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4TH GENERATION LAND BANKS:

REDEVELOPING BROWNFIELDS

MAY 2016

by

J. Justin Woods, JD, MPA

Legal & Policy Fellow

National Association of Local Government Environmental Professionals

Adjunct Professor of Public Administration

Dyson College, Pace University

Sustainable Development Scholar

Pace Land Use Law Center

LL.M. Candidate



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About the

Author



J. Justin Woods, JD, MPA is scholar and advocate for public management, law, and policies that advance smart growth, equitable and sustainable development, and environmental, economic, and social justice. He is a Legal and Policy Fellow at the National Association of Local Government Environmental Professionals (NALGEP), where he conducts research and advocates for federal and state sustainability funding and policies that benefit local communities. Justin has nearly 20 years of experience as a planner, community/economic developer, public

administrator, and consultant.

Justin is also a Sustainable Development Scholar at the Land Use Law Center at Pace Law School, where he is pursuing a Master of Laws (LL.M) in Environmental Law/Land Use & Sustainable Development Law. Justin publishes on a variety of land use law and public policy topics, including urban revitalization, land banks, and brownfields. He is also an Adjunct Professor of Public Administration at Pace University, teaching graduate level courses on municipal planning, public management, and sustainable development.



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About NALGEP



The **National Association of Local Government Environmental Professionals (NALGEP)** is a not-for-profit organization that was founded in 1993 by a group of local officials to represent local government personnel responsible for ensuring environmental compliance and developing and implementing environmental policies and programs.

NALGEP was established in recognition that local government environmental professionals are often confronted with tight budgets, complicated requirements and problems which, although are first-time problems for a particular local entity, may have been encountered and dealt with by other localities. In an era of restricted local budgets, governments are being asked to deliver environmental services and implement environmental programs with less resources and assistance than ever before.

NALGEP's membership includes more than 150 local government officials in communities located throughout the United States. NALGEP's membership communities range in size from the largest cities to the smallest towns. NALGEP's diverse membership includes environmental managers, solid waste coordinators, public works directors, brownfields directors, economic development officials, planning directors, and attorneys, all working on behalf of towns, cities, counties, and municipal associations. NALGEP brings together local environmental officials to network and share information on innovative environmental practices, conduct pioneering environmental policy projects, promote environmental training and education, and communicate the views of local environmental officials on national environmental issues. For more information about NALGEP, please visit: www.nalgep.org.



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FOREWORD

By T/B/D



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PREFACE

By T/B/D



I. Introduction

There are approximately 120 land banks and land banking programs throughout the nation.¹ Land banks are public authorities or special purpose non-profit organizations created to act as legal and financial conduits to transform, hold, manage, repurpose, and develop vacant, abandoned, tax-foreclosed, and other problem properties that have been discarded or underutilized by the private market.² Successful land bank programs revitalize blighted neighborhoods and direct reinvestment back into these neighborhoods to support their long-term community revitalization.³ Historically, land banks have focused predominantly on addressing vacancy and foreclosures, and while environmental contamination has been an issue that has arisen in some projects, brownfields has not been a primary focus of land banks.⁴ More recently

¹ Center State CEO and the New York Land Bank Association, New York State Land Banks: Combatting Blight and Vacancy in New York Communities 4 (Center for Community Progress) (2014), <http://www.centerstateceo.com/NYLBA>.

² J. Justin Woods, "Incorporating NY Land Banks into the Delinquent Property Tax Enforcement Processes," Vol. 15, No. 5 New York Zoning Law & Practice Report 2, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2367141 (citing) Land Banks, United States Department of Housing and Urban Development, <http://www.hud.gov/offices/cpd/about/conplan/foreclosure/landbanks.cfm>; Julie A. Tappendorf & Brent O. Denzin, Turning Vacant Properties into Community Assets Through Land Banking, 43 URB. LAW. 801 (2011); Jessica de Wit, Revitalizing Blighted Communities with Land Banks (University of Michigan) (2009), <http://www.umich.edu/~econdev/landbank>

³ Payton Heins and Tarik Abdelazim, Take it to the Bank: How Land Banks Are Strengthening America's Neighborhoods (Center for Community Progress) (2014), http://www.communityprogress.net/filebin/Center_for_Community_Progress_-_Take_it_to_the_Bank_-_2014_-_Updated_Online_Version.pdf; Frank Alexander, Land Banks and Land Banking 18 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

⁴ Evans Paull Seth Otto, "Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?," Brownfield Renewal Magazine (May 2013),



however,

new

configurations of land banks and land banking are emerging to better equip municipalities and land banks with innovative tools to redevelop brownfields.⁵

This paper places several new ideas and initiatives within the context of Frank Alexander's definitive history of the land banking movement, which outlines the evolution of land banks through three distinct generations.⁶ Looking at the scope of the nation's brownfield problem, this paper discusses how liability concerns limit municipalities ability to access or acquire properties for assessment, cleanup, or redevelopment.⁷ The paper then discusses emerging thought leadership and case studies that have reimagined and tailored new land bank models to better fit brownfield redevelopment goals. The paper identifies unique strategies, common themes, and barriers for land banks focusing on brownfields revitalization, and argues that new land banks addressing brownfeilds constitutes an emerging "fourth generation" land bank. The article concludes with some additional policy recommendations that should be incorporated into the model land bank enabling legislation and existing state statutes to ensure that land banks can become an effective tool for redeveloping brownfield sites.

http://www.brownfielddrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁵ Sections V. & VI. of this paper.

⁶ Frank Alexander, *Land Banks and Land Banking Chapter 2* (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

⁷ *See, e.g.*, 2008 Brownfield Survey (US Conference of Mayors) http://usmayors.org/76thWinterMeeting/release_012408b_report.pdf.



II. The Brownfields Problem

Fleeing labor and environmental regulations in pursuit of cheaper manufacturing and larger profits, large-scale manufactures have abandoned and “deindustrialized” many areas of the country, leaving behind a legacy of environmental contamination, brownfields, and blight that both is thwarting community revitalization and straining municipal budgets. Brownfields are abandoned or underutilized properties that remain undeveloped because of environmental contamination (real or perceived).⁸ Smaller brownfields such as vacant or existing sites previously used as dry cleaners, salvage yards, and gas stations also pose problems because the presence of environmental contamination and associated environmental liability and cleanup costs has a chilling effect on investment and redevelopment.⁹

Brownfields often sit idle for years without investment, cleanup, or redevelopment. Not only do brownfields represent a threat to human health and the environment, but they also degrade the economic health of a region by lowering the value of neighboring properties and depressing property tax revenues.¹⁰ The persistence of brownfields undermines the local tax base

⁸ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(a)(A), 115 Stat. 2356, 2361 (Jan. 11, 2002). *See also*, J. Justin Woods, “Brownfields Programs Strengthen Communities,” The Buffalo News, June 19, 2015, http://www.buffalonews.com/opinion/another-voice/another-voice-brownfields-programs-strengthen-communities-20150619?fb_ref=Default.

⁹ NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 1 (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.

¹⁰ *See, e.g.*, J. Justin Woods, “Brownfields Programs Strengthen Communities,” The Buffalo News, June 19, 2015, http://www.buffalonews.com/opinion/another-voice/another-voice-brownfields-programs-strengthen-communities-20150619?fb_ref=Default.



(and associated tax-funded services), dampens job creation and economic growth, leaves public transportation and infrastructure underutilized, causes blight, increases exposure to environmental contamination, and, by pushing development into outlying greenfields, promotes urban sprawl.¹¹ The impacts of brownfields are particularly hard felt in areas of concentrated poverty and underdevelopment, disproportionately affecting poor minority communities, where attracting economic investment is often most challenging.¹²

Many brownfields are not active in the real estate market because of ongoing liability, and because the costs associated with cleaning and redeveloping them are not economically viable; prompting existing owners to stop paying taxes or abandon them, and preventing new owners from acquiring or redeveloping them.¹³ Governments at different levels have invested in public improvements and infrastructure to serve the prior uses on brownfield sites, and without redevelopment and new tax revenues, the value of those investments are lost.¹⁴ To protect prior investments and to stimulate future ones, municipalities are forced to foreclose on the properties

[s-20150619?fb_ref=Default](#).

¹¹ See NALGEP, *Unlocking Brownfields: Keys to Community Revitalization*, at 16-18 (2005), <http://www.nalgep.org/publications/unlocking-brownfields-keys-to-community-revitalization.html>.

¹² See generally, NALGEP *Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 1* (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>; J. Justin Woods, "Brownfields Programs Strengthen Communities," *The Buffalo News*, June 19, 2015, http://www.buffalonews.com/opinion/another-voice/another-voice-brownfields-programs-strengthen-communities-20150619?fb_ref=Default.

¹³ See generally, 2008 *Brownfield Survey* (US Conference of Mayors) http://usmayors.org/76thWinterMeeting/release_012408b_report.pdf.

¹⁴ Unpublished information materials distributed by the Oregon Brownfields Coalition in support of Brownfields Land Bank Bill, H.B. 2734, Reg. Sess. (Or. 2015) (enacted).



and assume responsibility for redeveloping brownfields. Or they choose not to foreclose, leaving the properties in legal and environmental limbo while ineffectively waiting for the possibility of a private sector solution. Local governments benefit in many ways from redeveloping brownfields, but they are often reluctant to take title to these properties because of legal liability concerns.¹⁵ Furthermore, substantial remediation and development costs often exceed the value of the property, leaving them in or near “negative value situations.”¹⁶

The U.S. Government Accountability Office estimates that there are between 450,000 to one-million brownfield sites in the United States.¹⁷ The ability of municipalities to assess and remediate contaminated sites and redevelop areas abandoned by the private market is also hampered by a lack of resources and austerity budgets at the state and national levels.¹⁸ In Congressional testimony last summer, Mathy Stanislaus, Assistant Administrator of the Office of Solid Waste and Emergency Response at the Environmental Protection Agency, testified that the EPA can only fund approximately a quarter to a third of the competitive grant applications the

¹⁵ See generally, NALGEP *supra* note 7; US Conference of Mayors, *supra* note 11.

¹⁶ Evans Paull Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

¹⁷ U.S. Government Accountability Office, *Brownfield Redevelopment – Stakeholders Report That EPA’s Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts*, at 1 (December 2004) available at <http://www.gao.gov/new.items/d0594.pdf>.

¹⁸ J. Justin Woods, “Brownfields Programs Strengthen Communities,” *The Buffalo News*, June 19, 2015, http://www.buffalonews.com/opinion/another-voice/another-voice-brownfields-programs-strengthen-communities-20150619?fb_ref=Default



agency receives on an annual basis.¹⁹ And in every brownfields survey conducted by the U.S. Conference of Mayors, the top three impediments to redeveloping brownfields are the lack of funds for assessment, prohibitive cleanup costs, and liability issues.²⁰ Many communities are operating in broken real estate markets and they are struggling with residential vacancy and blight related to declining populations and urban decay. These problems were exacerbated by the mortgage foreclosure crisis, and many have turned to land banking as a revitalization strategy. After reviewing how land banks evolved to address vacancy and blight, the following sections will discuss municipal liability for brownfields, and will consider how land banks are being used, and could be further enhanced, to better facilitate brownfield redevelopment.

¹⁹ The Honorable Mathy Stanislaus, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Testimony on Helping Revitalize American Communities Through the Brownfields Program, House Subcommittee on Water Resources and Environment, July 22, 2015, available at <http://transportation.house.gov/calendar/eventsingle.aspx?EventID=399204>.

²⁰ See, e.g., 2008 Brownfield Survey (US Conference of Mayors) http://usmayors.org/76thWinterMeeting/release_012408b_report.pdf.



III. The Evolution of Land Banks²¹

About 15 years ago, the Local Initiatives Support Coalition (LISC), Smart Growth America, International City/County Management Association (ICMA), and National Trust for Community Preservation initiated the National Vacant Properties Campaign.²² The campaign had the dual purpose of developing new solutions to address vacant and abandoned properties, and helping communities build the capability to address these problems.²³ Sprouting from efforts associated with the Campaign and its successor, the Center for Community Progress, land banks have evolved and emerged into an innovative tool for communities to address the problems of vacant and blighted properties.²⁴ This section will review the history of land banks, laying the foundation for understanding how land banks have evolved, and how land banks can continue to evolve as an important tool for redeveloping brownfield sites.

The proliferation of land banks as a revitalization strategy has been driven in large part

²¹ This section is adapted and updated from J. Justin Woods, “Incorporating NY Land Banks into the Delinquent Property Tax Enforcement Processes,” Vol. 15. No. 5 New York Zoning Law & Practice Report 2, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2367141 (summarizing) Frank Alexander, Land Banks and Land Banking Chapter 2 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

²² National Vacant Properties Campaign, Vacant Properties: The True Costs to Communities. (2005), <http://www.communityprogress.net/filebin/pdf/toolkit/vacant-properties--the-true-costs-to-communities-pages-409.php>.

²³ National Vacant Properties Campaign, Vacant Properties: The True Costs to Communities. (2005), <http://www.communityprogress.net/filebin/pdf/toolkit/vacant-properties--the-true-costs-to-communities-pages-409.php>.

²⁴ Payton Heins and Tarik Abdelazim, Take it to the Bank: How Land Banks Are Strengthening America’s Neighborhoods (Center for Community Progress) (2014), http://action.communityprogress.net/p/salsa/web/common/public/signup?signup_page_KEY=8120.



by the Center for Community Progress (CCP), a national nonprofit organization focused on developing solutions for vacant, abandoned, and problem properties. “The Center for Community Progress serves as the leading resource for local, state, and federal policies and best practices that address the full cycle of property revitalization, from blight prevention, through the acquisition and maintenance of problem properties, to their productive reuse.”²⁵ CCP’s best practice work includes both providing technical assistance to municipalities, as well as disseminating and campaigning for adoption of the model state enabling legislation.²⁶

In *Land Banks and Land Banking*, Emory Law Professor Frank Alexander, a co-founder of the Center for Community Progress, outlines the evolution of land banks through three stages. The **first generation of land banks** were founded between 1971 and 1991 in St. Louis, Cleveland, Louisville, and Atlanta. First generation land banks had a common focus on addressing abandoned and tax delinquent properties, but lacked the capacity to efficiently and effectively manage and dispose of properties.²⁷ This included dealing with constitutional due process requirements for notifying parties of foreclosure proceedings, which became a significant problem dealing with the growth of tax lien and foreclosure speculators.²⁸ Most significantly, first generation land banks lacked a dedicated source of funding, and were further

²⁵ What We Do, Center for Community Progress, <http://www.communityprogress.net/about-pages-4.php>.

²⁶ What We Do, Center for Community Progress, <http://www.communityprogress.net/about-pages-4.php>.

²⁷ Frank Alexander, *Land Banks and Land Banking* 19 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

²⁸ Frank Alexander, *Land Banks and Land Banking* 19 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.



hampered by property tax foreclosure laws that created several impediments to securing and disposing of properties with marketable title.²⁹

The shortcomings of the first generation land banks led to the development of a **second generation of land banks** that were established through a series of laws in Michigan and Ohio between 1999 through 2010.³⁰ These efforts were accompanied by “much more extensive intervention in the property tax foreclosure process, and in the case of Michigan, the ability to acquire *all* tax foreclosed properties, not just properties for which there is no third-party investor ready to purchase it.”³¹ The case studies in Genesee County, Michigan (Flint) and Cuyahoga County, Ohio (Cleveland) provide some of the most successful examples of land banks as proactive redevelopment partners, because they created structurally diverse, dedicated funding streams to fund land bank programs and operations.³² However, the shortcoming of second generation land banks was that they were created through a series of home rule laws and amendments that were intricately drafted to amend several discrete statutory provisions.³³ The result of this organic statutory evolution was that the legal infrastructure for land banking in

²⁹ Frank Alexander, Land Banks and Land Banking 19 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

³⁰ Frank Alexander, Land Banks and Land Banking 20 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

³¹ Frank Alexander, Land Banks and Land Banking 21 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

³² J. Justin Woods, “Incorporating NY Land Banks into the Delinquent Property Tax Enforcement Processes,” Vol. 15. No. 5 New York Zoning Law & Practice Report 2.

³³ Frank Alexander, Land Banks and Land Banking 21 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.



Ohio and Michigan were not easily replicable in other states.³⁴

The **third generation of land banks** are based on the model enabling statute developed by the Center for Community Progress.³⁵ The model act, versions of which have been adopted in eight states in the past few years, was developed to codify the broad range of land bank powers from Ohio and Michigan into in a single statutory place.³⁶ The idea was that rather than intertwining enabling powers into several discrete enactments as in Michigan and Ohio, interested states could adopt the statute as a unified piece of enabling legislation.³⁷

³⁴ Frank Alexander, Land Banks and Land Banking 21 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

³⁵ Frank Alexander, Land Banks and Land Banking 22 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

³⁶ Frank Alexander, Land Banks and Land Banking 22 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.

³⁷ Frank Alexander, Land Banks and Land Banking 22 (Center for Community Progress) (2nd ed. 2015), <http://www.communityprogress.net/filebin/LandBanksLandBankingVer2DigitalFinal.pdf>.



While the model law does include broad powers and a flexibility of options for using and financing land banks, like the first generation land banks, it does not provide dedicated sources of funding for land bank operations.³⁸ Further, as it relates to redeveloping some of the most distressed properties, such as brownfields, that require extensive environmental assessment or cleanup, the model statute does not address issues such as legally accessing sites to conduct environmental assessment for contamination or potential environmental liability.

³⁸ Evans Paull Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html; J. Justin Woods, “Incorporating NY Land Banks into the Delinquent Property Tax Enforcement Processes,” Vol. 15. No. 5 *New York Zoning Law & Practice Report* 2-4, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2367141.



IV. Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment³⁹

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 defines a brownfield as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”⁴⁰ As previously noted, there are an estimated 450,000 to one-million brownfield sites in the United States.⁴¹ Local governments throughout the country have long recognized the harm abandoned and underdeveloped brownfield properties can pose to their communities. “Properties that lie idle because of fear of environmental contamination, unknown cleanup costs, and liability risks can cause and perpetuate neighborhood blight, with associated threats to a community’s health, environment, and economic development.”⁴² Local government property acquisition authority is one of the key tools to facilitate and “jump start” the redevelopment of brownfields. Through voluntary sales or involuntary means including tax liens, foreclosures and the use of eminent domain, local governments can take control of brownfields in order to clear

³⁹ While this section incorporates other information, it largely summarizes sections from a 2006 NALGEP Report, NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 1 (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.

⁴⁰ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(a)(A), 115 Stat. 2356, 2361 (Jan. 11, 2002).

⁴¹ U.S. Government Accountability Office, Brownfield Redevelopment – Stakeholders Report That EPA’s Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts, at 1 (December 2004) available at <http://www.gao.gov/new.items/d0594.pdf>.

⁴² NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment, Executive Summary (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.



title, conduct site assessment, remediate environmental hazards, and otherwise prepare the property for development by private sector partners, or for public and community facilities.⁴³

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded from acquiring brownfields due to fears of environmental liability.⁴⁴ The primary federal environmental liability law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), provides that any “potentially responsible party” can be held liable for the costs of cleaning up and restoring a polluted site in an action brought by EPA, the state, or a private party.⁴⁵ Under CERCLA § 107(a), a person or entity, including a local government, is a potentially responsible parties if the “person” is:

1. the current owner and operator of the facility;
2. a person who owned or operated the facility at the time of disposal of hazardous substances;
3. any individual, corporation, or government who arranged for the disposal or treatment of hazardous substances; or
4. the transporter of the hazardous substances if that individual selected the disposal or treatment site.

Courts have held that liability under CERCLA is generally strict,⁴⁶ joint and several,⁴⁷ and

⁴³ NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 1 (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.

⁴⁴ Personal experience, confirmed by interviews with other practitioners, including Suffolk County.

⁴⁵ See Resource Conservation and Recovery Act, 42 U.S.C. §§ 9601 — 9675 (2000).

⁴⁶ See *United States v. Monsanto Co.*, 858 F.2d 160, 167-68 (4th Cir. 1988); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).



retroactive.⁴⁸ Thus, any current owner of contaminated property, that does not qualify for a land owner liability protection, is potentially liable for the entire cleanup cost associated with that property, regardless of whether that owner contributed to the contamination or owned the property at the time contamination occurred.⁴⁹ When a local government takes ownership of a site, it may be exposed to the same environmental liability risks faced by private entities. Thus, many local governments have refused to “even foreclose on abandoned industrial complexes in redevelopment zones because [of] the potential for staggering cleanup costs and liability claims once they take ownership.”⁵⁰

Congress has enacted several provisions of CERCLA that are intended to protect local governments and other non-responsible parties when they acquire contaminated property. Under certain circumstances, these provisions can reduce or limit CERCLA liability when a local government:

1. Acquires contaminated property involuntarily by virtue of its function as a sovereign,⁵¹
2. Qualifies for a third party defense or innocent landowner liability protection,⁵²

⁴⁷ See *Monsanto*, 858 F.2d at 171-73; *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983)

⁴⁸ See *Monsanto*, 858 F.2d at 173-75; *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732-34.

⁴⁹ NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment, 3 (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.

⁵⁰ See generally, Deborah Cooney et al. *Revival of Contaminated Industrial Sites: Case Studies*, at 1 (Northeast-Midwest Institute 1992). Also confirmed by authors professional government experience, and in interviews for new case studies.

⁵¹ 42 U.S.C. § 9601(20)(D).

⁵² 42 U.S.C. §§ 9607(b)(3), 9601(35)(A).



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3. Qualifies as a bona fide prospective purchaser when it acquires the contaminated property,⁵³ or
4. Is conducting or has completed a cleanup of a contaminated property in compliance with a state cleanup program.⁵⁴

Nonetheless, a substantial number of local governments avoid acquiring brownfield sites because of the fear of potential environmental liability.⁵⁵

The most significant liability provision is under CERCLA Section 101(20)(D),⁵⁶ which provides an *exemption* from liability for property acquired “involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.” Elsewhere, section 101(35)(A)(ii)⁵⁷ also uses the term “involuntary” in defining an *affirmative defense* for government acquisitions by “escheat, or through any other involuntary transfer or acquisition.” EPA has also published documents that provide guidance on municipal liability under CERCLA, which details how municipalities may qualify for the other exemptions to avoid CERCLA liability:

The method or type of property acquisition by a local government will play a critical role in the application of liability exemptions, affirmative defenses, or protections. Although most often applied in the purchase and gift/donation context, BFPP status is available for the majority of property acquisitions. *Note: In cases where it is unclear whether the involuntary acquisition exemption, affirmative defenses, or liability protections are sufficient, EPA encourages the local government to achieve and maintain BFPP status to increase certainty that it will not be liable under CERCLA* (emphasis in original).⁵⁸

⁵³ 42 U.S.C. §§ 9601(40), 9607(r)(1).

⁵⁴ 42 U.S.C. § 9628(b).

⁵⁵ Also confirmed by authors professional government experience, and in interviews for new case studies.

⁵⁶ 42 U.S.C. § 9601(20)(D).

⁵⁷ 42 U.S.C. § 9601(35)(A)(ii).

⁵⁸ CERCLA Liability and Local Government Acquisitions and Other Activities, EPA-330-F-11-003 at 4, (March 2011), <https://www.epa.gov/sites/production/files/documents/local-gov-liab-acq-fs-rev.pdf>.



While getting into the details of each of these provisions is outside the scope of this paper, the important point is that outside of the carved out exemptions, municipalities may still incur liability under CERCLA § 107(a), including for any continuous release of contamination that occurs after they acquire ownership. Surveys conducted by NALGEP and US Conference of Mayors demonstrate that many localities are “are dissuaded from playing an active role in brownfield development out of concern about Federal environmental liability... and several local governments stated that they never voluntarily acquire brownfield properties because of liability concerns.”⁵⁹

Absent federal legislation clarifying municipal liability, as advocated for by NALGEP and the US Conference of Mayors,⁶⁰ state environmental laws and the way they interact with CERCLA can limit liability for local governments that acquire lands for the purpose of facilitating cleanup and redevelopment. Section 128(b) of CERCLA limits EPA’s authority to take CERCLA enforcement actions against persons who are conducting or have conducted cleanups at eligible response sites “in compliance with a state program that governs response actions for protection of human health and environment.”⁶¹ EPA has entered into non-binding

⁵⁹ NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 5 (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.

⁶⁰ The Honorable J. Christian Bollwage, Mayor of the City of Elizabeth, New Jersey, Testimony on Helping Revitalize American Communities Through the Brownfields Program, House Subcommittee on Water Resources and Environment, July 22, 2015, <http://transportation.house.gov/calendar/eventsingle.aspx?EventID=399204>.

⁶¹ NALGEP Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 5 (2006), <http://www.nalgep.org/publications/superfund-liability-a-continuing-obstacle-to-brownfields-redevelopment.html>.



Memoranda of Agreement
(MOA) with over 20 states which clarify EPA enforcement intentions under CERCLA at sites addressed in compliance with state response programs.⁶² Therefore, in states with MOAs, how states define brownfields and municipal liability under state law can help shield municipalities from liability under CERCLA. Similarly, how states establish, define and structure land banks under state law (for example, are land bank powers assigned to local municipalities or counties, public authorities, or do they establish independent nonprofits, etc.) can facilitate, limit, or preclude land bank liability and access to various state and federal brownfields programs.

⁶² CERCLA Liability and Local Government Acquisitions and Other Activities, EPA-330-F-11-003 at 8, (March 2011), <https://www.epa.gov/sites/production/files/documents/local-gov-liab-acq-fs-rev.pdf>.



V. Inventing the Brownfields Land Bank

The proliferation of land banks as a community revitalization strategy has been well-documented to help communities grow redevelopment capacity for addressing vacant and foreclosed properties.⁶³ This strategy was delineated in Payton Hines and Tarik Abdelazim’s *Take it to the Bank: How Land Banks are Strengthening America’s Neighborhoods*, a Community Progress publication.⁶⁴ Preceding that report, brownfield economist Evans Paull and planning consultant Seth Otto posited the idea of combing tools from the land bank movement, tax increment financing, and redevelopment authorities to “invent a brownfields land bank.”⁶⁵

Since that time, the land bank movement has continued to mature, and there are several creative land bank initiatives being developed that focus on brownfields revitalization. This section explores the concept of a Brownfield Land Bank as envisioned by Paull and Otto, and the next section explores three case studies using innovative land bank approaches focused on redeveloping brownfields.

⁶³ Payton Heins and Tarik Abdelazim, *Take it to the Bank: How Land Banks Are Strengthening America’s Neighborhoods* (Center for Community Progress) (2014), http://www.communityprogress.net/filebin/Center_for_Community_Progress_-_Take_it_to_the_Bank_-_2014_-_Updated_Online_Version.pdf

⁶⁴ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁶⁵ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.



Previous

generation land banks are geared to demolishing or revitalizing the larger inventory of vacant property, most of which is residential and comes to the land bank through tax foreclosure.⁶⁶ For example, the Genesee County Land Bank in Michigan is a vacant property land bank that sometimes addresses brownfields.⁶⁷ One of the most cited keys to success was found in the use of Tax Increment Financing (TIF) tools to finance much of the assessment, remediation, and pre-development work.⁶⁸ While this example demonstrates how land banks can effectively use TIF laws and development finance tools to “cross-collateralize” redevelopment - using profitable projects to subsidize negative value projects - traditional land banks are not typically equipped with the legal tools or staff expertise to handle complex brownfields redevelopment projects.⁶⁹

Many industrial development agencies and other economic and commercial redevelopment authorities also engage in some form of brownfields redevelopment work. Those

⁶⁶ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html

⁶⁷ Personal Notes from phone interview with Christina Kelly Director of Planning & Neighborhood Revitalization, Genesee County Land Bank.

⁶⁸ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁶⁹ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.4



that do, traditionally focus on using economic development or development finance tools to provide gap-financing to private sector projects.⁷⁰ Paull and Otto highlight two programs - St. Paul Port Authority in Minnesota and the Michigan Brownfields Redevelopment Authorities (BRAs) - that “combine the technical skill and long term perspective necessary to successfully redevelop brownfields.”⁷¹ In both programs, strong and aggressive use of TIF laws are coupled with the long term planning and community revitalization goals similar to that of land banks.⁷² Additionally, in Michigan, the ability to reinvest TIF revenue from successful projects to serve new ones, as opposed to just paying off old bonds, has been key to its success.⁷³

Until recently, the only known land bank that had an industrial or brownfields focus was

⁷⁰ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfielddrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁷¹ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfielddrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁷² Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfielddrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁷³ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfielddrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.



the

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Industrial-Commercial Land Bank.⁷⁴ The Cleveland Industrial Commercial Land Bank provides the opportunity for the City to “strategically assemble properties to attract businesses and create long-term community investment.”⁷⁵ Informed from the experiences in Cleveland as well as Redevelopment Authorities and vacant property land banks, Paull and Otto conceptualized brownfield land banks as a “hybrid: part vacant property land bank, with a commitment to management of vacant property and patiently planning ultimate reuse; and part redevelopment authority, with aggressive use of acquisition and redevelopment financing tools.”⁷⁶ To date, no state legislature or municipality has fully integrated the concepts Paull and Otto proposed, but as the next section shows, there are at least three land bank initiatives moving in this direction.

VI. Land Banks Focusing on Brownfields

The collective activities of the three case studies reviewed in this section demonstrate an emerging trend towards applying and evolving land bank concepts for brownfields

⁷⁴ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.

⁷⁵ Cleveland’s Industrial Commercial Land Bank: A National Model for Brownfield Redevelopment <http://rethinkcleveland.org/About-Us/Our-Initiatives/Industrial-Commercial-Land-Bank.aspx>

⁷⁶ Evans Paull and Seth Otto, “Inventing the Brownfields Land Bank: Could a Brownfield Land Bank Be Matched with Revved Up TIF Authority to Create a New Brownfields Tool and Lure Manufacturing Back to Former Industrial Sites?,” *Brownfield Renewal Magazine* (May 2013), http://www.brownfieldrenewal.com/story-news-features_story_economic_impact_investing_in_the_brownfields_land_bank-1067-r1bbd93.html.



redevelopment.

Taken together, these initiatives represent the beginning of a new focus on brownfields for land banks, and in certain cases, a new type of land bank altogether. This section will review three case studies - a county land bank and two statewide initiatives - focused on helping municipalities use land banks to redevelop brownfields. The next section will make the case that these initiatives represent an emerging, “fourth generation” land bank.

1. Suffolk County Landbank Corporation (NY)

The Suffolk County LandBank (SCLBC) on Long Island, New York represents the transition from the third to the fourth generation land bank. The SCLB was enabled when New York passed the CCP model land bank statute,⁷⁷ embedding it firmly in the third generation of land banks. However, unlike the other vacant property land banks throughout New York, the SCLBC was the only land bank in the state specifically created to “be devoted to the responsible and productive re-use of brownfield properties.”⁷⁸

SCLBC was created specifically because the County does not foreclose on brownfields because of the potential environmental liability.⁷⁹ The Suffolk County government maintains an interdepartmental work group to “triage” potentially contaminated properties and prevent the

⁷⁷ N.Y. Not-for-Profit Corp. Law Article 16.

⁷⁸ <http://suffolkcountylanbank.org/AboutUs/BrownfieldProperties.aspx>

⁷⁹ J. Justin Woods, Personal Notes from Interview with Suffolk County Planning Staff and Asst. Corporation Counsel on July 1, 2015.



County from foreclosing on them.⁸⁰ This creates a backlog of problematic properties in “dead zones,” where the landowner fails to pay taxes and the County declines to foreclose because of potential environmental liability.⁸¹ However, since the SCLBC was created, it has received funding from the United States Environmental Protection Agency and the New York State Attorney General’s Office to perform over twenty phase one environmental assessments.⁸² The environmental assessments help the County to decide whether to foreclose on a given property or have the SCLBC develop an alternative plan for additional assessment and disposition of contaminated delinquent properties.⁸³

Beyond the focus on brownfields, what distinguishes the SCLBC from other vacant property land banks is two creative strategies employed by the land bank and county to access the properties for environmental assessment, and to avoid taking title to brownfield properties. First, for properties the County will not foreclose on, the SCLBC works with the Suffolk County Health Department to gain legal access to the sites to conduct additional environmental assessments (Phase II Assessments).⁸⁴ The Health Commissioner’s power to obtain site access

⁸⁰ J. Justin Woods, Personal Notes from Interview with Suffolk County Planning Staff and Asst. Corporation Counsel on July 1, 2015.

⁸¹ J. Justin Woods, Personal Notes from Interview with Suffolk County Planning Staff and Asst. Corporation Counsel on July 1, 2015

⁸² Suffolk County Land Bank Board of Directors Meeting Presentation, February 2015.

⁸³ J. Justin Woods, Personal Notes from Interview with Suffolk County Planning Staff and Asst. Corporation Counsel on July 1, 2015.

⁸⁴ J. Justin Woods, Personal Notes from Interview with Suffolk County Planning Staff and Asst. Corporation Counsel on July 1, 2015.



comes from

Sections 1303

and 1304 of NYS Public Health Law, as well as Sections 760-704 and 760-1204 of the Suffolk County Sanitary Code.⁸⁵ Under this authority, the:

“Health Commissioner may make, or cause to be made, or order the owner or operator of any property or facility to make any investigation or study which, in the Commissioner's opinion, is needed for the enforcement of this Article or for controlling or reducing the potential for contamination of the waters of the County from sewage, industrial or other wastes, toxic or hazardous materials and/or stormwater runoff. This may include the ordering of an independent groundwater investigation where evidence suggests that a discharge of toxic or hazardous materials may have occurred.”⁸⁶

The process begins when the Health Commissioner requests and is denied access to investigate the site. The Commissioner then issues a notice of violation of the sanitary code and following a hearing, an administrative warrant to access to the site is issued. The Suffolk County Attorney then requests that a “court of competent jurisdiction” to confirm the Commissioner’s determination, and when the Order is signed, the order is delivered to the Sheriff’s Office to coordinate access for the inspection.⁸⁷

Following additional site assessment, the second innovation Suffolk County and the SCLBC use is to transfer control of the property without actually foreclosing or taking title to the property. Because the County remains reluctant to foreclose on contaminated properties, it assigns the tax liens to the SCLBC without ever taking actual ownership of the properties. This is also important because under the Suffolk County Code, the legislature may not convey a

⁸⁵ N.Y. Pub. Auth. Law §§ 1303-04, and Suffolk County Sanitary Code §§ 760-704, 760-1204.

⁸⁶ Suffolk County Sanitary Code § 760-704.

⁸⁷ Suffolk County Land Bank Board of Directors Meeting Presentation, February 2015.



property to a private party
“unless a minimum payment of the tax arrears, interest, penalties, administrative fees, recording fees and/or rent, and all other charges due.”⁸⁸ While such a provision works well with properties that have value above the back taxes and penalties, this is not the case with many negative-value brownfields properties. Therefore, by transferring the tax liens without actually foreclosing, the County and SCLBC are able to stay out of the chain of title for CERCLA liability purposes, and the SCLBC can transfer the tax liens to a private party or developer in accordance with state law and its disposition policy (which are not subject to the County Code restrictions for minimum sale price).⁸⁹

Unfortunately, there is also a downside to not taking title, because certain state brownfields grant programs available to municipalities are not available to land banks (this differs by state law). Nevertheless, transferring the ownership of the liens does enable the SCLBC to use its land bank powers in conjunction with the environmental assessment information to package redevelopment deals for private purchasers in amounts for less than the back taxes. This “write-down” of the sale cost is accomplished without either the County or SCLBC ever taking ownership of the property, thereby avoiding potential CERCLA liability.

While Suffolk County and the SCLBC have been creative in finding ways to access sites and avoid potential environmental liability, statewide legislation permitting municipalities and

⁸⁸ Suffolk County Code § 29-3.

⁸⁹ N.Y. Not-For-Profit Corp. Law § 1607.



land banks to access tax delinquent sites for potential environmental assessments could accelerate and broaden this process. In the SCLB case, the method devised takes approximately 47 weeks.⁹⁰ Further, extending any municipal liability protections and remediation funding under state law to land banks is essential if land banks are to effectively acquire and redevelop a significant volume of brownfield sites.⁹¹

2. Oregon's Brownfields Land Bank Bill

Cleveland had the first local land bank dedicated to brownfields and Suffolk County has one of the only vacant property land banks focused on brownfields. However, the first statewide land bank enabling legislation focusing on contaminated properties was Oregon Brownfields Land Bank Bill (the Bill).⁹² The Bill was passed and signed into law last summer to provide Oregon municipalities with a new tool to address some of the estimated 13,500 brownfield sites across the state.⁹³ Under this bill, municipal governments may establish local land bank authorities to acquire derelict brownfield properties and use a variety of strategies and funding sources to clean them up and return them to productive use.⁹⁴ The law authorizes the creation of

⁹⁰ Suffolk County Land Bank Board of Directors Meeting Presentation, February 2015.

⁹¹ In fact, the author has an Amendment to Title 5 in Article 56 of the New York Environmental Conservation Law, which would include land banks under the definition of municipality for the purposes of the Environmental Restoration Program.

⁹² H.B. 2734, Reg. Sess. (Or. 2015) (enacted). <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2734>.

⁹³ Committee Report, <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2734>.

⁹⁴ H.B. 2734, Reg. Sess. (Or. 2015) (enacted). <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2734>.



public land bank authorities, giving local governments a means of addressing contaminated properties that the private sector is unwilling to take on, without also acquiring liability solely as a result of obtaining the property.

Establishment of a separate, independent land bank entity protects the local government from exposing its general fund to the risks associated with acquiring and owning contaminated property. At the same time, the Oregon land bank authorities will be protected under state law from liability for pre-existing contamination.⁹⁵ This incorporates state law liability protections for the land bank through the “federal bar” provisions discussed in Section IV. Moreover, like federal or state superfund laws, the Oregon land banks also have the ability to pursue cleanup costs from responsible parties.⁹⁶

It is anticipated that the land banks will be well situated to facilitate redevelopment deals using existing tools like prospective purchaser agreements, which are already available to provide liability protection to private parties for contamination caused by previous owners.⁹⁷ While the initial law did include authorization for municipalities to bond on behalf of land banks, it did not explicitly include other funding or financing mechanisms such as TIF. However, the Oregon Legislature recently passed another law authorizing municipalities to institute property tax incentive programs.⁹⁸ This new law grants municipalities the power to issue special

⁹⁵ H.B. 2734, Reg. Sess. (Or. 2015) §§ 10(c), 11(c).

⁹⁶ H.B. 2734, Reg. Sess. (Or. 2015) § 7.

⁹⁷ Unpublished information materials distributed by the Oregon Brownfields Coalition.

⁹⁸ H.B. 4084, Reg. Sess. (Or. 2015) (enacted), <https://olis.leg.state.or.us/liz/2016R1/Measures/Overview/HB4084>.



assessments to brownfields, or exempt new and existing improvements and personal property on brownfields for period of up to 10 years, with an additional period up to five years based on locally adopted criteria.⁹⁹

It is worth noting that Oregon Land Bank Bill only went into effect January 1, 2016, so this new type of brownfield land bank is very much in its infancy. However, the passage of the additional tax assessment bill this past spring demonstrates the legislature's focus on developing a suite of tools to tailor land banks for brownfields. Observers interested in best practices for redeveloping brownfields should pay close attention to the implementation of Oregon's brownfield land banks and any new legislative creations by the Oregon legislature.

3. Connecticut Brownfield Land Bank Act

The Connecticut Brownfield Land Bank (CBLB) is unique in the land bank discussion because it operates as a statewide non-profit absent any land bank enabling legislation, though that will likely change when the Governor signs the recently passed Public Act 16-115, which authorize the creation of Brownfield Land Banks in Connecticut.¹⁰⁰ The CBLB was an outgrowth of the Regional Brownfields Partnership of West Central Connecticut, which is hosted by the Valley Council of Governments.¹⁰¹ The CBLB is focused on providing municipalities with

⁹⁹ H.B. 4084, Reg. Sess. (Or. 2015) (enacted), <https://olis.leg.state.or.us/liz/2016R1/Measures/Overview/HB4084>.

¹⁰⁰ 2016 Conn. Public Act No. 16-115, An Act Concerning the Creation of Connecticut Brownfield Land Banks, Certain Lender Responsibility for Releases at Brownfields and Revisions to the Brownfield Remediation and Development Programs.

¹⁰¹ Mission (and slideshows), <http://www.ctblb.com/>; also personal notes from staff interviews on June 30, 2015.



technical assistance in the assessment, remediation, and redevelopment of brownfield sites. The CBLB also hopes to become a transactional partner, using its status as a statewide not-for-profit corporation to help municipalities aggregate parcels for redevelopment and structure redevelopment deals for properties with longstanding brownfield issues.¹⁰²

The aims of the CBLB are largely transactional, focusing on brownfield sites identified by municipal partners on an ad-hoc basis.¹⁰³ While Connecticut has a variety of programs for liability relief and funding assistance for brownfields, the CBLB must carefully select which sites to work on based on environmental liability, the availability of assessment and remediation funds, and a private partner or other end user of the site.¹⁰⁴ Additionally, any sites held by the CBLB will be subject to property taxes unless the local municipality either reduces the assessment to zero because of contamination, or agrees to enter the site into some other eligible tax abatement program.¹⁰⁵

Under the new Brownfield Land Bank Legislation, the CBLB and other nonprofits will be able to apply to the State's Commissioner of Economic and Community Development for certification as a Connecticut Brownfield Land Bank upon developing a proposed land banking agreement with one or more municipalities, and submitting other required information including

¹⁰² Mission (and slideshows), <http://www.ctblb.com/>.

¹⁰³ Personal notes from interview with Executive Director and Counsel on June 30, 2015.

¹⁰⁴ Personal notes from interview with Executive Director and Counsel on June 30, 2015.

¹⁰⁵ J. Justin Woods, Personal Notes from Interview with Executive Director and Counsel on June 30, 2015.



a business plan for operating the land bank.¹⁰⁶ Once certified under the new law, the CBLB or other approved land banks will be able to hold property tax free without having to negotiate individual abatements with each municipality.¹⁰⁷

The new legislation also authorizes environmental liability protection for non-profits certified as a land bank, and explicitly authorizes:

“...A Connecticut brownfield land bank or any licensed environmental professional employed or retained by such Connecticut brownfield land bank may enter, without liability, upon any property subject to a land banking agreement between such Connecticut brownfield land bank and the municipality in which such property is located for the purpose of performing an environmental site assessment or investigation on behalf of such Connecticut brownfield land bank if:

- (A) Such environmental site assessment or investigation is required Substitute House Bill No. 5425 Public Act No. 16-115 15 of 45 under a land banking agreement between such municipality and such Connecticut brownfield land bank, and such municipality is otherwise authorized under this subsection to enter such property without liability, or
- (B) the property owner has entered into a voluntary agreement with such municipality or such land bank for the performance of an environmental site assessment or investigation. The municipality or, if applicable, the Connecticut brownfield land bank shall give at least forty-five days' notice of such entry before the first such entry by certified mail to the property owner's last known address of record.”¹⁰⁸

And the law includes constitutional due process provisions permitting owners to file an action opposing site access in Superior Court, but the owner bears the burden of showing that the action is not necessary because the owner has completed or is the process of completing an

¹⁰⁶ 2016 Conn. Public Act No. 16-115 § 2.

¹⁰⁷ 2016 Conn. Public Act No. 16-115 § 5.

¹⁰⁸ 2016 Conn. Public Act No. 16-115 § 8(a).



environmental

assessment, provide or will provide a copy of the report within 30 days of receiving it, and has paid any delinquent taxes.¹⁰⁹

In many ways, Connecticut's law systematically integrates Brownfield Land Banks into all of the states brownfield programs in an even more robust way than the Oregon law, treating brownfield land banks as similar to a municipality or economic development corporation. However, it does not include the type of cost recovery provisions contained in the Oregon law nor does it integrate the TIF financing mechanisms recommended by Paull and Otto.

¹⁰⁹ 2016 Conn. Public Act No. 16-115 § 8(c)



VII. Fourth Generation Land Banks – Redeveloping Brownfields

The land bank movement is growing rapidly. According to the Center for Community Progress, there were only a “handful” of land banks in 2005. In 2011, they counted 79; today, there are approximately 120.¹¹⁰ Similarly, only five states passed land bank legislation between 1971 and 2008, and eight more states have passed the model law since 2011.¹¹¹ To an extent, all land banks deal with some potential contamination issues. But now, across the country, from New York and Connecticut to Oregon, community leaders, state legislatures, and thought leaders are grappling and innovating with novel approaches to use land banking to redevelop brownfields.

The Suffolk County Landbank Corporation is firmly embedded in the third generation of land banks, authorized by New York’s adoption of CCP’s model statute. However, its primary focus on brownfields redevelopment is unique among traditional vacant property and other third generation land banks. The Oregon and Connecticut statutes go even further - reinventing land banks far beyond the Cleveland Industrial-Commercial Land Banks or the Brownfield Redevelopment Authorities in Michigan - and they certainly have a different focus than previous incarnations of vacant property land banks. This new focus on brownfields enabled the Oregon

¹¹⁰ Payton Heins and Tarik Abdelazim, Take it to the Bank: How Land Banks Are Strengthening America’s Neighborhoods (Center for Community Progress) (2014), http://www.communityprogress.net/filebin/Center_for_Community_Progress_-_Take_it_to_the_Bank_-_2014_-_Updated_Online_Version.pdf.

¹¹¹ Payton Heins and Tarik Abdelazim, Take it to the Bank: How Land Banks Are Strengthening America’s Neighborhoods (Center for Community Progress) (2014), http://www.communityprogress.net/filebin/Center_for_Community_Progress_-_Take_it_to_the_Bank_-_2014_-_Updated_Online_Version.pdf.



and

Connecticut

laws warrants recognition as a new **“fourth generation” of land banks.**

By either establishing a brownfields land bank or amending existing land bank enabling statutes, state legislatures must shield local governments and land banks from state environmental liability and financial exposure. The recent passage of the Oregon and Connecticut Brownfield Land Banks propel land banking into a new realm; land banks that will function as brownfields redevelopment authorities. It is important to note that there is no panacea for dealing with vacant, delinquent, or contaminated properties, especially in situations where the clean-up and redevelopment costs far exceed property values. However, expanding access for assessment and environmental liability protections will create new tools that land banks can use to help end the cycle of disinvestment and decay caused by the presence of brownfields,

Fourth generation land banks are only in their infancy, and they will no doubt continue to evolve. So Land bank and brownfields advocates must learn from the shortcomings of the third generation land banks, which often lack adequate funding and financing mechanisms. Lack of adequate funding is extremely problematic in broken real estate markets, and it is even worse in negative value brownfields situations. Future land bank legislation, whether focused on brownfields or not, must include a system to finance land bank programs and operations. Combining reliable funding streams modeled after the Ohio Delinquent Tax and Assessment Collection system and modified versions of tax increment financing as proposed by Paull and Otto are the likely keys to the continued growth and success of both third and fourth generation



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