

Date July 27, 2009

RESOLUTION ENDORSING THE EXTENSION OF THE BROWNFIELDS PROGRAM AND THE AMENDMENT OF THE PROGRAM REGULATIONS TO CLARIFY AND BOLSTER LIABILITY PROTECTIONS FOR LOCAL GOVERNMENTS THAT ACQUIRE BROWNFIELD SITES.

WHEREAS, The US Conference of Mayors, National League of Cities, National Association of Counties, and numerous individual cities have endorsed action on a bill pending in congress to reauthorize and amend the U.S. Environmental Protection Agency (EPA) Brownfields Program in a manner that would clarify and bolster liability protections for public entities when they acquire contaminated land; and,

WHEREAS, the City Manager recommends that the City Council endorse the concepts as presented in the accompanying council communication, and authorize the Mayor to execute the accompanying letter to the U.S. House of Representatives; NOW THEREFORE,

BE IT RESOLVED, by the City Council of the City of Des Moines, Iowa, as follows:

1. The City Council hereby expresses its support for the reauthorization and amendment of the Brownfields Program in a manner that would clarify and bolster liability protections for public entities when they acquire contaminated land.
2. The Mayor is hereby authorized and directed to sign the accompanying letter to the U.S. House of Representatives on behalf of the City of Des Moines.

(Council Communication No. 09- 501)

MOVED by _____ to adopt.

FORM APPROVED:

Roger K. Brown
 Roger K. Brown, Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
HENSLEY				
KIERNAN				
MAHAFFEY				
MEYER				
VLASSIS				
TOTAL				

MOTION CARRIED APPROVED

 Mayor

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

 City Clerk



T. M. Franklin Cownie
Mayor

July 27, 2009

The Honorable Frank Pallone, Jr
U.S. House of Representatives
237 Cannon Building
Washington, D.C. 20515-3006

The Honorable Joe Sestak
U.S. House of Representatives
1022 Longworth House Office Building
Washington, DC 20515

Dear Representatives Pallone and Sestak:

RE: EPA Brownfields Reauthorization and Public Entity Liability

We understand that your offices are considering taking a lead sponsor role on a bill to reauthorize the U.S. Environmental Protection Agency (EPA) Brownfields program. We, the undersigned individuals and organizations, are writing to express our support for reauthorization of the EPA Brownfields Program and request consideration of an amendment that would clarify and bolster liability protections for public entities when they acquire contaminated land.

ALL-AMERICA CITY
1949, 1976, 1981
2003

America's communities face a daunting but critically important task in attempting to clean up brownfields sites for new uses. Cities are in the process of transitioning their economies from industry and manufacturing to new sources of economic growth. The most environmentally responsible way to accommodate the new engines of growth is to locate the new uses right where the old industrial plants were established, with infrastructure in place and the workforce nearby. However, with an estimated 450,000 to 1,000,000 brownfields sites nationally, the task at hand faces numerous obstacles. Some of those obstacles would be significantly reduced if Congress adopts the recommendations of the National Brownfields Coalition in reauthorizing the EPA Brownfields Program.

One of the Coalition's proposals is to clarify and expand liability protections for public entities that acquire contaminated brownfields sites where the public entities had no involvement in the contamination. This proposal is of great interest to the many localities that are, out of necessity, taking ownership

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of brownfields properties. Some brownfields sites are unlikely to be redeveloped through private investment. If these sites are blighting influences that prevent neighborhood revitalization, the only option that will work is public acquisition.

Through a variety of means including tax liens, foreclosures, purchase, and the use of eminent domain, local governments can take control of brownfields in order to clear title, consolidate multiple parcels into an economically viable size, conduct site assessments, remediate environmental hazards, address public health and safety issues, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of incurring liability for contamination they had no role in creating or releasing. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes liability defenses and exemptions that may protect local governments that “involuntarily” acquire brownfields. However, the majority of the sites acquired by local government are either unprotected (which is the case for voluntary acquisition), or are subject to widely varying interpretations of what is meant by “involuntary acquisition.” Even properties acquired through tax delinquency (one of the examples cited in the law and often presumed to be protected) may not necessarily be exempt if the local government took affirmative (“voluntary”) steps in the tax delinquency process.

A 2006 report by the National Association of Local Government Environmental Professionals concluded that the term “involuntary acquisitions” is subject to wide interpretation and local governments find it “inconsistent, ambiguous, and confusing.” The report further finds that EPA’s various guidance documents on the subject only serve to “muddy the waters.”

This lack of clarity and certainty has a chilling effect on strategic acquisition-redevelopment activities. In some cases, local governments have adopted conservative policies that strictly limit the acquisition of contaminated properties. These policies keep localities out of the courtroom, but they also leave many contaminated sites as neglected blighting influences on their surrounding communities. In other cases, local governments have taken a risk by acquiring properties, essentially “rolling the dice” in favor of community revitalization.

A secondary problem is that many potential brownfields projects on publicly-owned sites have been ruled ineligible for EPA funding because the localities cannot satisfy the requirements to establish “involuntary acquisition.” Aside from the loss of funding, localities rightly fear that, if EPA has determined them to be ineligible for funding, that is tantamount to determining that the locality is a potentially responsible party.

The undersigned organizations favor amending CERCLA to provide for greater clarity and a higher level of protection for acquisition activities that clearly serve public purposes. The amendments should:

- Eliminate the term “involuntary” in describing the protected activities.
- Add a plain language exemption for local governments that acquire contaminated properties for redevelopment purposes, as long as the governmental entities have not created or released the contamination.
- Modify and expand the current protections under the category of “rendering care and advice” to include actions taken by local government to address public health and safety issues at sites, so long as the governmental entity acts responsibly in doing so.

We encourage you to consider improving liability protections so that governmental entities will not have to “roll the dice” when pursuing activities that are so clearly benefitting the public – addressing public health and safety concerns, attracting jobs and investment in distressed communities, and re-positioning vital assets for environmentally-responsible economic growth.

If you have any questions, please contact Chuck Thompson at the International Municipal Lawyers Association (202-742-1016, CThompson@imla.org), Evans Paull at the Northeast-Midwest Institute (202-329-4282, epaull@nemw.org), or Judy Sheahan at the U.S. Conference of Mayors (202-861-6775, jsheahan@usmayors.org).

Sincerely,

T.M. Franklin Cownie, Mayor
City of Des Moines, Iowa

cc: The Honorable Henry A. Waxman
The Honorable Joe Barton
The Honorable Edward J. Markey, Chair
The Honorable Fred Upton, Ranking Member
Members of the House Energy and Commerce Committee
The Honorable Leonard L. Boswell
The Honorable Tom Harkin