

**CASE STUDY OF STATE INCENTIVES:
PROPOSALS TO MAKE STRATEGIC INVESTMENTS IN BROWNFIELDS
REDEVELOPMENT**

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Genesis of This Report

Northeast-Midwest Institute (NEMW) was requested by a state, which will be hereafter referred to as “State A” to advise the state relative to the potential for modifying and expanding State A’s brownfields incentives.

The project involved two conference calls with State A’s economic development and environmental officials, reviewing State A’s current brownfields incentives, reviewing a draft proposal to expand State A’s brownfields incentives, and a comparative analysis of incentives that are offered by other states vis-à-vis State’s needs.

NEMW asked Charles Bartsch, Senior Vice President, ICF International, to assist in this endeavor, and NEMW gratefully acknowledges Charlie’s contribution to the preparation of this report.

NEMW regards this project as a potential model for future projects, and requests for similar assistance may be directed to Evans Paull, 202-464-4004 or epaull@nemw.org.

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STATE A – PROPOSALS TO MAKE STRATEGIC INVESTMENTS IN BROWNFIELDS REDEVELOPMENT

EXECUTIVE SUMMARY

1. **Site assessments.** State A should consider boosting site assessments as “job one” for enhancing state brownfields incentives.
2. **Consider no-cost reforms.**
 - a. Measures to encourage the use of tax increment financing (TIF) on brownfields sites: 1) eliminate the urban renewal plan requirement for isolated brownfields sites; and 2) allow the TIF base to be reduced by estimated cleanup costs.
 - b. Measures to encourage local government to proactively address brownfields sites by providing for: 1) public agency liability protections, and 2) site access under eminent domain.¹
3. **Priorities.** There are two potential “workhorses” to fund cleanup and site preparation: an income tax credit and state-facilitated tax increment financing.² While offering a menu of cleanup funding options is ideal, State A may be faced with difficult choices. It may come down to this: if State A projects that the state can be the “senior partner” in financing cleanups statewide, then the income tax credit may be the preferred option. If State A projects that there will be limited state funding availability and localities will be the “senior partner,” then a state-facilitated TIF program may be the best option.
4. **Income tax credit option.** If State A’s preference is an income tax credit program, consideration should be given to adopting at least a basic cleanup tax credit as fully automatic. A needs-tested and capped second tier could cover higher levels of cleanup, as well as demolition and site preparation.
5. **State-facilitated TIF program.** If State A’s preference is a state-facilitated TIF program, consider building up a significant revolving loan fund (RLF) that would serve to provide favorable financing (loans and guarantees) for local brownfields TIF projects, including a simplified “pay-go” option.
6. **Current grant-loan program.** Retooling and strategically narrowing the current brownfields redevelopment grant program might be viewed as the dependent variable in the equation, depending on the outcome of numbers 3-5.
7. **Local property tax abatement.** Tax abatement might also be thought of as a dependent variable. If State A is encouraging the TIF option, tax abatement would presumably work counter to the plan. The current proposal to link the state income tax credit to a negotiated property tax abatement, as well as a payment from the locality to the state to fund an RLF, is one way to marry state and local commitments, but there a number of difficulties outlined in more detail, below.
8. **Seek stakeholder input.** These recommendations have been made by experts in the field who are far removed from State A. State A should seek input from communities, developers, and other stakeholders. State A may also want to consider changes on the regulatory side if stakeholders indicate that there are regulatory obstacles that are holding back brownfields investment.

¹ NEMW has not reviewed current State A law to determine whether these proposals are needed.

² The assumption is that a sizable increase in the current grant-loan program is a rejected option.

BACKGROUND

Many states have rather modest brownfields incentives, usually a grant-loan program to fund site assessments and cleanups, and usually under-funded relative to needs. Some of these states may be considering proposals to improve, expand or modify these incentives in order to get more mileage out of limited funds and accelerate cleanup and redevelopment activity.

“State A” is in precisely this position. State A asked Northeast-Midwest Institute (NEMW) to review their current brownfields incentive program and make recommendations as to the most efficient and effective way to accelerate brownfields redevelopment in the state. State A had also prepared an internal draft proposal for expanding incentives, and the state asked NEMW to review this proposal.

NEMW asked Charles Bartsch, Senior Vice President, ICF International, to assist in this endeavor. NEMW and ICF carried out two conference calls with State A’s economic development and environmental officials, reviewed State A’s current brownfields incentives, reviewed the draft proposal to expand State A’s brownfields incentives, and carried out a comparative analysis of incentives that are offered by other states vis-à-vis State A’s needs.

This paper is being published and distributed because NEMW believes that State A’s predicament is shared by many states, i.e. that other states may find the recommendations applicable and helpful. State A asked that the report be published in a generic fashion, because State A has not decided whether to adopt the recommendations.

NEMW begins this analysis, below, with basic principles that NEMW recommends for ANY state incentive program.

SOME BASIC PRINCIPLES TO CONSIDER

1. ***Site assessment funding as basic.*** For states that have modest brownfields incentives, boosting up site assessments is the simplest and most direct way to overcome one basic brownfields hurdle: the fear of the unknown.
2. ***Predictability of incentives.*** The local real estate community needs to have a reasonable expectation that, if it has certain qualifying circumstances, it can expect to get certain kinds of assistance. That way the developer can “pro forma” the expected incentive, which means that the incentive has accomplished its mission to help level the playing field between brownfields and greenfields. An income tax credit that is fully automatic (no needs test, no state cap, no queuing) is the Cadillac of predictable incentives.
3. ***Needs testing.*** Needs testing may be necessary for higher levels of assistance. The down side of automatic, predictable incentives is that some sites will get assistance that do not really need it. Thus, for higher levels of subsidy, needs testing is usually necessary as a fiscal precaution.

4. ***Funding non-cleanup site prep costs.*** Most brownfields sites are complicated by demolition and site preparation hurdles that go beyond cleanup. It is desirable for funding to cover some portion of the gaps that are created by these additional factors.
5. ***Using TIF to bring in the locals.*** A marriage of state and local commitments will make the state dollars go further. Local government has one very powerful incentive to bring to the table: tax increment financing. State A should consider brownfields incentives that complement and encourage the application of TIF to brownfields. Tax abatements are another significant local incentive, and the current draft State A proposal creatively ties state financing to local tax abatement.
6. ***Broad definition eligible remediation activities.*** For any of the options listed below, consider a broad definition of remediation activities, including: any remedial action required by the state (including a site cap), site assessment costs, asbestos and lead paint abatement in buildings or as part of demolition, cost of environmental insurance, and any cost related to maintaining institutional controls.
7. ***Responsible Person (RP) exclusions.*** No one wants to violate “polluter pays,” but there are many innocent parties that are technically RPs. For example, a local government that acquired a site pre-voluntary cleanup program (VCP) and pre-Bona Fide Prospective Purchaser may be technically an RP. Consider making incentives available to any entity that did not cause or contribute. A more liberal version of this would be to allow incentives to benefit owners and operators who have conformed with the laws in place at the time of their operation and who did not knowingly cause or contribute.
8. ***No double-dipping.*** To the extent that there is overlap in incentives, the state does not want to pay for the same thing twice. Thus, for example, if a project received a site assessment grant, the amount of that grant should be deducted from any cleanup tax credit.
9. ***Public benefit requirements, criteria, and benefit variation.*** State A may want to consider some combination of program requirements, criteria, and/or variations in benefit level in order to reinforce other state priorities, such as:
 - Job creation
 - Affordable housing
 - Sustainable development/green buildings
 - Targeted investments for distressed areas
 - Unrestricted cleanups³
 - Small sites/rural sites
 - Location in an existing developed area or planned growth area
10. ***Regulatory exclusions from site eligibility.*** NEMW recommends that State A attempt to minimize regulatory exclusions from site eligibility. Some states limit the eligibility of sites that are under the Resource Conservation and Recovery Act

³ It should be pointed out that offering a higher level of incentives for unrestricted cleanups creates an inefficiency in that public funds are going to cleanups that are, arguably, unnecessary. If the state has strong institutional controls, cleanup to unrestricted use should not be necessary.

(RCRA) regulation or under enforcement orders, but the result of those exclusions is that the most difficult sites remain contaminated and stagnant.

11. Other site eligibility criteria

- Sites receiving state funding should be endorsed by the local government.
- Projects must be in the state VCP or under other state regulatory oversight.

STATE A’S CURRENT BROWNFIELDS INCENTIVES

State A Brownfields Redevelopment Program:

- Pays up to 25% of eligible costs.
- Eligible costs are broadly defined – acquisition, site assessments, cleanup, redevelopment.
- For private sites, a local government sponsor is required.
- Requires the purchaser and seller to enter into an agreement such that the seller will transfer title upon completion of cleanup.
- Limits the windfall the purchaser can receive upon re-sale of the property.

NEMW comments on current State A Brownfields Redevelopment Program:

- Insufficiently funded – not a predictable source.
- 25% ceiling is too low for the site assessment side to be effective.
- Windfall provisions are confusing and limit the appeal to private developers. Consider either eliminating this section or revamping it and having it apply only to localities.

An assumption that NEMW has made is that significantly boosting the current grant program is a rejected option. Assuming this is correct, retooling the current Brownfields Redevelopment Program might be viewed as the dependent variable in the larger picture of whether State A is going to adopt an income tax credit and/or a state-facilitated TIF approach as the primary brownfields cleanup and redevelopment incentive(s). State A should consider narrowing the grant program, structuring it to fill certain gaps or to provide more targeted assistance relative to tax credit and/or TIF programs.

One potential direction would be to concentrate on preparing publicly owned sites to be “development-ready.” Both the income tax credit and the state-facilitated TIF approach will work best when development is imminent or at least fairly predictable. The grant program can assist tougher sites (usually publicly-owned) where some level of upfront activity is necessary in order to make the property marketable.

Another potential direction would be if the broader strategy is to provide an income tax credit program that is universally available with no geographic targeting. The grant program might then be re-formulated to provide assistance to sites in distressed communities where the marketplace requires a higher level of subsidy.

PROGRAM PROPOSALS AND RECOMMENDATIONS

1. Boosting site assessments

A well-funded and thoughtfully structured site assessment program, while not eye-catching, would be a significant first step toward overcoming brownfields hurdles. The draft State A proposal includes \$3 million for a site assessment program, and NEMW endorses this approach. To fine-tune the concept, State A should consider:

- Site assessment matching grants up to \$100,000 per site with variable match requirements:
 - If applicant is a governmental entity or non-profit that is an owner or prospective purchaser, state share is 75%.
 - If applicant is a private entity/innocent purchaser, state share is 50%.
 - If applicant is a private entity/owner/RP, state share is up to 50%, but the grant converts to a loan if the applicant does not enter the property into the state VCP within 12 months of completion of the site assessment. If there is discomfort with this assistance to an RP, this section could be limited to owners that did not cause or contribute.

2. Income tax credit

Draft State A proposal. The draft State A proposal includes a brownfields income tax credit program. The proposed elements are:

- 15% credit of eligible cleanup and redevelopment costs. Redevelopment costs are not currently defined, but the intent is a broad definition that would roughly correspond to total investment.
- Credit is limited to two times cleanup costs.
- Credit is transferable.
- Credit carries forward for five years.
- Credits in aggregate are limited by a \$10 million cap; approvals are first-come, first-served.

Comments on draft proposal. Generally, the proposed credit would certainly help kick-start the marketplace, but here are some issues to consider:

- The \$10 million cap in combination with the first-come, first-served method of approval may cause queuing and delay, and the result will be that the credit will sometimes assist projects well after the developer has become committed (producing “gravy” to the developer). Working out the logistics of first-come, first-served may involve a number of difficult issues as well. While fiscal and political realities may trump other factors, State A should consider making a basic cleanup credit fully automatic, with no needs test or cap.
- The inclusion of non-brownfields redevelopment costs is laudable, but the 15% ceiling may be higher than it needs to be, given fiscal constraints. A parallel Michigan credit that involves a needs test is 10% and is viewed as effective. New York’s credit is 12% to 20% and fully automatic, and has been criticized as too generous.

- There appears to be an inadvertent incentive for the developer to increase cleanup costs beyond what might be required. If the “two-times-cleanup-costs” factor is limiting the amount of the credit, which will be the usual case, the developer can get \$2 of tax credit for every \$1 of cleanup. While there may be some value in encouraging cleanups to go beyond the minimum, there is a danger that the credit will assist fewer sites because the first sites into the queue will inflate their cleanup costs in order to get more tax credit.
- If State A decides to stick with this proposal with only minor modification, consider adding public benefit requirements (see “Basic Principles, #9,” above). Since the likelihood is that demand for the credit will exceed the budget, the state should leverage its limited dollars to get the greatest possible public benefit.

Alternative income tax credit proposal. State A should consider a two-tier tax credit with Tier 1 being fully automatic and Tier 2 being needs-tested and subject to a cap.

1. Tier 1 – Cleanup credit modeled after Colorado’s, fully automatic if all eligibility requirements are met, with no needs test and no cap:
 - a. 50% credit for first \$100,000 of cleanup
 - b. 30% credit for second \$100,000
 - c. 20% credit for third \$100,000
2. Tier 2 – Broader cleanup/demolition/site preparation credit, subject to a needs test and a statewide cap:
 - a. 30% of cleanup/demolition/site preparation costs. If cleanup costs exceed \$300,000, they can be added to the second tier.
 - b. Need must be demonstrated through “but-for” test.
 - c. Consider other public benefit factors as either “requirements” that all projects must achieve or as variations in the amount of the credit available. For example (illustrative only):
 1. Require all Tier 2 recipients to build to a high-performance “green” standard.
 2. Offer an extra 10% credit if the project is located in an area of high economic distress and creates 100 jobs.
3. Considerations for any income tax credit program:
 - a. Credits should be transferable.
 - b. Eligible entities should include non-profits and local government, if possible, so that these entities can sell the credits to private entities with tax liability.
 - c. Consider how phased cleanups will work. Illinois accommodates phasing by allowing up to \$40,000 per year with an overall maximum of \$150,000 per site.
 - d. One way to target the credit to sites where redevelopment is unlikely absent the credit is to add an eligibility requirement that the site has to be vacant for “X” years. Missouri uses three years.

Income tax credit programs in other states are summarized in Appendix 1.

3. State-facilitated TIF program

Advantages of the TIF approach. To some degree, state-facilitated TIF financing represents an alternative to both the grant programs and tax credit programs. It can be advantageous to have an entire menu of options, but fiscal realities usually dictate picking and choosing. Fiscal concerns may also favor options that marry state and local commitments. There are several advantages of the state-facilitated TIF approach:

- With tax increments stretching out as long as 20 years, TIF is a powerful incentive that can bring more resources to the table than typical cash-strapped loan and grant programs.
- The state's commitment can be loans and guarantees, rather than grants and treasury-depleting tax credits.
- The state could build up a revolving TIF loan/guarantee program with new appropriations over several years. When loan re-payments (and freed up guarantees) are substantial enough to replenish the fund, the state's new appropriations to the fund could be very significantly diminished.

Current State A TIF law. State A's TIF law is relatively permissive. TIFs are not limited to public infrastructure, so use of TIF to pay for brownfields-related costs is possible without statutory change. The TIF law does require localities to develop an urban renewal plan before establishing TIF districts.

Proposals to maximize the brownfields-TIF connection. State A may want to consider several changes to its current TIF enabling act in order to make brownfields redevelopment more attractive:

- Establish an exception such that an isolated brownfields site can be designated as a TIF without being part of an urban renewal plan.
- Add brownfields redevelopment as one of the program purposes.
- Allow the base to be reduced by cleanup costs, as revealed in a site assessment, modeled after Minnesota's TIF Hazardous Substance Subdistricts.

Beyond those changes to the existing program, State A should consider adopting a financing mechanism that has the effect of creating favorable financing for brownfields TIFs. This approach is critical because of a mismatch between the demands of the bond market and the reality of brownfields projects. The bond market generally will not finance a TIF bond until vertical development is committed, whereas brownfields projects need cash at an earlier point to address site deficiencies.

TIFs can be financed either through a pay-go mechanism that avoids financing costs or a loan or bond mechanism. There is a potential state role in both options.

- ***Pay-go.*** The brownfields version of pay-go would be that either the developer or the city fronts the funding for brownfields costs and is paid back at a later point when the TIF revenues come in. The state could play a role that would lower the risk of non-performance by guaranteeing a percentage of the TIF revenues.
- ***Loan-bond-guarantee.*** When borrowing becomes necessary, State A should consider a mechanism that is designed to address the upfront financing needs of a brownfields

site, because the bond market will only rarely fund such activities. There are at least two models (see Appendix 2):

- Michigan employs a flexible loan structure with 2% interest rates and no payments for up to five years. This is ideal, although maybe even more flexible than it needs to be. The delayed repayment has the effect of broadening the types of projects that might benefit to include those where the redevelopment is less than assured.
- Connecticut employs a loan-bond-guarantee combination, but the key element is that the state guarantee takes the risk of non-performance away from both the locality and the developer. Presumably, this guarantee is for only a portion of the total financing package. A guarantee program is more suited to projects where vertical development is committed.

State A may want to consider setting up a fund that can go either way (loan or guarantee) depending on the circumstance.

Note that the loans and guarantees envisioned here as facilitating TIFs could have broader purposes and could directly finance or guarantee brownfields activities unrelated to TIF. State A may want to allow that scenario, but give preference to TIF projects.

Eligible expenditures for the TIF loan/guarantee program should include acquisition, at least if the acquiring entity is a public agency. This will encourage localities to address difficult sites.

4. Property tax abatements and property tax funding of state RLF

Current proposal. The draft State A proposal establishes a negotiated tax abatement of up to 50% for a period not to exceed 10 years for projects determined to be eligible for the income tax credit. There is also a property tax tie-in to funding a state RLF, so that if the project is getting the state income tax credit, 25% of the incremental property tax revenues will go to the state to fund the RLF.

Comments on current proposal. Consider the following:

- The interaction of the two provisions is not clear. Is the 25% that goes to the state based on 100% of property tax revenues or only the 50% unabated portion?
- The concept of linking the three incentives (income tax credit, property taxes and abatements, and the state RLF) is creative and helps make the locality a partner. However, by limiting the tax abatement to sites qualifying for the income tax credit program, the sites served are going to be limited.
- State A might also anticipate some level of local resistance to the concept of the state mandating that a portion of local property taxes should go to the state. Additionally, there may also be administrative difficulties in attempting to collect the state portion.

5. Measures to encourage proactive action by local government

NEMW was not asked about this issue; nevertheless, State A may want to consider ways to encourage localities to address sites that are unlikely to attract private investment.

Liability protections for public agency site acquisition. NEMW has not reviewed State A’s hazardous waste statutes, but if the state law reflects federal law, it is likely that localities are reluctant to acquire contaminated property because of liability concerns. Appendix 3 describes how seven states have modified their liability schemes to offer greater protection to public agencies.

Site access under eminent domain. State A may want to also consider examining the eminent domain or urban renewal statutes relative to the site access issue. Presuming that State A allows eminent domain for economic development purposes, one of the inhibiting factors for acquisition of contaminated sites is that it is impossible for the acquiring authority to assess the site prior to taking possession. This tends to lead to one of two poor outcomes: site acquisition is dropped because of fear of the unknown, or site acquisition proceeds but the public sector pays fair market value as if the property were clean, and then is stuck with cleanup costs.

Maryland and Virginia have adopted amendments to allow site access under eminent domain. NEMW can provide the language if it is of use to State A stakeholders.

Appendix 1 - State Brownfields Income Tax Credit Programs⁴

State	% or amount of credit	Eligible expenditures	Eligible sites	Transfer-able	Automatic vs. needs test	Varying the credit amt
Mo.	Up to 100% - need must be demonstrated	Site testing and remediation	Abandoned for 3 years and project creates 25 jobs		Needs test	There are separate programs for job creation and demolition credits.
Mich.	10% of all development (not just cleanup) expenditures, up to \$1 million – requires application demonstrating need and impact			Yes	Needs test	
Mass.	25-50%	Site testing and cleanup	Economically distressed area; response costs exceed 15% of assessed value	Yes		The higher 50% credit for “full” cleanups only – no use restrictions.
Ky.	25% or \$150,000 whichever is less	Site testing and remediation	In-state VCP			
Fla.	Up to 50% of cleanup costs per year, not to exceed \$1 million	Site testing and cleanup		Yes		<ul style="list-style-type: none"> ▪ Coverable cleanup expenditures increase to 75% if result in affordable housing ▪ Bonus tax refund of \$2,500 for each new job
Ill.	25% up to \$40K/yr, \$150k per site.	Site testing and remediation			Automatic	
Co.	50% - first \$100,000, 30% - 2nd \$100,000; 20% - 3 rd \$100,000	Site testing and cleanup	In-state VCP		Automatic	
New	<ul style="list-style-type: none"> ▪ 10% - 12% of total development costs; 		In-state VCP		Automatic	<ul style="list-style-type: none"> ▪ Additional 8% credit if

⁴ Information in this chart was organized by NEMW, using data from previous reports, as well as program websites. The information has not been verified by the states. In some instances, NEMW was unable to distinguish certain program elements, such as whether the credit is transferable; these are left blank.

York ⁵	<ul style="list-style-type: none"> One-time credit of 50% (up to \$30,000) of environmental insurance costs 					<ul style="list-style-type: none"> located in distressed area Additional 2% credit if cleanup to an unrestricted use
Del.	\$650 credit for each \$100,000 of new investment, and \$650 for each new job		Located in a distressed area and creating at least 5 jobs		Automatic	Job credits are increased by \$250 per job for brownfields sites
NJ	Reimbursement of up to 75% of eligible costs	Site testing and remediation	Depends on state revenues from the site			
La.	15% of site testing 25% of cleanup		“State-certified brownfields”		Automatic	
Wisc.	50%	Site testing and remediation	In development zones/distressed areas		Automatic	

Missouri:

<http://www.missouridevelopment.org/topnavpages/Research%20Toolbox/BCS%20Programs/Brownfield%20Redevelopment%20Program.aspx>

Colorado: <http://www.revenue.state.co.us/fyi/html/income42.html>; <http://www.cdph.state.co.us/hm/bftaxhowto.htm>

Delaware: <http://delcode.delaware.gov/title30/c020/sc03/index.shtml>

Florida: <http://www.floridadep.org/waste/categories/vctc/default.htm>

Illinois: <http://www.revenue.state.il.us/publications/bulletins/2003/Fy200309.pdf>

Mass:

[http://www.mass.gov/?pageID=dorterminal&L=7&L0=Home&L1=Businesses&L2=Help+%26+Resources&L3=Legal+Library&L4=Technical+Information+Releases&L5=TIRs+-+By+Year\(s\)&L6=\(1990-1999\)+Releases&sid=Ador&b=terminalcontent&f=dor_rul_reg_tir_tir_99_13&csid=Ador](http://www.mass.gov/?pageID=dorterminal&L=7&L0=Home&L1=Businesses&L2=Help+%26+Resources&L3=Legal+Library&L4=Technical+Information+Releases&L5=TIRs+-+By+Year(s)&L6=(1990-1999)+Releases&sid=Ador&b=terminalcontent&f=dor_rul_reg_tir_tir_99_13&csid=Ador)

New Jersey: <http://www.state.nj.us/treasury/taxation/pdf/pubs/misc/bcs100.pdf>

Wisconsin: <http://www.dnr.state.wi.us/org/aw/rr/archives/pubsYes/RR563.pdf>

La: <http://www.legis.state.la.us/billdata/streamdocument.asp?did=297823>

⁵ New York’s program is under revision in the state legislature

Appendix 2 - State-Facilitated Tax Increment Financing

Michigan's Brownfield Redevelopment Authorities

TIF is the key element in Michigan's brownfield program. To encourage brownfield redevelopment, the Brownfield Redevelopment Financing Act (1996 PA 381, as amended) allows local units of government to establish a TIF district and capture the property tax increments to provide reimbursement for the costs of the eligible cleanup and site preparation activities. Local Brownfield Redevelopment Authorities (BRAs), the entities that govern the TIF plans, also may establish a Local Site Remediation Revolving Fund from surplus captured taxes in order to cover cleanup and site preparation at other designated properties in the BRA's jurisdiction (http://www.michigan.gov/deq/0,1607,7-135-3311_4110_23246---,00.html).

Michigan's TIF-complementary financing programs. Recognizing the mismatch between how the bond market works and how brownfields projects work, Michigan created three alternative financing vehicles: Brownfields Redevelopment Grants (BRG) and two loan programs: Brownfields Redevelopment Loans (BRL) for cleanup, and Revitalization Revolving Loans (RRL) for demolition and site preparation. The two loan programs are designed to work with TIFs, as they feature flexible repayment terms such as no payments due for the first five years and 2% interest rates. These terms are an ideal match with front-loaded, long-lead-time brownfields projects. Notably, the RRL funds demolition and site preparation because Michigan recognized that brownfields projects often involve financing gaps that are due to a whole set of site conditions, not just cleanup.

The developer also may apply for a Single Business Tax (SBT) Brownfield Redevelopment Credit, which boosts the state's participation in a project. This credit can total 10 percent of any innocent party's development costs, though not cleanup costs, up to \$1 million.

With Michigan's BRG grant program, its two TIF-oriented loan programs, and the SBT tax credit, Michigan has an impressive arsenal to close financing gaps on brownfields projects. However, all but the SBT are now endangered as funding through the Clean Michigan Initiative has been exhausted and renewal is uncertain.

Wisconsin's Environmental Remediation Tax Incremental Financing

Wisconsin's Environmental Remediation TIF program represents a new twist on previous Wisconsin TIF authority, which was already one of the more permissive. Wisconsin law allows TIF funds to flow back to the developer for a variety of allowable development costs that are not limited to public infrastructure. The application of TIF to brownfields sites, under either the new environmental remediation authority or under the previous TIF authority, involves three basic models:

- Locality advances cleanup/site preparation funds to the developer from local operating funds or a previously authorized general obligation (GO) bond issue and then reimburses itself from the tax increments on a "pay-go" basis;

- Developer finances the cleanup/site preparation from private sources, and the city agrees to devote the tax increment to repay part or all of the developer's investment; or
- Locality takes the proposed project to the bond market as a revenue bond, to raise the upfront funds for the project; advances the bond funds to the developer; and repays the bond from the tax increment.

The first two options are “pay-go” TIFs because there is no borrowing to convert the revenue stream to upfront financing. Instead, the upfront expenditures are advanced by either the locality or the developer and then, when the tax increment begins to flow, the upfront expenditures are simply reimbursed. This is an attractive, simplified, and highly efficient method of applying TIF to brownfields sites. It works best on smaller sites with modest cleanup costs.

Connecticut Brownfields Redevelopment Authority (CBRA)

CBRA offers financing for brownfields remediation through its parent organization, the Connecticut Development Authority (CDA). Grants up to \$10 million, derived from the TIF, are available to investors, developers, and business owners who undertake brownfields redevelopment projects. CDA has pre-existing bond funds that are used for this purpose. The grant proceeds can be used for any expense directly related to the remediation of the project, and the project can be located anywhere in Connecticut. Municipal authorities must agree with CBRA about the allocation of incremental tax revenues. The allocation is the key factor in determining the amount of the grant (<http://www.ctbrownfields.com/Content/Grants.asp>).

A typical site might involve an improvement that will generate \$100,000 in new annual taxes, an agreement by the city to devote 50 percent of the incremental taxes for 10 years to the TIF, or the delivery by CBRA of \$500,000 (minus fees) to the developer for the cleanup costs. CBRA accepts the risk that the project will not perform, effectively shifting risk away from both the community and the developer.

New Jersey's Redevelopment Area Bond Financing Program

The New Jersey Economic Development Authority makes available low-cost tax-exempt bond financing to municipalities to fund infrastructure, remediation, and demolition on projects where vertical development is committed. The repayment agreement is a form of tax increment financing, using Payments in Lieu of Taxes (PILOTs) and/or special assessment district tax revenues as the basis of repayment. There must be an adopted redevelopment plan. Qualifying bonds are excluded from the municipality's gross debt. See: New Jersey enabling legislation: http://www.njleg.state.nj.us/2000/bills/pl01/310_.htm and New Jersey program: http://www.njeda.com/pdfs/Resources_for_Redevelopment.pdf

Pennsylvania's Tax Increment Financing Guarantee Program

Pennsylvania's TIF Guarantee Program is designed to assist local TIFs that qualify under a strict definition of blight removal. The state's guarantee, up to \$5 million per project, can serve as an important credit enhancement that can make the difference between a feasible and an infeasible project. TIF proceeds may be used for infrastructure and environmental remediation costs. The

state gives priority to brownfields sites as one of several program criteria. The program is funded to provide \$100 million total in guarantees. See: (<http://www.newpa.com/programDetail.aspx?id=45>)

Minnesota's Hazardous Substance Subdistricts

Minnesota's TIF program has an interesting brownfields variation. It permits the frozen tax value, or "base" value, in a subdistrict to be written down by the cost of cleanup, thus increasing the increment. This increased increment creates an interesting option for sites where development may be years off. A tax increment can be generated without any vertical development; the increment is the difference between the base, adjusted for cleanup costs, and the previous base.

Mississippi - Bringing state tax revenues to a deal

Most TIF projects work with local property taxes as the revenue stream, but for some projects this is not enough to cover a financing gap. Such was the case for a 540-acre former chemical plant on the Mississippi River in Vicksburg, Mississippi. Under an agreement adopted in special legislation by the Mississippi state legislature, all state taxes (sales, income, and franchise) will be rebated to the developer for 10 years or 2½ times the cleanup costs, whichever is less. With this financing in place, Silvertip Properties, the developer, is proceeding with an \$8 million cleanup, which is paving the way for a planned resort and casino.

A small minority of states (Missouri, Illinois, and Indiana) allow some proportion of state sales taxes to supplement local TIFs.

Appendix 3 - State Liability Protections for Public Agencies

Federal Context. Under federal law, local governments that acquire contaminated property are subject to liability under CERCLA unless the property was acquired “involuntarily.” The CERCLA exemption for involuntary acquisition clearly protects properties that were acquired because of “bankruptcy, tax delinquency, and abandonment.” Acquisition by eminent domain is also covered, but as a third-party affirmative defense, not an exemption. Voluntary purchase is not protected. Acquisition “under the threat of eminent domain” is in a legal gray area. Acquisition by quasi-public agencies is also subject to interpretation related to the definition of “local government.”

In light of these uncertainties, a number of states have adopted special liability protections for public agencies.

- **Coverage beyond “involuntary acquisitions.”** All six states cited below define the class of protected acquisitions more broadly than “involuntary acquisitions.” These states protect acquisition activities for “redevelopment purposes,” for “removal of slums and blight,” or for properties acquired under the threat of eminent domain.
- **Covering quasi-public entities.** Three states (Pennsylvania, Wisconsin, and California) explicitly exempt quasi-public development corporations.
- **Protection that goes beyond liability to the state.** At least three states (Wisconsin, Pennsylvania, and New Jersey) have included language that goes beyond liability relative to state enforcement action, offering protections against toxic tort and common lawsuits.

New Jersey. New Jersey’s Brownfield and Contaminated Site Remediation Act of 1998 included reforms that give local public agencies broad protections, offering a safe harbor from not only state enforcement action, but also toxic tort, and covering any local government acquisition activity carried out “for the purpose of redevelopment.” An excerpt follows:

“Any federal, state, or local governmental entity which acquires ownership of real property through bankruptcy, tax delinquency, ... eminent domain in which the governmental entity involuntarily acquires title by virtue of its function as a sovereign, or where the governmental entity acquires property by any means for the purpose of promoting redevelopment of the property, shall not be liable ... pursuant to common law, to the State, or to any other person for any discharge which occurred or began prior to that ownership” (emphasis added; NJ PL 1997, chapter 278 (S39) page 39).

Pennsylvania. Act 3 (1995) involves a broad liability exemption from state enforcement action for both public agencies and “economic development agencies” engaged in property acquisition for redevelopment purposes:

“An economic development agency that holds an indicia of ownership in property as a security interest for the purpose of developing or redeveloping the property or to finance an economic development or redevelopment shall not be liable under the environmental

acts to the department or to any other person...unless the agency... directly cause an immediate release or directly exacerbate a release... ”⁶ (emphasis added).

Under a separate section entitled “defenses to environmental liability,” public agencies and economic development agencies are also given a third-party defense to common law actions:

“Economic development agency can avoid liability under the environmental acts or the common law equivalents by showing evidence that a release was caused by...the act of a third party...” (emphasis added).

Maryland. Under Maryland law, a state or local government is excluded from the definition of "responsible person," "except in the cases of gross negligence or willful misconduct." (Maryland. Code Ann., Environment. § 7-201(X)(2)(vii) (1996)).

Wisconsin. Wisconsin offers a broad exemption to the requirements of the state’s spill laws, including the underground storage tank laws, for both public entities and a variety of quasi-public development corporations. Protected activities include acquisitions “for the purpose of slum clearance or blight elimination.” To be eligible for the exemption, the entity must not have “caused the discharge.” The definition of “cause the discharge” includes a “due care” requirement, such that “failure to take appropriate action to restrict access to the property in order to minimize costs or damages that result from unauthorized persons entering the property” would cause loss of protection. The acquiring entity is also provided “civil immunity” both before and after but not during the period of time that the entity owns the property⁷ (emphasis added).

California. California’s 1990 Polanco Act, amended in 2001, provides broad immunities from state enforcement action, though not toxic tort, for both local governments and redevelopment agencies. Local governments and redevelopment agencies, contingent on following Polanco Act procedures, are protected not only when they take possession of contaminated land, but also when performing site testing and cleanup while not owning the land.⁸

Minnesota. Minnesota’s statute confers liability protection to public agencies that acquire property through eminent domain, specifically defining the protected circumstances as including properties acquired under the threat of eminent domain. Public financing activities are protected as well:

115B.02 Subd. 5. Eminent domain. (a) *The state, an agency of the state, or a political subdivision is not a responsible person under this section solely as a result of the acquisition of property, or as a result of providing funds for the acquisition of such*

⁶ See: <http://www.palrb.us/pamphletlaws/19001999/1995/0/act/0003.pdf>

⁷ The inclusion of “civil immunity” can be interpreted as providing liability protection against toxic tort. A more in-depth review of legislative history would be required to provide a definitive interpretation. See: <http://www.dnr.state.wi.us/org/aw/rr/archives/pubs/RR579.pdf>, and Godfrey & Kahn, S.C, “Environmental Liability Mitigation Strategies for Local Public Agencies,” 2005, http://www.glc.org/wiconference/PDF/mw_913100_1.pdf

⁸ Beveridge and Diamond, “A Practical Guide to Implementing the Polanco Act for Redevelopment of Brownfields,” 2001.

property either through loan or grant, if the property was acquired by the state, an agency of the state, or a political subdivision (1) through exercise of the power of eminent domain, (2) through negotiated purchase in lieu of, or after filing a petition for the taking of the property through eminent domain, (3) after adopting a redevelopment or development plan under sections ... (emphasis added).