



MOHAWK VALLEY BROWNFIELD DEVELOPERS SUMMIT

Limiting Liability & Land Reuse – The Tools to Facilitate Brownfield
Redevelopment and Overcoming Liability

April 12-13, 2022

Linda Shaw, Esq.



Liability Liability Liability

- At one of the first Brownfield Conference held in Pittsburgh in 1991, this one word was the reason that a large corporation gave for not selling their real estate.
- Environmental Liability results from ownership of contaminated real estate.
- The automatic joint and several liability scheme in both federal and state environmental law has created brownfield areas and often prevents municipalities from stepping in to help.
- Today, we hope to help you understand how to overcome environmental liability challenges utilizing a variety of both federal and state relief mechanisms.

Topic 1 – FEDERAL MUNICIPAL LIABILITY EXEMPTION

June 15, 2020 US EPA Memorandum - **Superfund Liability Protections for Local Government Acquisitions**

By acquiring ownership or control or supporting the transfer of ownership of contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities.

In 2018, Congress addressed this concern by enacting the Brownfields Utilization Investment, and Local Development Act of 2018 (BUILD Act). The BUILD Act amended CERCLA's Section 101(20)(D) liability protection for state and local government acquisitions of contaminated property by adding a new category of **exempt acquisitions and by removing a requirement that the properties must be acquired "involuntarily."**

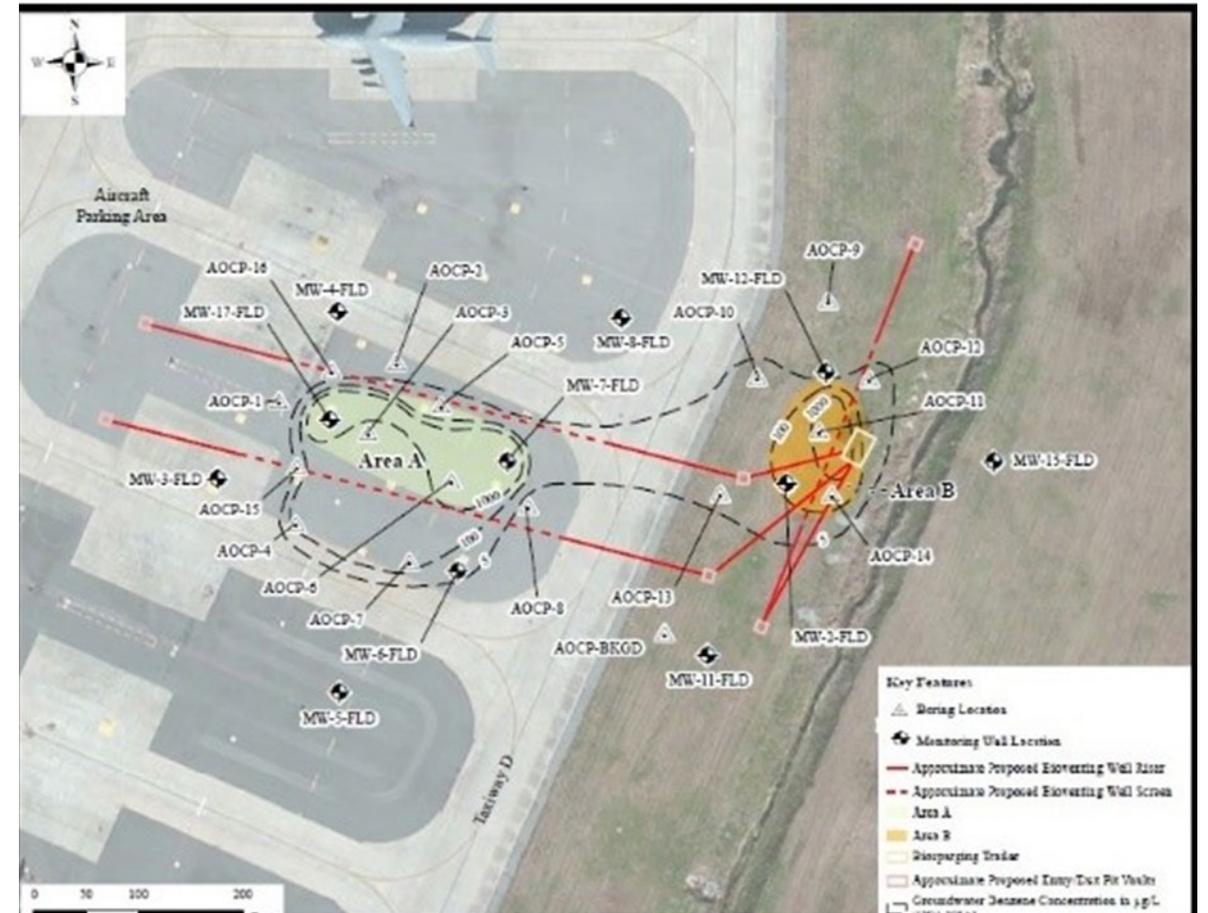


Type of Acquisition is Broad but One Caveat is that the Municipality Did Not Cause Contamination

- CERCLA § 101(20)(D) Municipal Liability Exemption provides for the following examples of acquisition methods that may exempt local governments from potential liability as an “owner” or “operator” PROVIDED the municipality did not cause or contribute to the release or threatened release –
 - property acquisitions through seizure or otherwise in connection with law enforcement activity
 - Voluntary or involuntarily acquisitions
 - bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign
 - **STATUTORY LANGUAGE - The term “owner or operator” does not include a unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign.**
 - **The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.**

EPA Recommends Site Investigation Prior to Municipal Acquisition

- Prior to acquiring ownership or control of a potentially contaminated property, all parties, including local governments, are strongly encouraged to perform an environmental site assessment, such as “all appropriate inquiries” (AAI) to preserve its ability to satisfy certain federal or state liability protections even though CERCLA § 101(20)(D) exempts certain units of local government from the definition of “owner or operator” because this “layers the liability protections” with the *Bona Fide* Prospective Purchaser Defense in CERCLA §§ 101(40) and 107(r)(1) and third party defense and innocent purchaser defenses in CERCLA §§ 107(b)(3) and 101(35)(A)



Topic 2 – State Municipal Exemption

NY Environmental Conservation Law §27-1323(2) contains NY's Municipal Liability Exemption:

(a) ... no public corporation shall incur any liability from any statutory claims of the state as an owner or operator of a site, or a person responsible for the disposal of a **hazardous waste** at such site, if such public corporation acquired such site **involuntarily**, and such public corporation retained such site **without participating in the development of such site**.

(b) This exemption shall not apply to any public corporation that has caused or contributed to the release or threatened release of a hazardous waste from or onto the site, or to any public corporation that generated, transported, or disposed of, arranged for, or that caused the generation, transportation, or disposal of hazardous waste, from or onto the site.



Narrower Involuntary Acquisition And Petroleum is NOT Covered

“Involuntary acquisition” includes:

(i) Acquisitions by a public corporation in its sovereign capacity, including but not limited to acquisitions pursuant to **abandonment proceedings or bequest**;

(ii) Acquisitions by a public corporation, or its agent, acting as a **conservator or receiver** pursuant to a clear and direct statutory mandate or regulatory authority;

(iii) Acquisitions of assets through **foreclosure** and its equivalents, or otherwise, by a public corporation in the course of administering a loan, loan guarantee, tax lien, or tax forbearance agreement, or loan insurance program; or

(iv) Acquisitions by a public corporation pursuant to **seizure, injunction, condemnation, or forfeiture authority**; provided that such ownership or control is not retained primarily for investment purposes.

exercise of eminent domain authority by purchase or condemnation also added later in the exemption

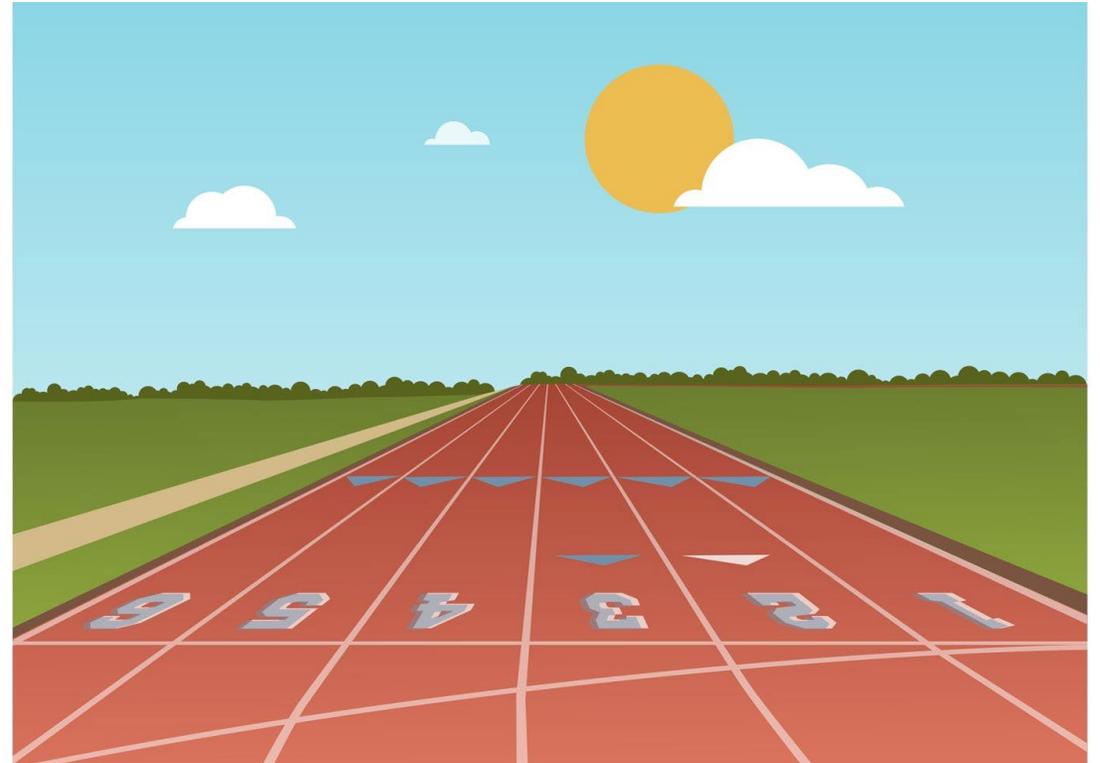


Navigation Law §181(4))(a) Third Party Defense

This defense added in 2003 largely tracks the CERCLA third party defense and applies if a party proves it:

- “exercised due care with respect to the petroleum concerned,” and
- “took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions.”
- **So how does a municipality get to the finish line and take on a brownfield site**

Getting to the Certificate of Completion Finish Line!



Educate Local Developers about the Brownfield Cleanup Program

Most developers who earn the BCP tax credits continue to recycle the \$\$\$ back into their next BCP project leading to multiple BCP projects in the same municipalities. E.g.s. Buffalo, New Rochelle, Yonkers, Rochester, etc.

Upon receipt of a Certificate of Completion, the State provides a liability release that runs with the land

Host Special Brownfield Site Auctions and teach buyers about the BCP

Fortunately, this tax credit program has been extended for 10 years but Part 375 regulations amendments are critically important to preserving the statutory intent of the tax credit provisions!



If no developer wants to buy the site:

- **Get Bold! Work with NYSDEC to obtain a Liability Relief Agreement so you can eliminate blight from your community**
- **Use the NYS Bond Act Incidents of Ownership Provision to get access to the Site BEFORE acquisition to perform an investigation**
- **E.g. City of Rochester goes to court to obtain access rights and then investigates the property**
- **Then the City holds Brownfield Auctions OR the City takes the City into the BCP and then flips it to the developer after the investigation or cleanup is done.**
- **This aggressive strategy, which should focus on the worst brownfield in an area one site at a time, generally results in economic development improvements on adjacent properties whose owners begin to invest in their own sites or sell.**
- **IF YOU HAVE AN END USE, THE USE CAN FACILITATE THE ENTIRE PROCESS.**

HOPE YOU ENJOYED THE PRESENTATION

LINDA SHAW, ESQ.

KNAUF SHAW LLP

(585) 546-8430

LSHAW@NYENVLAW.COM



**Knauf
Shaw**

LLP