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**LEGAL TOOLS FOR ACCESS AND
CONTROL OF BROWNFIELDS
PROPERTIES**

Presented by:

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BROWNFIELDS

Problem of Access and Control



Problem: How can local government gain access to or control over Brownfields sites to assess the hazards, secure the property and delineate the contamination?



There is no direct legal authority in Indiana allowing local government to access private property to conduct environmental investigations

BROWNFIELDS

Problem of Access and Control



Constitutional Concerns -- Fourth Amendment





- administrative (non-criminal) inspections of property without a warrant are allowed only where there is a regulatory scheme with certain and regular inspections

BROWNFIELDS

Problem of Access and Control



Potential Legal Tools

-  General authority for ordinance enforcement allows property entry to cause compliance and lien the property for costs – I.C. 36-1-6
-  Nuisance Actions – I.C. 36-30-6, -7, -8
-  Unsafe Building Law – I.C. 36-7-9
-  Property Tax Laws – I.C. 6-1.1-24

UNSAFE BUILDING LAW

Background



The Unsafe Building Law (UBL)



Applicable to:

- a consolidated city -- by statute
- any other municipality or county that adopts an ordinance adopting the statute

UNSAFE BUILDING LAW Background



Ordinance must:

- adopt UBL provisions as a local ordinance
- establish uniform standards for securing, repairing and maintaining unsafe properties
- specify or establish the responsible executive department
 - ★ in a municipality with a building commissioner, the commissioner administers the UBL

UNSAFE BUILDING LAW

Background

Limitation: UBL focuses on structures; "Unsafe Building" defined as a *building or structure*, or any part thereof, that is:

- in an impaired condition making it unsafe to person or property
- a fire hazard
- a public nuisance
- dangerous to person or property due to a violation of statute/ ordinance concerning building condition or maintenance, or
- vacant and not maintained in a manner allowing for *human habitation, occupancy, or use* under a statute/ordinance

UNSAFE BUILDING LAW

Background

- Moreover, the legislative purpose of the UBL is stated in terms of the problems posed by *vacant structures* and remedies to ensure property maintenance and repair of *vacant structures*
- Therefore, the UBL is best-suited for and most often used in urban areas with multiple vacant, abandoned structures
- However, Brownfields often include problem structures, so the UBL could be used to address threats posed by buildings and structures on located on Brownfields properties






UNSAFE BUILDING LAW

Background

- However, the UBL arguably covers more than just buildings -- "Unsafe Premises" is defined to include:
 - ★ the unsafe building *and* the real property on which it is located
 - ★ a non-agricultural tract of real property without buildings if it is a fire hazard, a hazard to public health, a public nuisance, or dangerous to a person or property due to violation of statute or ordinance

UNSAFE BUILDING LAW Enforcement

 Ordinance must create an administrative enforcement structure, including:

-  a department = the executive department authorized to administer the UBL
-  an enforcement authority (EA) = the chief administrative officer of the department
-  a hearing authority (HA) = the person or persons designated as such by:
 -  the executive of a city or county
 -  the legislative body of a town

UNSAFE BUILDING LAW Enforcement

Enforcement Authority: Broad Powers & Duties

- establish an unsafe building fund
- establish an unsafe building program
- order action relative to Unsafe Premises
- modify or rescind its orders
- take emergency action to protect life, safety or property
- cause the performance of ordered remedial action

UNSAFE BUILDING LAW Enforcement



Enforcement Authority's Powers & Duties (cont.)

- conduct building inspections to determine if unsafe
 - ★ authority limited to inspections of *buildings*; inspections of "premises" not mentioned
 - ★ provides a mechanism for obtaining a warrant
- prosecute its orders administratively or judicially
- collect costs of remedial work and penalties
- cause remedial costs and penalties to be certified by county as a real property special assessment

UNSAFE BUILDING LAW Enforcement

Enforcement Authority's Powers & Duties (cont.)

 initiate civil actions for:

- ★ injunctive relief requiring compliance with order
- ★ a performance bond for additional time for the owner to perform ordered work
- ★ civil penalties for willful failure to perform
- ★ appointment of a receiver over the property
- ★ authorization to perform ordered work
- ★ collection of work costs and penalties


UNSAFE BUILDING LAW Enforcement

 Enforcement Authority's Orders: With regard to an Unsafe Premises, the EA may order:

 vacation of an Unsafe Building (HA Review)

 sealing an Unsafe Building

 extermination of vermin in or about the Unsafe Premises

 removal of trash, debris, fire hazardous material, or a public health hazard in or about the Unsafe Premises

UNSAFE BUILDING LAW Enforcement



Enforcement Authority's Orders (cont.)

- repair or rehabilitation of building to bring it into compliance with legal standards required for human habitation, occupancy or use
- removal of part or all of an Unsafe Building
- require certain exterior improvements for buildings to be sealed for more than 90 days

UNSAFE BUILDING LAW Enforcement

■ Hearing Authority's Powers and Duties:







conduct hearings to review the EA's orders

review hearing required for orders to vacate the premises, remove of all or part of a building, or to make exterior improvements required for long-term sealing of a building

review hearing required in other instances (i.e., orders for sealing a building, extermination of vermin, removal of hazards, and repair/rehab of a building) *only* if requested by owner within 10 days



UNSAFE BUILDING LAW Enforcement

Hearing Authority's Powers & Duties (cont.)

-  affirm, rescind or modify the EA's orders (or reduce or strike the order and penalties if satisfied that all necessary work has been performed)
-  impose a civil penalty up to \$5,000 for willful failure to comply with an order and for *each* instance where work is not progressing and the premises has a negative effect on property values or quality of life of surrounding area
-  require owner to post a performance bond
-  make a record of its findings

UNSAFE BUILDING LAW Enforcement

Hearing Authority's Powers & Duties (cont.)

-  New effective July 1, 2009: if HA affirms or modifies the EA's order, it shall issue a "continuous enforcement order" (CEO)
-  CEOs streamline the UBL enforcement process by authorizing specific ongoing compliance and enforcement activities, including assessment of fees and costs, without the need for a new notice of violation and hearing process

UNSAFE BUILDING LAW Enforcement



Court Actions: County Circuit and Superior Courts have jurisdiction to:

- hear and decide appeals of the HA's actions
 - hear and decide civil actions initiated by the EA
 - affirm, modify or rescind remedial orders
 - Issue continuous enforcement orders
 - impose civil penalties, including treble damages for second or subsequent judgments rendered in any two year period, even if for different properties
 - issue (or deny) inspection warrants
- ★ **Note: civil actions under the UBL have priority and must be tried and determined by the court as early as possible**

UNSAFE BUILDING LAW Enforcement



Abatement of Vacant and Abandoned Structures

- New code chapter effective July 1, 2009 – I.C. 36-7-36
- Applies specifically to commercial & industrial properties not used for six months and in need of completion, rehabilitation or repair
- Enforced by the EA created under the UBL and “in conjunction with any enforcement or civil action under” the UBL
- Authorized orders of abatement, cleaning and securing the vacant or abandoned structure and assessment of fines
- Vague language of the statute and its reference to the UBL render it unclear how effective this tool might be until tested in the courts

UNSAFE BUILDING LAW

Pros and Cons for Brownfields

Con: Limits purposes for site access

- UBL allows access to real property only to:
 - ★ inspect *a building* to determine if it is unsafe, or
 - ★ cause ordered work to be performed
- emergency environmental hazards could be an exception (under either the UBL or general police power), but only to abate the immediate threat to persons or property
 - ★ more extensive remedial action for contamination probably preempted by state/federal law
- typical Brownfield not an imminent threat

UNSAFE BUILDING LAW

Pros and Cons for Brownfields

 **Con: Limitations regarding access (cont.)**

 **Example of Distinction:**


- ★ **Property A contains leaking chemical containers; the EA may use the UBL's emergency provisions to enter the property and remove the threat**
- ★ **Property B is environmentally impaired, but does not pose imminent danger; the UBL is not a good tool to gain entry for environmental investigation**

UNSAFE BUILDING LAW

Pros and Cons for Brownfields



Con: Limitations regarding access (cont.)

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- With regard to the Property B example, the EA could conceivably initiate a civil action asking the court to authorize it to conduct environmental investigations as part of a larger plan to assess the threat and carry out a remedial order, but:
- ★ court actions cost money
 - ★ court actions take time (statutory priority helps)
 - ★ the UBL is not designed to carry out environmental remedial plans; may be preempted by state/federal

UNSAFE BUILDING LAW

Pros and Cons for Brownfields








Con: Administratively burdensome

- somewhat complex administrative process (new CEOs help)
- stringent notice requirements to protect due process rights of those with interests in Unsafe Premises, including mortgagees

UNSAFE BUILDING LAW

Pros and Cons for Brownfields

Con: Costs

-  funding needed for personnel and administrative costs of enforcing the UBL
-  funding needed for performing ordered work
-  Unsafe Building Fund (UBF) established, with funding sources, but:
 -  up-front funding needed to establish and operate program
 -  could be a challenge for the UBL program to ever be self-funded

UNSAFE BUILDING LAW

Pros and Cons for Brownfields

- Pro: use of existing executive organizations to administer the UBL
- Pro: applicable to all types of properties
- Pro: emergency authority available
- Pro: repair orders are recorded, so they run with the land
- Pro: continuous enforcement orders now streamline the process, particularly for repeat offenders

UNSAFE BUILDING LAW

Pros and Cons for Brownfields

- Pro: The UBF is a dedicated, non-reverting fund with funding sources, including:
 - ★ all recovered work costs and penalties, which must be deposited in the UBF
 - ★ general appropriations
 - ★ grants and donations
 - ★ deposit of certain property taxes (discussed later)

UNSAFE BUILDING LAW

Pros and Cons for Brownfields

- Pro: Costs and penalties may be entered as a personal judgment against those with an interest in the property (except mortgagees)
- Pro: Costs and penalties may be certified as a special assessment and added to the property tax bill
 - ★ special assessments are priority liens
 - ★ special assessments are collected like property taxes
 - ★ county executive can obtain title through tax sale
 - ★ probably the most advantageous aspect of the UBL with regard to Brownfields

Property Tax Collection





An Option for Control of Brownfields



Ownership and Control - Ultimately, the best way for local government to control the fate of a Brownfield is to *own or otherwise control* the property



Tools to obtain ownership and control:

-  Donation
-  Purchase
-  Eminent Domain
-  Tax Sale

Property Tax Collection

An Option for Control of Brownfields

 Purchasing property takes time and requires money:

- appraisals
- offers and negotiations
- public notice
- administrative and transaction costs
- purchase money

Property Tax Collection

An Option for Control of Brownfields





Eminent domain:

- also takes time
- also requires appraisals and offers
- imposes legal costs
- also requires the purchase money (and the amount is less certain)
- public scrutiny (negative impressions)

Property Tax Collection




An Option for Control of Brownfields

-  Environmental Liability: Taking ownership voluntarily through donation, purchase or eminent domain could impose environmental liability under Indiana and Federal law
-  CERCLA Sec. 107(a) excludes from the definition of "owner" or "operator" of a facility from which a release of hazardous substances "a unit of state or local government which acquires ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."

Property Tax Collection

An Option for Control of Brownfields


Environmental Liability (cont.)

-  CERCLA Sec. 107(b) “innocent landowner defense” - exempts from liability one who shows the release was caused by an act or omission of a third party who is not an employee, agent or one acting in connection with a contractual relationship
-  “Contractual relationship” includes land contracts, deeds, easements, leases or other instruments transferring title or possession to property
-  “Contractual relationship” does not include acquisition by a government entity by escheat, through any other involuntary transfer, or through the exercise of eminent domain authority *by purchase or condemnation* – CERCLA Sec. 101(35)(A)(ii)

Property Tax Collection

An Option for Control of Brownfields




Environmental Liability (cont.)

-  Problem: there is a split of authority among federal courts whether an outright purchase or condemnation governmental entities are “involuntary”
- ★ if not involuntary, then local government is liable and can seek only contribution of a pro rata share of remediation costs from other potentially responsible parties (PRPs), rather than imposing joint and several liability on other PRPs

Property Tax Collection

An Option for Control of Brownfields



Environmental Liability (cont.)

-  Recent case law applicable in Indiana: *Evansville Greenway & Remediation Trust v. Southern Ind. Gas & Electric Co., Inc.*, 661 F.Supp.2d 989 (S.D. Ind. 2009)
-  Held: Indiana law requires any person with eminent domain power to first make an effort to purchase the property before proceeding to condemn; therefore, a purchase by the government is the exercise of eminent domain authority fitting the CERCLA language referring to “the exercise of eminent domain authority by purchase or condemnation.”
-  First case authority in Indiana holding that a mere purchase of property by local government does not subject it to CERCLA liability

Property Tax Collection

An Option for Control of Brownfields

Environmental Liability (cont.)

-  **Caution:** The innocent landowner defense also requires that the person claiming it exercised due care with respect to the hazardous substances concerned and took precautions against foreseeable acts or omissions of the third party
-  **Tip:** Document the transaction. In Evansville Greenway, the City of Evansville entered into an agreement with the site owner which referenced the contamination and CERCLA Sec. 107(b) and 101(35)(A)(ii), acknowledged that the City was acquiring the site through exercise of eminent domain by purchase, and stated as a condition to the acquisition the owner's commitment and financial resources (insurance) for remediation of the site

Property Tax Collection

An Option for Control of Brownfields





➔ The Property Tax Sale – The Best Option

- Changes in the tax sale process effective January 1, 2007 have made it easier for local government to gain control of abandoned properties with tax delinquencies
- Most Brownfields are abandoned and tax delinquent
- Remember the UBL? Costs & penalties imposed under the UBL may be certified as special assessments against the property and collected through tax sale if not paid
 - ★ special assessments have the same lien priority as property taxes and are collected in the same manner

Property Tax Collection

An Option for Control of Brownfields

Limitation: Authority Vested Solely With the County Executive

-  *only* the county executive (i.e., board of commissioners) may obtain title to properties through the tax sale
-  however, the law allows a number of options for the executive to dispose of the property for reuse, including transfer to other government entities
-  the definition of “county executive” includes “the executive’s designee”
 -  allows cities & towns to work collaboratively with the county executive to redevelop the properties

Property Tax Collection

An Option for Control of Brownfields




Advantage: Minimal Cost

- administrative and personnel cost of a program to identify properties for expedited tax sale
 - ★ can likely be done by existing personnel
- no payment required to obtain title
- county treasurer administers the sale process

Property Tax Collection

An Option for Control of Brownfields




Bonus: Avoiding Environmental Liability

-  obtaining title to and control of a property through the tax sale process is “involuntary” under CERCLA Sec. 107
-  allows the government to seek recovery of remedial costs jointly and severally from PRPs
-  don't forget the insurance policies!

Property Tax Collection

An Option for Control of Brownfields






Double Bonus: Access Without Ownership

-  if a property does not sell at tax sale, the county auditor is *not* required to deed it to the county executive if the county executive determines that the property involved contains hazardous waste or another environmental hazard for which the cost of abatement or alleviation will exceed the fair market value of the property
-  in this instance, the statute provides that: “the county executive may enter the property to conduct environmental investigations”
 -  the only direct legal authority to access property to conduct environmental investigations is found in the tax sale statute!

Property Tax Collection

An Option for Control of Brownfields






Expedited Tax Sale Process

-  county treasurer certifies a list of properties to be sold
-  county executive certifies a list of vacant or abandoned properties with as little as *one* tax or special assessment delinquency to be included in the tax sale
-  expedites getting a property to sale
-  certified properties must be offered for sale separately from other properties
-  be mindful of certification deadlines and coordinate with the county auditor and treasurer

Property Tax Collection

An Option for Control of Brownfields






County Executive's Lien

-  county executive acquires a lien, by law, on *any* unsold property immediately at the end of the sale
-  lien is exercised by the executive requesting a tax sale certificate from the county auditor
-  county executive may then:
 -  sell the certificates, as can any sale purchaser, in the manner prescribed by the statute, or
 -  after a 120-day redemption period, obtain an auditor's deed (reduced from the 360-day redemption period applicable to sold properties, further expediting the process)

Property Tax Collection

An Option for Control of Brownfields

Auditor's Deed

-  extinguishes the taxes and special assessments for which the real property was offered for sale and accruing to the date of the deed, plus costs of the sale
-  vests in the county executive fee simple absolute title, free and clear of all liens and encumbrances created or suffered before or after the tax sale
 -  exception for federal priority liens and tax liens accruing subsequent to the sale
 -  extinguishes mortgages and mechanic's liens
 -  easements, restrictive covenants and land use commitments remain unaffected

Property Tax Collection

An Option for Control of Brownfields




Land Disposal Options

-  Public sale of the tax certificates
-  Transfer to nonprofit corporations for “use for the public good” after a public hearing
-  Transfers under general property disposal statute (I.C. 36-1-11), including public auction sale, sale to adjacent landowners and *transfer to another government entity*
-  Transfer to a redevelopment commission for sale, grant, or other disposition under the redevelopment laws (I.C. 36-7-15)

Property Tax Collection

An Option for Control of Brownfields

Land Bank Option

-  Rather than disposing of the property, the county executive may retain the property and use it as it would any other county-owned property
-  Funding: Property taxes generated in the first year after a property is disposed of must be disbursed to the county executive for deposit in the county general fund, the redevelopment fund, the unsafe building fund, or a housing trust fund
-  funds must used for purposes related to the use, management and redevelopment of property

Q & A ?

THANK YOU!

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Robert M. Frye is a 1994 graduate of Indiana University School of Law – Indianapolis and a 1989 graduate of the Indiana University School of Public and Environmental Affairs. Prior to and while attending law school, Bob worked in environmental management for the City of Indianapolis, holding a variety of positions with responsibilities ranging from the enforcement of local codes, permitting and inspection, pollutant sampling, performance of Phase I assessments, and oversight and coordination of contractors performing environmental services. From 1995 to 1997, he served as in-house corporate counsel for the City of Indianapolis, counseling local boards and agencies with regard to public works, environmental, municipal and contractual matters. From 1997 to 2000, Bob was an associate with Foley & Pool, LLP, where he practiced civil litigation, real estate, land use and zoning, construction law and environmental law. Bob joined the City of Indianapolis again in 2000, serving for two years as administrator of the City's economic development, real estate redevelopment and property management programs. Bob returned to private practice in 2002, and since 2006 has been a shareholder with Stewart & Irwin, P.C., where he engages in civil and administrative litigation, real estate, land use and zoning, municipal law, construction law and environmental law. Bob continues to advise the City of Indianapolis as outside counsel with regard to redevelopment issues. Bob is admitted to practice law in all state courts in Indiana, the U.S. District Courts for the Northern and Southern Districts of Indiana, and the U.S. Court of Appeals for the Seventh Circuit.



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