groundwater remediation credits.¹⁰¹ For each component, there are credits of twelve percent for business taxes and ten percent for personal taxes.¹⁰² However, if there are no use restrictions after cleanup, these credits increase to fourteen percent and twelve percent, respectively.¹⁰³ If at least half the site is located in an area deemed an “environmental zone” by the Commissioner of Economic Development—an area with a

⁹⁹ In addition to the three major financial incentives for brownfield redevelopment in New York’s Superfund/Brownfield law, as discussed above, grants, reimbursements, and contractual funding are also provided through the following programs: Department of Environmental Conservation’s Hudson River Estuary Grants Program, Water Quality Improvement Projects; Department of Health’s Drinking Water State Revolving Fund Program; Department of Labor, Division of Safety and Health’s Occupational Safety and Health Training and Education Grants; Department of Motor Vehicles, Governor’s Traffic Safety Committee’s Highway Safety Grant Program; Department of State, Division of Coastal Resources’ Local Waterfront Revitalization Program; Department of Transportation’s Industrial Access Program, Transportation and Community and System Preservation Pilot Program, and Transportation Enhancements Program; Education Department’s Local Government Records Management Improvement Fund; Empire State Development’s New York State Incentive Programs; Energy Research and Development Authority’s New York Energy Smart New Construction Program; Governor’s Office of Small Cities’ Community Development Strategic Plan Technical Assistance Grant Program and Small Cities Community Development Block Grants Program; Housing Finance Agency’s New York State Affordable Housing Corporation’s Affordable Home Ownership Development Program; Housing Trust Fund Corporation’s HOME Program and Low-Income Housing Trust Fund Program; Hudson River Valley Greenway’s Communities Council Planning Grants, Greenway Compact Grant Program, and Greenway Water and Land Trail Grants; Office of Parks, Recreation and Historic Preservation’s Acquisition Program, Heritage Areas Program, Historic Preservation Program, and Parks Program. *Id.* at 2-7 to -8.

Loan and loan guarantees are provided through the following entities’ programs: Department of Health’s Drinking Water State Revolving Fund Program; Department of Transportation’s Industrial Access Program; Division of Housing and Community Renewal’s Housing Development Fund and Senior Housing Initiative; Empire State Development’s New York State Incentive Programs; Environmental Facilities Corporation’s Clean Water State Revolving Fund Program; Industrial Finance Program; Housing Finance Agency’s Secured Loan Rental Housing Program; Housing Trust Fund Corporation’s HOME Program, Homes for Working Families Program, and Low-Income Housing Trust Fund Program. *Id.* at 2-7 to -9. Tax incentives also are provided through Empire State Development’s New York State Incentive Programs. *Id.* at 2-7 to -9.

¹⁰⁰ *Id.* at 2-13.

¹⁰¹ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-14.

¹⁰² *Id.*

¹⁰³ *Id.*

poverty rate of at least twenty percent and an unemployment rate that is one and a quarter times the state's average unemployment rate—the credit will be increased by eight percent.¹⁰⁴ Credits for real property taxes are also included in the BCP.¹⁰⁵ Tax credits are based on the number of employees the developer employs, up to 100 employees, and are increased for employment in environmental zones.¹⁰⁶ Both “participants” and “volunteers” are eligible to participate in the program.¹⁰⁷ Participants are parties that owned or operated the site at the time of the contamination, or caused or contributed to the contamination.¹⁰⁸ Volunteers are parties other than participants that have taken “reasonable steps” regarding the site's contamination.¹⁰⁹ Credits cannot be received until the party completes remediation of the site.¹¹⁰

The BOA Program provides grants and technical assistance to municipalities and community-based organizations to conduct brownfield redevelopment planning and site assessments.¹¹¹ Grants are provided to cover up to ninety percent of these costs.¹¹² Community-based organizations are eligible if they have 501(c)(3) tax-exempt status, have a mission dedicated to brownfield redevelopment in their area, represent a community with demonstrated financial need, and have one quarter of their board members living in the community.¹¹³ Sites must be owned by a municipality or a volunteer.¹¹⁴ A site designated as a BOA receives priority consideration for ERP funding.¹¹⁵

The ERP provides financial incentives for brownfield redevelopment through reimbursement grants, as well as liability protection and technical assistance.¹¹⁶ A fund of \$200 million was created for the ERP under the 1996 Clean Water/Clean Air Bond Act.¹¹⁷ Out of this fund, municipalities can be reimbursed up to ninety percent for on-site investigation and remediation, and 100% for off-site remediation, if re-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-13.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2-15.

¹¹¹ *Id.* at 2-3.

¹¹² *Id.* at 2-17.

¹¹³ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-17.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2-17, 2-19.

¹¹⁶ *Id.* at 2-19.

¹¹⁷ *Id.*; *see* N.Y. ENVTL. CONSERV. LAW § 56-0601 (McKinney Supp. 2004).

quired by the Department of Environmental Conservation.¹¹⁸ Remediation can include cleanup of soil and groundwater contamination.¹¹⁹ A municipal cost share is required.¹²⁰ Costs incurred for building and asbestos removal, if included, may be reimbursed up to fifty percent.¹²¹ Projects are evaluated for grants under five criteria: (1) benefit to the environment; (2) economic benefit to the state; (3) potential for public or recreational use of the property; (4) real property in a BOA; and (5) availability of other funding sources.¹²² Sites may be used for industrial, commercial, residential, or public use.¹²³

C. Pennsylvania

Pennsylvania provides loans, grants, and tax credits as financial incentives to encourage brownfield redevelopment. Financial incentives fall under numerous programs.¹²⁴ Prominent amongst the assessment and cleanup funding sources are the Industrial Sites Reuse Program, the Infrastructure Development Program, the Brownfield Inventory Grants (BIG) Program, and Pennsylvania Infrastructure and Investment Authority (PENNVEST) loans. Through the Industrial Sites Reuse Program, municipalities and private entities are provided with loans and grants for site assessment and remediation.¹²⁵ Up to \$200,000 is given for site assessments from the Industrial Sites Cleanup Fund and \$1 mil-

¹¹⁸ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-19.

¹¹⁹ *Id.* at 2-3.

¹²⁰ *Id.*

¹²¹ *Id.* at 2-3 to 2-4.

¹²² *Id.* at 2-19.

¹²³ *Id.*

¹²⁴ Programs include: Brownfield Inventory Grants (BIG), Growing Greener Initiative, Industrial Sites Reuse Program, Infrastructure Development Program, Job Creation Tax Credit Program, Key Sites Initiative, Keystone Opportunity Zones and Expansion Zones, Business in Our Sites, Building PA, Tax Increment Financing Guarantee Program, Infrastructure Facilities Improvement Program, New PA Venture Guarantee Program, New PA Venture Capital Investment Program, 2nd Stage Loan Program, Pennsylvania Infrastructure and Investment Authority (PENNVEST) Brownfields Loans. See U.S. ENVTL. PROT. AGENCY, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES 45 (2006), available at http://epa.gov/brownfields/pubs/st_res_prog_report.htm [hereinafter STATE BROWNFIELDS PROGRAMS]; see also PA. LAND RECYCLING PROGRAM, FINANCIAL INCENTIVES (on file with author) [hereinafter PA. LAND RECYCLING]. More financial incentives are available for brownfield redevelopment in Pennsylvania. Commonwealth of Pennsylvania, Department of Environmental Protection, Financial Incentives, <http://www.depweb.state.pa.us> (click on "Brownfield Redevelopment" hyperlink in pull-down menu under "Land Topics;" then expand "Brownfield Redevelopment" hyperlink and click on "Financial Incentives").

¹²⁵ STATE BROWNFIELDS PROGRAMS, *supra* note 124.

lion per year is given for remediation from the Industrial Sites Environmental Assessment Fund.¹²⁶ However, funding cannot exceed seventy-five percent of the total costs.¹²⁷ Loans have a two percent interest rate for terms of five years for assessments and fifteen years for remediation.¹²⁸ Both loans and grants require a twenty-five percent match.¹²⁹ Both private and public developers can receive grants and loans for site clearance, remediation, and construction through the Infrastructure Development Program.¹³⁰ Funding cannot exceed \$1.25 million per project.¹³¹ Loans carry a three percent interest rate for fifteen years.¹³² The BIG program provides up to \$50,000 to cities and economic development agencies for brownfield inventories.¹³³ Thirty percent of PENNVEST's Clean Water State Revolving Loan Fund is earmarked for municipalities for brownfield redevelopment financing.¹³⁴ Loans up to \$11 million are made per project, per municipality.¹³⁵ If projects serve more than one municipality, the loan amount is increased to \$20 million.¹³⁶

Significant tax incentive programs for brownfield redevelopment in Pennsylvania include Keystone Opportunity Zones (KOZ), Keystone Opportunity Expansion Zones (KOEZ) and the Tax Increment Financing (TIF) Guarantee Program.¹³⁷ In areas designated as KOZs or KOEZs, certain state and local taxes may be forgiven for property owners, residents, and businesses¹³⁸ until 2010 for KOZs or 2013 for KOEZs.¹³⁹ Through the TIF program, municipalities can take loans for

¹²⁶ PA. LAND RECYCLING, *supra* note 124.

¹²⁷ STATE BROWNFIELDS PROGRAMS, *supra* note 124; PA. LAND RECYCLING, *supra* note 124.

¹²⁸ STATE BROWNFIELDS PROGRAMS, *supra* note 124; PA. LAND RECYCLING, *supra* note 124.

¹²⁹ STATE BROWNFIELDS PROGRAMS, *supra* note 124; PA. LAND RECYCLING, *supra* note 124.

¹³⁰ STATE BROWNFIELDS PROGRAMS, *supra* note 124; PA. LAND RECYCLING, *supra* note 124.

¹³¹ STATE BROWNFIELDS PROGRAMS, *supra* note 124.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ STATE BROWNFIELDS PROGRAMS, *supra* note 124; PA. LAND RECYCLING, *supra* note 124.

¹³⁸ PA. LAND RECYCLING, *supra* note 124.

¹³⁹ STATE BROWNFIELDS PROGRAMS, *supra* note 124.

development of “blighted areas.”¹⁴⁰ New tax revenues, generated as a result of the redevelopment, are used to repay the loan.¹⁴¹

D. Ohio

Ohio has many funding mechanisms available for brownfield projects. In 2000, Ohio voters approved a \$400 million bond issuance to establish a grant program to fund the assessment and remediation of brownfields, preserve green space and farmland, and create trails.¹⁴² The \$200 million brownfield portion of these funds is administered by the Ohio Department of Development’s (ODOD) Office of Urban Development, in cooperation with the Ohio Environmental Protection Agency.¹⁴³ The brownfield funding is split into two distinct funds: the Clean Ohio Assistance Fund and the Clean Ohio Revitalization Fund.¹⁴⁴ As of October 2006, \$145.6 million had been expended on brownfield projects from both funds, with an expected leveraging of \$2.2 billion from other funding sources.¹⁴⁵

The Clean Ohio Assistance Fund is a \$10 million annual fund that is available in eligible areas of the state.¹⁴⁶ The funds may be used for Phase I and Phase II site assessments, cleanup activities, and projects that benefit public health.¹⁴⁷ Eligible areas are those defined as distressed or located in an inner city area, and those that constitute an area of situational distress or a labor surplus area.¹⁴⁸ Eligible applicants include townships, municipalities, counties, port authorities, and conservancy districts.¹⁴⁹

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See OHIO REV. CODE ANN. §§ 122.651–.659 (West 2002 & Supp. 2006); see also Welcome to the Clean Ohio Fund, <http://www.clean.ohio.gov> (last visited Apr. 17, 2007).

¹⁴³ Ohio Department of Development, Urban Development in Ohio, <http://www.odod.state.oh.us/ud> (last visited Apr. 17, 2007).

¹⁴⁴ See *id.*

¹⁴⁵ CLEAN OHIO FUND, GOVERNOR BOB TAFT’S CLEAN OHIO FUND SITE TOUR (Oct. 4, 2006), available at <http://www.taftnews.com/releases> (click on “10/04/06—Taft Announces Statewide Clean Ohio Projects” hyperlink; then click on “Complete list of statewide Ohio funds awarded to date” hyperlink).

¹⁴⁶ Ohio Department of Development, Clean Ohio Assistance Fund, <http://www.odod.state.oh.us/ud/COAF.htm> (last visited Apr. 17, 2007).

¹⁴⁷ *Id.*

¹⁴⁸ OHIO DEPT. OF DEV., CLEAN OHIO ASSISTANCE FUND POLICIES § 1.03, at 1 (2006), available at <http://www.odod.state.oh.us/UD> (click on “Clean Ohio Assistance Fund” hyperlink; then click on “General COAF Policies” hyperlink) (promulgated pursuant to OHIO REV. CODE ANN. § 122.656 (West 2002)).

¹⁴⁹ *Id.* § 1.01.

If the \$10 million allotment is not awarded in a calendar year, ODOD may carry the balance forward to the following year.¹⁵⁰ Although ODOD may set deadlines for applications,¹⁵¹ to date applications have been accepted and reviewed on an on-going basis. The maximum amount awarded is \$8,000 for a Phase I assessment, \$15,000 for a Phase I assessment plus asbestos survey, \$300,000 for a Phase II assessment, and \$750,000 for cleanup activities, unless the Director of Development determines that more investment is necessary to further economic development goals.¹⁵²

The Clean Ohio Revitalization Fund is a competitive grant program that most recently announced Round 4 of the program, with \$43 million available for that round.¹⁵³ Eligible applicants include townships, municipalities, counties, port authorities, and conservancy districts.¹⁵⁴ Eligible activities do *not* include site assessments, but only cleanup or remediation, such as infrastructure costs, removal of hazardous or petroleum waste, and soil and water cleanup to applicable standards.¹⁵⁵ Removal of tires and solid waste are also not eligible costs.¹⁵⁶ The maximum amount available per project from this fund is \$3 million.¹⁵⁷

The selection criteria for Clean Ohio Revitalization Funds include the following considerations: economic improvement, which includes known end-user, property valuation, infrastructure usage, tax revenues, job creation or retention, job quality, vacant property designation, and ownership status; environmental improvement, including remedy selection, proximity to receptors, exposure potential, sustainable redevelopment and green building practices, orphan property designation, contribution from potentially responsible parties (PRPs), and reuse of existing structures or materials; match, including percentage participation in project, percentage participation by the applicant, and private

¹⁵⁰ *Id.* § 8.01, at 7–8.

¹⁵¹ *Id.* § 5.01, at 5.

¹⁵² OHIO DEPT. OF DEV., CLEAN OHIO ASSISTANCE FUND REVISED ELIGIBLE COST POLICIES (2004), available at <http://www.odod.state.oh.us/UD> (click on “Clean Ohio Assistance Fund” hyperlink; then click on “Policies on Size of Grants” hyperlink).

¹⁵³ Ohio Department of Development, CORF Round 4, <http://www.odod.state.oh.us/ud/CORFRoundFour.htm> (last visited Apr. 17, 2007).

¹⁵⁴ OHIO DEPT. OF DEV., ROUND 4 CLEAN OHIO REVITALIZATION FUND POLICIES 1 (2006), available at <http://www.odod.state.oh.us/UD/CORFRoundFour.htm> (click on “CORF Round 4 Policies” hyperlink) (established pursuant to OHIO REV. CODE ANN. § 122.657 (West 2002)).

¹⁵⁵ *See id.* § 3, at 2.

¹⁵⁶ *Id.* § 3.10, at 3.

¹⁵⁷ *Id.* § 8.03, at 11.

match contributions; benefit to low-income communities; project viability, including the percentage of dollars used toward cleanup and demolition, strategic plan existence, community outreach, and industrial or research and development end user; combination of uses; and whether the applicant requests that a portion of the funds be awarded as a loan rather than a grant.¹⁵⁸

In addition to the Clean Ohio Fund programs, ODOD offers below-market rate loans from a Brownfield Revolving Loan Fund.¹⁵⁹ In 2005, ODOD, along with three other applicants, received joint funding in the amount of \$4 million from EPA.¹⁶⁰ Eligible borrowers include both public and private entities who are not subject to CERCLA liability for the site in question.¹⁶¹ Eligible activities for funding include any costs associated with removing, mitigating, or preventing the release or threatened release of contaminants, including fencing, site security measures, drainage control, removing or capping contaminated soils, bioremediation, removing hazardous substances, and disposal of hazardous materials.¹⁶² Site assessments are not an eligible cost.¹⁶³ This fund requires collateral, as well as the payment of a non-refundable application fee of \$1500 and a processing or servicing fee for loans over \$1 million.¹⁶⁴

Ohio uses parts of its Water Pollution Control Loan Fund to address brownfield sites that affect water quality.¹⁶⁵ This fund is available to both private and public entities.¹⁶⁶ This money may be used for site

¹⁵⁸ See generally CLEAN OHIO FUND, 2006 CLEAN OHIO REVITALIZATION FUND ROUND FOUR APPLICATION, GUIDANCE FOR PART C (2006), available at <http://www.odod.state.oh.us/ud/CORFRoundFour.htm> (click on "CORF Part C Scoring Guidance" hyperlink).

¹⁵⁹ OHIO DEPT. OF DEV., BROWNFIELD REVOLVING LOAN FUND (BRLF) PROGRAM POLICIES 1 (2006), available at <http://www.odod.state.oh.us/ud/BCRLF.htm> (click on "Brownfield Revolving Loan Fund Policies" hyperlink) [hereinafter BRLF PROGRAM POLICIES].

¹⁶⁰ See U.S. ENVTL. PROT. AGENCY, BROWNFIELDS 2005 GRANT FACT SHEET: OHIO DEPARTMENT OF DEVELOPMENT 560-F-05-197 (2005), available at <http://www.epa.gov/brownfields/05grants/ohiodod.pdf>.

¹⁶¹ *Id.*; BRLF PROGRAM POLICIES, *supra* note 159, at 1–2.

¹⁶² BRLF PROGRAM POLICIES, *supra* note 159, at 1–2.

¹⁶³ *Id.* at 2.

¹⁶⁴ *Id.* at 3.

¹⁶⁵ See generally Ohio Environmental Protection Agency, Division of Environmental and Financial Assistance, Water Pollution Control Loan Fund, <http://www.epa.state.oh.us/defa/wpclf2.html> (last visited Apr. 17, 2007).

¹⁶⁶ *Id.*

assessments, design, and remediation to the extent that they affect water quality.¹⁶⁷

Finally, property that is taken through Ohio's Voluntary Action Program (VAP) is granted a tax exemption by the State and receives a covenant not to sue from Ohio's Environmental Protection Agency.¹⁶⁸ The tax exemption covers the increased assessed value of land improvements, buildings, fixtures, and structures that exist at the time the tax abatement order is granted.¹⁶⁹ The County Auditor's Office maintains a list of properties in that county that have received the abatement.¹⁷⁰

The states discussed above are not the only states that offer brownfield funding assistance. For help in finding what individual states offer, call or visit the homepage of one of eight Environmental Finance Centers,¹⁷¹ EPA's State Brownfield and Voluntary Response Program update,¹⁷² or the Northeast-Midwest Institute.¹⁷³

III. OTHER FUNDING OPTIONS

Local governments are also potential sources for brownfield funding. In addition to money that has been funneled through cities from the federal or state governments for brownfield or economic development projects, municipalities, counties, and port authorities often have bonding authority.¹⁷⁴ Local governments also may offer loans, loan guarantees, tax incentives, and grants.¹⁷⁵ One tax incentive is called "tax increment financing," wherein the increased tax revenue derived from a project is set aside into a special fund to pay for infrastructure, remediation, or other costs associated with that project.¹⁷⁶

¹⁶⁷ Ohio Environmental Protection Agency, Division of Environmental and Financial Assistance, The WPCLF Community Guide: A User's Guide to the Ohio Water Pollution Control Loan Fund, <http://www.epa.state.oh.us/default/comguide> (last visited Apr. 17, 2007).

¹⁶⁸ See OHIO REV. CODE ANN. § 5709.87 (West 2002).

¹⁶⁹ *Id.* § 5709.87(A)(2)(c).

¹⁷⁰ *Id.*

¹⁷¹ See U.S. Environmental Protection Agency, Environmental Finance Program, Environmental Finance Center Network, <http://www.epa.gov/efinpage/efc.htm> (last visited Apr. 17, 2007).

¹⁷² See STATE BROWNFIELDS PROGRAMS, *supra* note 124.

¹⁷³ See Northeast-Midwest Institute, <http://www.nemw.org> (last visited Apr. 17, 2007).

¹⁷⁴ See, e.g., OHIO REV. CODE §§ 761.03, 4582.06; see also BARTSCH & WELLS, *supra* note 5, at 29–35.

¹⁷⁵ See generally BARTSCH & WELLS, *supra* note 5, at 29–35.

¹⁷⁶ See U.S. Environmental Protection Agency, Brownfields Cleanup and Redevelopment: Available Funding Mechanisms, <http://www.epa.gov/brownfields/funding.htm> (last visited Apr. 17, 2007) [hereinafter U.S. EPA, Available Funding]; see also Ohio Department

Private sector funding for brownfield redevelopment is increasing.¹⁷⁷ Such financial assistance comes from both non-profit organizations and for-profit corporations. Non-profit corporations, such as those with 501(c)(3) tax-exempt status, and intellectual or philanthropic foundations, are the two types of entities providing private funding in the non-profit sector.¹⁷⁸ Non-profit corporations leverage public funding with private capital.¹⁷⁹ This is often accomplished through revolving funds.¹⁸⁰ Revolving funds provide loans to parties who, in turn, reimburse the fund with the principle plus interest.¹⁸¹ This payback allows the fund to continue providing the same or increased levels of funding.¹⁸² Revolving funds typically finance the cleanup of the brownfield site, which induces for-profit lenders and developers to finance the site's redevelopment.¹⁸³ On the other hand, foundations provide grants, rather than loans, for brownfield revitalization.¹⁸⁴ While each foundation has its own specific focus, many provide grants to foster environmental or economic redevelopment in urban areas.¹⁸⁵

Private financing from for-profit entities comes from venture capital firms—which are usually associated with developers—and lending institutions.¹⁸⁶ Venture capital and development companies typically do not become involved with a site until funding is leveraged for site assessments, demolition, remediation, infrastructure improvements, and general site preparation.¹⁸⁷ Securing funding in these areas supports liability protection and financial incentives, and reduces or quantifies remediation costs—three factors that encourage venture capital and development companies to acquire the site.¹⁸⁸ Lending institutions, such as commercial banks, often require venture capital or private non-profit involvement.¹⁸⁹ Banks often look to prior brownfield redevelop-

of Development, Tax Increment Financing, <http://www.odod.state.oh.us/edd/tif> (last visited Apr. 17, 2007).

¹⁷⁷ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-269.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ U.S. EPA, Available Funding, *supra* note 176.

¹⁸² *Id.*

¹⁸³ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-269.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 2-270.

¹⁸⁸ *Id.*

¹⁸⁹ N.Y. BROWNFIELDS FINANCIAL RESOURCES MANUAL, *supra* note 95, at 2-270.

ment experiences when considering loans.¹⁹⁰ Furthermore, a sole lender may be reluctant or unable to finance an entire project.¹⁹¹ If all parties contributing to the financing are credit-worthy borrowers, the commercial lender will often enter into a partnership agreement with them.¹⁹² Commercial lenders also consider insurance and the proposed land leases in their loan considerations.¹⁹³

IV. INSURANCE OPTIONS

The real estate lawyer of yore was primarily concerned with issues such as clear title, zoning restrictions, and financing when representing a buyer of property, as well as with selling the property "as is" when representing a seller.¹⁹⁴ These remain important issues, but the possibility that the real estate is contaminated and that liability will transfer with title is now an additional concern.¹⁹⁵ As a result of this new liability issue, litigation arose between insureds and their carriers who argued over coverage for site conditions.¹⁹⁶ By 1986, absolute pollution exclusions in insurance policies were common.¹⁹⁷

Nevertheless, sites today may be covered under historic insurance policies, regardless of whether property title has transferred.¹⁹⁸ Many types of old policies may cover residual contamination, such as comprehensive general liability, auto, garage, environmental impairment, first-party property, and personal injury policies.¹⁹⁹ Many offered coverage first for accidents, then for occurrences, or sudden events, all of which in some way could cover spills and contamination.²⁰⁰ It was not until 1985 that the insurance industry implemented what is commonly called the "absolute pollution exclusion."²⁰¹ Before then, any ambiguity in the policy, which was basically a contract, had to be resolved in favor of the insureds.²⁰²

¹⁹⁰ *Id.* at 2-270 to 2-271.

¹⁹¹ *Id.* at 2-271.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Fersko & Waeger, *supra* note 1.

¹⁹⁵ *See id.* at 165-66; Simons, *supra* note 3.

¹⁹⁶ *See* Fersko & Waeger, *supra* note 1, at 166.

¹⁹⁷ *Id.*

¹⁹⁸ *See* Simons, *supra* note 3, at 101.

¹⁹⁹ Diane R. Archangeli & Ricky S. Torrey, *Using Old Insurance Policies as Weapons*, in *BROWNFIELDS GUIDE*, *supra* note 1, at 175, 176-77.

²⁰⁰ *Id.* at 177.

²⁰¹ *Id.* at 178.

²⁰² *Id.* at 176.

There are several steps to determining coverage under old policies. First, one has to look for the policies in the current and previous owners' records, which may be in warehouses, basements, or other storage facilities.²⁰³ The best evidence is the actual executed policy, with secondary evidence including certificates, partial policies, letters that contain policy numbers, management and corporate records, financial ledgers, schedules, and correspondence.²⁰⁴ Some use the phrase "insurance archeology" to describe the systematic recovery and analysis of old policies to determine coverage.²⁰⁵

Issues may arise with successor corporations or with new property owners, especially if the policies were not assignable by their own terms.²⁰⁶ Courts have held that corporate mergers or consolidations, or transfers of liability to a new property owner coupled with an event that would have been covered for the predecessor, are enough to deem that coverage is appropriate.²⁰⁷

However, defenses surely exist when trying to collect on an old policy. Coverage may be denied if certain persons in the organization knew or could reasonably have been expected to know that a pollution condition existed prior to purchasing the policy, but failed to disclose the condition.²⁰⁸ Other defenses include late notice, dispute over whether property damage is equal to the cost of remediation, whether the property damage took place during the policy period, and the transferability of the policy to successor corporations or property owners.²⁰⁹ In addition, coverage may be denied if the insured made payments toward remedial measures or assumed the obligation to clean up the site.²¹⁰

Newer insurance mechanisms can offer protection for on-site or off-site remediation, property damage, and bodily injury resulting from contamination.²¹¹ Insurance providers have realized that the reward of investing in brownfield projects outweighs the risk, and coverage is

²⁰³ *Id.* at 175.

²⁰⁴ *Id.*

²⁰⁵ Archangeli & Torrey, *supra* note 199, at 175.

²⁰⁶ *See id.* at 177.

²⁰⁷ *Id.*

²⁰⁸ *See id.* at 182; *see also* KRISTEN R. YOUNT & PETER B. MEYER, N. KY. UNIV., ENVIRONMENTAL INSURANCE PRODUCTS AVAILABLE FOR BROWNFIELDS REDEVELOPMENT 14 (2005), available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf.

²⁰⁹ Archangeli & Torrey, *supra* note 199, at 180–82.

²¹⁰ *Id.* at 183–84.

²¹¹ Fersko & Waeger, *supra* note 1, at 167.

evolving rapidly.²¹² The two most common policies are liability-related policies and cost cap policies.

Pollution liability policies are widely used and protect against claims for third-party cleanup costs, bodily injury, and property damage, as well as certain legal fees.²¹³ Cost cap insurance is available for sites where assessments are complete and a remediation plan is in place, but cleanup costs exceed the estimated amount.²¹⁴ Cost cap insurance may be combined with liability coverage.²¹⁵

Secured lender policies are also available; these protect lenders from losses due to site contamination.²¹⁶ These policies benefit property owners and developers because they may increase a lender's willingness to provide financing for the project.²¹⁷ Coverage is usually conditional on loan default, and the lender usually receives the loan balance or the cost of remediation.²¹⁸

V. CONTRIBUTIONS FROM POTENTIALLY RESPONSIBLE PARTIES

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),²¹⁹ commonly referred to as Superfund, may provide avenues for funding brownfield cleanups. It provides three avenues for actions against potentially responsible parties (PRPs), through section 107—cost recovery—and two through section 113—contribution.²²⁰

Specifically, section 107 provides that PRPs²²¹ are liable for costs of removal or remediation incurred by the U.S. government²²² and for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”²²³ Courts have construed this provision as a cost recovery provision, which is avail-

²¹² *Id.* at 166.

²¹³ YOUNT & MEYER, *supra* note 208, at 1.

²¹⁴ *Id.* at 1–2.

²¹⁵ *Id.* at 28.

²¹⁶ *Id.* at 3.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ 42 U.S.C. §§ 9601–9675 (2000 & Supp. IV 2004).

²²⁰ See *Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 163 (2004); *Consol. Edison Co., v. UGI Utilities Inc.*, 423 F.3d 90, 94–95 (2d Cir. 2005); see also 42 U.S.C. §§ 9607(a), 9613(f). This Article provides only a summary of cost recovery; a thorough discussion of this concept would constitute a separate law review article.

²²¹ See 42 U.S.C. § 9607(a); *Aviall*, 543 U.S. at 161.

²²² 42 U.S.C. § 9607(a)(4)(A); *Aviall*, 543 U.S. at 161.

²²³ 42 U.S.C. § 9607(a)(4)(B). The National Contingency Plan establishes procedures and standards for cleanup of hazardous substances. See *id.* § 9605; 40 C.F.R. pt. 300 (2005).

able to innocent parties who voluntarily clean up property.²²⁴ Courts are divided, however, on whether PRPs can recover from other parties under this section. The U.S. Court of Appeals for the Third Circuit has held that a PRP cannot seek cost recovery under CERCLA section 107,²²⁵ while other circuits have held that section 107 cost recovery is available both to innocent parties and PRPs.²²⁶ However, it is required that the National Contingency Plan be followed, which may not be a requirement for state voluntary cleanup programs and thus may effect an entity's ability to recover costs under section 107.²²⁷

Section 113(f)(1) of CERCLA provides for contribution from other PRPs as follows:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.²²⁸

Similarly, section 113(f)(3)(B) provides that a PRP who *settles its claims* with the U.S. government or a state can seek contribution from other non-settling PRPs.²²⁹ Cost recovery for PRPs might thus be limited to those situations where the government has sued the PRP, or at least settled its CERCLA claims.²³⁰

²²⁴ E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 530 (3d Cir. 2006) (citing New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120 (3d Cir. 1997)).

²²⁵ E.I. DuPont de Nemours, 460 F.3d at 518, 541-42.

²²⁶ See, e.g., Atlantic Research Corp. v. United States, 459 F.3d 827, 829 (8th Cir. 2006); Consol. Edison Co. v. UGI Utilities Inc., 423 F.3d 90, 100 (2d Cir. 2005). The Court in *Avi-all* declined to address the issue because Aviall wrapped its section 107 claim into its section 113 claim in the lower court. *Aviall*, 543 U.S. at 168-70. The U.S. Supreme Court did address the issue tangentially, but not directly, in *Key Tronic Corp. v. United States*, by noting that section 107 and section 113 are distinct remedies. 511 U.S. 806, 812-13, 815-16 (1994). It is likely that the Court will consider the issue directly in the near future.

²²⁷ See *supra* note 223.

²²⁸ 42 U.S.C. § 9613(f)(1).

²²⁹ *Id.* § 9613(f)(3)(B).

²³⁰ Cost recovery under federal law is currently an ongoing issue in many courts.

States may also offer cost recovery as part of their cleanup programs, whether they are CERCLA-type programs or voluntary programs.²³¹ CERCLA-type programs may be subject to the same issues that are being litigated today; namely, the difference between the cost recovery mechanism that is available to PRPs versus non-PRPs. The voluntary cleanup cost recovery actions available in states logically will differ just as each program differs.

CONCLUSION

There are many brownfield funding mechanisms available for patient and diligent developers—both for- and not-for-profit—as well as governmental entities. Brownfield projects often take time and money to overcome unknown site conditions or known environmental contamination. It is imperative that brownfield sites be revitalized, however, to re-energize our cities and prevent urban sprawl.²³²

Grant and loan programs are available on the federal, state, and local levels. These programs include funding for both environmental assessments and clean-up requirements. Most funding programs prohibit a potentially responsible party from receiving the monetary assistance. Recipients of state money often must follow that state's voluntary clean-up program requirements at the site to be eligible for funding. Most grant and loan programs take a significant amount of time from putting together the application to receipt of award. Nevertheless, these federal and state dollars can contribute a significant amount of money to a project.

In addition, old insurance policies may cover the cleanup of contamination that is discovered during property revitalization activities. Likewise, newer insurance mechanisms can make buyers and sellers of property more comfortable with moving the transaction forward.

Finally, cost recovery through federal or state laws might be an option on certain sites. These provisions generally allow a volunteer to obtain cost recovery from Potentially Responsible Parties (PRPs), and PRPs to obtain contribution from other PRPs. This process also can be time-consuming, but nonetheless remains an option.

²³¹ See, e.g., OHIO REV. CODE ANN. § 3746.23 (West 2006).

²³² Many resources are available to help craft brownfield funding portfolios. These resources include EPA's brownfield and environmental finance programs; the Environmental Finance Center Network (which has finance centers located across the country); the Rocky Mountain Institute; the Environmental Council of States; the Northeast-Midwest Institute; and the National Association of Local Government Environmental Professionals.