

## Ohio House Bills 168 and 110: Just Another Drop in the Bucket for Brownfield Redevelopment?

Mia Petrucci

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# OHIO HOUSE BILLS 168 AND 110: JUST ANOTHER DROP IN THE BUCKET FOR BROWNFIELD REDEVELOPMENT?

*Mia Petrucci*

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## ABSTRACT

This article examines Ohio House Bills 168 and 110.<sup>1</sup> These House Bills provide liability protection to purchasers of brownfield sites, allocate \$500 million dollars to brownfield funding—with \$350 million allotted for investigation, cleanup, and revitalization of brownfield sites and \$150 million for demolition of vacant/abandoned buildings—and create a new Building Demolition and Site Revitalization Program, for the revitalization of properties surrounding brownfield sites.<sup>2</sup> In the first three Sections of this article, the concept of brownfield redevelopment is introduced, the associated challenges with brownfield projects are discussed, and attempts by federal and state governments to address brownfield remediation challenges in the past is explained. In Section IV, this article analyzes the legislative framework set forth in House Bills 168 and 110 and discusses how Ohio is attempting to address the associated brownfield challenges. Finally, recommendations are made for future Ohio brownfield redevelopment legislation. This article argues that Ohio should continue to regulate brownfield redevelopment through emulating other state's low interest loan programs or create brownfield-specific tax credits to developers. While incentivizing development will always be a step in the right direction, not every brownfield site is in an area where developers want to build. Thus, Ohio should further allocate funds for the purposes of revitalizing low-to-no market value brownfield sites in historically underserved communities.<sup>3</sup> This can be done through partnering with land banks, creating community land trusts, or partnering with environmental advocacy organizations. Redevelopment of brownfield sites in such areas would work to create green spaces in historically underserved communities, countering environmental justice concerns and providing further access to clean environment, as well as bolstering community engagement and health.

## I. INTRODUCTION

A brownfield is “a property, [where] the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”<sup>4</sup> The Environmental Protection Agency (“EPA”) estimates that there are more than 450,000 brownfields in the United States.<sup>5</sup> National redevelopment programs for brownfield sites did not begin until the mid-1990's with the creation of the EPA's Brownfield and Land Revitalization Program in 1995.<sup>6</sup> Communities during this time “began to recognize that the fear and uncertainty associated with potential environmental contamination was seriously undermining efforts to keep urban areas vital” and habitable.<sup>7</sup> In the 1990s, then-Mayor of Cleveland, Michael White, characterized environmental contamination as “the number one obstacle facing the development community.”<sup>8</sup> Along with the creation of the EPA's brownfield program, the EPA also created a National Priorities List (“NPL”) in which it identifies sites that need further investigation.<sup>9</sup> Sites are added to the list after a preliminary Hazard Ranking Screening (“HRS”) and a notice-and-comment period.<sup>10</sup> Identifying these

sites guides the EPA in determining “which sites warrant further investigation to assess the nature and extent of the human health and environmental risks associated with a site.”<sup>11</sup> In addition, the identification of sites helps the EPA identify potential remedial actions, alert the public of such sites, and serve as notice for responsible parties.<sup>12</sup> It was also during the 1990s that individual states began to develop voluntary cleanup programs and the EPA partnered with twenty other federal agencies, including the Economic Development Administration (“EDA”), the Army Corps of Engineers, the Department of Housing and Urban Development (“HUD”), to further its brownfield redevelopment goals.<sup>13</sup>

So why remediate brownfields? Brownfields pose health risks; contamination can lead to “respiratory, ‘liver, diabetes, stroke, [chronic obstructive pulmonary disease] COPD, [and] heart disease.”<sup>14</sup> Brownfields can also contribute to urban sprawl, because developers would rather avoid these properties.<sup>15</sup> Urban sprawl causes many indirect societal and environmental harms, such as increased wealth disparities, threats to biodiversity, deterioration of water quality, and increased air pollution from transportation.<sup>16</sup> Brownfields also devalue the property around them, and they have particular influence over residential prices.<sup>17</sup>

Furthermore, brownfield redevelopment poses various legal and financial risks for developers. First, there are questions of liability for brownfield purchasers. Moreover, cleanup can take an extended amount of time, project scheduling can be extremely hard to predict, regular financing may be hard to find, and brownfield sites are often in underdeveloped and weak market areas.<sup>18</sup> These risks seriously impact the willingness of developers to take on brownfield redevelopment projects.

Despite these risks, the revitalization and redevelopment of these properties protects the environment from further harm, can foster economic growth, and utilizes existing infrastructure to reduce pressure to develop undeveloped land, preventing the development of open land.<sup>19</sup> The EPA identifies three major reasons why redevelopment is a good opportunity for communities: (1) it reduces environmental and health harms, (2) it sustainably reuses existing infrastructure, and (3) it can lead to community revitalization and involvement.<sup>20</sup>

## II. REGULATORY CHALLENGES TO BROWNFIELD REDEVELOPMENT

At the federal level, legislators have attempted to control brownfield redevelopment through several statutory and regulatory schemes. Some of these schemes have been incorporated into state programs.<sup>21</sup> The three main sources of regulations are (1) the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), (2) the Resource and Conservation Recovery Act (“RCRA”), and (3) EPA regulations and grant programs. These programs attempt to tackle liability concerns of brownfield purchasers, proper disposal requirements for hazardous waste to protect the environment and human safety, and the flexibility of brownfield purchasers to operate under multiple sources of law.

CERCLA has liability provisions that inhibit brownfield redevelopment.<sup>22</sup> CERCLA “treat[s] *current owners* of contaminated properties as potentially liable parties even if they demonstrably did not contribute to the contamination. Because developers often purchase the sites that they intend to redevelop, developers can become automatically liable for all the contamination present on the property.”<sup>23</sup> Developers under CERCLA could also be liable for hazardous materials that migrated from their property onto others, regardless of whether the developer created the hazard.<sup>24</sup> At the turn of the new millennium, this provided a strong disincentive for developers to take on brownfield projects.

The Small Business Liability Relief and Brownfields Revitalization Act (“SBLRBR”) removed a lot of the brownfield problems present in CERCLA prior to 2002.<sup>25</sup> SBLRBR was created to provide relief to small businesses: it (1) provides for financial support in the “cleanup and reuse of brownfields, (2) provides financial assistance for brownfields revitalization, and (3) enhances State response programs.<sup>26</sup> The SBLRBR amends Section 107 of CERCLA through the inclusion of two liability defenses and a new ability-to pay settlement procedure.<sup>27</sup> These liability defenses are extended to not only small businesses, but also to parties who contributed marginal amounts of hazardous or non-hazardous waste to brownfield sites.<sup>28</sup> These defenses are the “*de micromis* exception” and the “municipal solid waste exemption.”<sup>29</sup>

The *de micromis* exception is backwards facing. It details that a potentially responsible party (“PRP”) who generates or transports hazardous waste will not be liable for response costs at facilities identified on the NPL if “the total amount of material containing hazardous substances that the person arranged for disposal or treatment of or . . . accepted for transport . . . at the facility was less than 110 gallons or less than 200 pounds of solid waste materials.”<sup>30</sup> The exception applies if the disposal, treatment, or transport of the hazardous materials occurred prior to April 1, 2001.<sup>31</sup> Notably, this exception has its own exceptions. The *de micromis* exception does not apply if “EPA determines that hazardous substances disposed of ‘have contributed significantly, either individually or in the aggregate, to the costs of the response action or natural resource restoration with respect to the facility.’”<sup>32</sup> In the case of a contributory action with a third party, the third party bears the burden of proof to establish that the conditions of the exception were not met; in a cost-recovery action by the government, the PRP bears that burden.<sup>33</sup>

The municipal solid waste exception is similar in that it provides liability exemption for PRP disposal of municipal solid waste at an NPL.<sup>34</sup> However, this exception regulates generators of waste, not transporters.<sup>35</sup> Municipal waste is defined as waste “generated by a household . . . commercial, industrial, or institutional entity, to the extent that the waste is” essentially the same as normal household waste, disposed of as normal household waste, and is as hazardous as normal household waste.<sup>36</sup> This exemption is available to (1) “an owner, operator, or lessee of residential property from which all . . . waste was generated,”<sup>37</sup> (2) “a business entity . . . that . . . employ[s] on average not more

than 100 full-time individuals [during the last three years],”<sup>38</sup> or (3) a “501(c)(3) non-profit organization employing not more than 100 employees at the location where the waste was generated.”<sup>39</sup> This exemption is not available to municipalities.<sup>40</sup> Again, the exception does not apply if the EPA has determined that the PRP has significantly contributed to the costs of the redevelopment, the PRP has failed to comply with information requests, or the PRP has hindered the process of the response action, as in the *de micromis* exception.<sup>41</sup>

Title II establishes additional liability protections for owners and developers of brownfield sites, including the contiguous property owner defense and the bona fide prospective purchaser defense.<sup>42</sup> The contiguous property owner defense is for people whose property “is or may be contaminated by a release or threatened release of a hazardous substance from real property that is not owned by that person.”<sup>43</sup> For the contiguous property owner defense, the property owner “shall not be considered liable as an owner or operator under CERCLA Section 107(a)(1) or (2).”<sup>44</sup> To avail themselves of this defense, the owner must prove eight elements, that they: (1) did not cause, contribute, or consent to the waste, (2) are not affiliated with the person who did cause the waste, (3) are taking reasonable steps to stop the continuing waste releases, (4) are taking reasonable steps to prevent future releases, (5) are attempting to prevent human, environmental, or other exposure, (6) are cooperating with response activity, (7) are providing all legally required notices, and (8) comply with any land use restrictions.<sup>45</sup> The bona fide purchaser exception defines a bona fide purchaser as:

[A] person (or a tenant of a person) who acquires ownership of a facility after enactment of the Act and who (1) acquires ownership after all disposal of hazardous substances occurred at the facility; (2) made all appropriate inquiry into the former uses and ownership of the facility (again consistent with the revised innocent landowner provisions contained in section 101(35) of CERCLA); (3) provided all legally required notices with respect to the release of hazardous substances at the facility; (4) cooperated with persons performing response actions at the facility; (5) complied with land use restrictions and institutional controls at the facility; (6) responded to EPA information requests; and (7) stopped continuing releases, prevented future releases, and prevented or limited exposure to hazardous substances at the facility.<sup>46</sup>

With these exceptions to liability, bona fide purchasers, innocent landowners, and contiguous property owners can more readily take on remediation projects. CERCLA’s main impact on brownfield remediation is the liability protection that it creates under federal law. This is important because one of the main concerns of brownfield purchasers is the potential to incur liabilities from past pollution on the property that they inherited with their purchase. Of course, this only protects purchasers at the federal level, so purchasers may still be liable under state laws.

RCRA is the statute that “creates the framework for the proper management of hazardous and non-hazardous solid waste.”<sup>47</sup> RCRA gives the EPA the authority to regulate the “generation, transportation, treatment, storage, and disposal of hazardous waste.”<sup>48</sup> The EPA, in June of 1998, incorporated RCRA in its brownfield initiative through the creation of the RCRA Brownfields Prevention Initiative work group.<sup>49</sup> RCRA was included within this initiative because the EPA recognized that brownfields usually result in a multitude of issues across multiple jurisdictions and permitting schemes.<sup>50</sup> RCRA may apply to many brownfield properties since many waste management facilities and activities are required to obtain a RCRA permit, under which “the facility and all contiguous properties identified within it remain subject to the permit conditions—including facility-wide corrective action until EPA (or the authorized state) terminates the permit.”<sup>51</sup> Of course, that means subsequent purchasers of brownfield properties will be subject to any previous RCRA permit, which often discourages potential buyers, as a RCRA permit is just one more set of rules and conditions potential buyer have to follow.<sup>52</sup> Also, a previously un-permitted brownfield site may potentially come under the jurisdiction of RCRA when a brownfield purchaser begins cleanup activities.<sup>53</sup> The work group’s goal is to remove any RCRA red-tape from redevelopment while ensuring that the project still protects the health of both the environment and humans.<sup>54</sup> The RCRA Brownfields Prevention Initiative addresses facilities that are subject to RCRA by allowing flexibility in the cleanup process, to attempt to ease the ability of purchasers to remediate their property.<sup>55</sup>

The EPA has implemented several regulatory initiatives to facilitate brownfield redevelopment. In the rule entitled the Hazardous Remediation Waste Management Requirements, the EPA codified a permitting provision eliminating “the requirement for facility-wide corrective action at cleanup-only sites that are not otherwise subject to RCRA permit requirements.”<sup>56</sup> In the Post-Closure Rule, the EPA allowed storage, closing treatment, or disposal facilities to be cleaned under approved or “alternative mechanisms without having to obtain a post-closure permit.”<sup>57</sup> In both preambles to these rules, the EPA discussed the relationship of these rules to the RCRA program, expressing an intent to continue building flexibility into the RCRA framework.<sup>58</sup>

Ultimately, there are several legal frameworks under which brownfield redevelopment occurs. Although the EPA has attempted to make it easier for brownfield purchasers to wade through the statutory red-tape of both CERCLA and RCRA, there is still a lot for purchasers to consider even before the cleanup process can begin. Once purchased, brownfield purchasers must design and implement cleanup in a way that ensures compliance with Tribal, Federal, State, and local regulations and regulatory guidelines.<sup>59</sup> Purchasers must also keep an eye out for any regulations that could become effective in the middle of the project, ensure coordination with state voluntary cleanup programs, and develop cleanup and subsequent monitoring plans.<sup>60</sup> Additionally, they must demonstrate that they “exercise

‘appropriate care’ with respect to hazardous substances found at the facility by (1) taking reasonable steps to contain contamination, (2) preventing any threatened future release, and (3) preventing or limiting human environmental, or natural resource exposure to a previously released hazardous substance,” in addition to compliance with Institutional Controls,<sup>61</sup> to establish a CERCLA bona fide prospective purchaser defense, amongst a multitude of other considerations.<sup>62</sup> Thus, brownfield redevelopment projects remain a headache to take on.

### III. ADDITIONAL CHALLENGES TO BROWNFIELD REDEVELOPMENT

#### A. FINANCIAL CHALLENGES TO BROWNFIELD REDEVELOPMENT

Another large barrier to brownfield redevelopment is simply the cost and duration of cleanup projects. The Northeast Midwest Institute (“NEMW”) estimates the average cost of brownfield cleanup to be \$602,000 based on cleanup data provided by the EPA.<sup>63</sup> It can cost \$15,000 to \$35,000 to remediate one acre of contaminated land.<sup>64</sup> Hidden cleanup costs are not uncommon in the late stages of the redevelopment process, which leads to more budgeting problems and unpredictability down the line.<sup>65</sup> The unpredictability of costs of cleanup is an effective deterrent, as it “affect(s) a property’s marketability before remediation.”<sup>66</sup> The marketability of Brownfields after remediation is also a concern for purchasers. Studies suggest long-term stigmatization of land affects property values after remediation.<sup>67</sup> Therefore, even when a property is cleaned and no longer toxic, the memory of hazardous conditions remains and may impact the ability of brownfield purchasers to profit from their newly remediated land. Another component affecting post-cleanup marketability is that brownfields are often located in “weak real estate market areas,” where “sellers far outweigh buyers and prices are in a general state of decline, or where there is little demand for a property.”<sup>68</sup> This makes the likelihood of profitability much lower post-redevelopment, which disincentivizes purchasers from taking on such costly projects.

On top of those factors, these projects also take a long time to complete. Investigations of the property typically last 90–180 days; full cleanup can potentially take over three years to complete.<sup>69</sup> Environmental assessments, cleanup durations, and other federally or state mandated evaluations complicate projects because each step requires documentation and oversight from different governmental agencies, which makes actual timelines for projects tricky to predict.<sup>70</sup> The duration of the cleanup is only one part of the project; further development of the land—once the land is habitable—takes additional time.

Another problem for purchasers is that financial institutions have historically been unwilling to take on the risk of brownfield redevelopment projects, due to factors causing anticipated costly setbacks.<sup>71</sup> This leaves brownfield purchasers at a disadvantage in comparison to non-hazardous land purchasers. Brownfield purchasers typically must finance remediation projects through federal or state grants or loan programs, which may be hard to



acquire and likely come with more strings attached than regular grants or loans.<sup>72</sup> The bar is higher to acquire brownfield redevelopment grants and loans because of the hazardous nature of the project. This higher bar also works to ensure the safety of the redeveloper, the employees conducting the cleanup, and public health. More bureaucratic red tape and oversight exists for the same reason.

## B. HOW CHALLENGES HAVE BEEN ADDRESSED THROUGH PAST PROGRAMS

There have been several federal and state incentive programs created since national attention turned towards brownfield redevelopment in the 1990s. Federal programs include: (1) the Small Business Liability Relief and Brownfields Revitalization Act, (2) the Brownfields Expensing Tax Incentive, and (3) the Consolidated Omnibus Appropriations Act of 2018, along with several EPA Brownfield grant programs.<sup>73</sup> State incentive programs include low-interest loans, grants, and tax credits.<sup>74</sup> Ultimately, these incentives all aim to lower the financial burden on purchasers to remediate brownfield properties.

### A. FEDERAL ECONOMIC INCENTIVE PROGRAMS

There are three main federal incentive programs adopted in recent years: (1) the Small Business Liability Relief and Brownfields Revitalization Act, (2) the Brownfields Expensing Tax Incentive, and (3) the Consolidated Omnibus Appropriations Act of 2018.<sup>75</sup>

The Small Business Liability Relief and Brownfields Revitalization Act creates an ability-to-pay settlement.<sup>76</sup> This settlement is for PRPs who can demonstrate an inability to pay.<sup>77</sup> This section aims to expedite settlement procedures detailed in Section 122(g) of CERCLA.<sup>78</sup> It attempts to accomplish this goal by considering alternative payment methods and mandates that EPA balance the ability of the PRPs to maintain their basic business functions and pay the response costs.<sup>79</sup> The PRP must “waive all claims against other PRPs, not impede response actions at the site, and comply with EPA’s requests for access or information. As with the Act’s liability exemptions, EPA’s decisions regarding whether to enter a limited ability-to-pay settlement are not subject to judicial review.”<sup>80</sup>

Title II of the Act is the “Brownfields Revitalization and Environmental Restoration Act of 2001.”<sup>81</sup> Subtitle A details funding for brownfield redevelopment.<sup>82</sup> The Act amends Section 104 of CERCLA.<sup>83</sup> Eligible recipients include units of local governments, land clearance authorities, government entities created by state legislatures, and states.<sup>84</sup> Grants are generally capped at \$200,000.<sup>85</sup> Grant applicants are ranked by the Administrator of the EPA in regards to identified criteria that weigh the potential of the projects: to stimulate subsequent reuse of the site; to stimulate the economy; to reduce threats to human health or the environment; and/or to facilitate the creation of a park, greenway, or some other nonprofit purpose, etc.<sup>86</sup>

The Consolidated Omnibus Appropriations Act of 2018 was created to “inject flexibility into the existing grant programs.”<sup>87</sup> The Act aims to do this by allowing contaminated properties to

access certain types of funding despite not meeting the eligibility requirements.<sup>88</sup> It also increased the maximum amount of grants available for brownfield sites to \$500,000.<sup>89</sup> Additionally, it “allows grants that cover characterization, assessment, and remediation, whereas the previous statute required that separate grants be awarded for characterization/assessment and remediation.”<sup>90</sup> The combination of different allocations of the grant money makes it easier for purchasers to obtain funding for all or most parts of the redevelopment process.

The EPA’s Brownfields Program has a variety of brownfields grants.<sup>91</sup> These include: Brownfields Assessment Grants, which “provide funding for brownfield inventories, planning, environmental assessments, and community outreach”; Brownfields Revolving Loan Fund Grants, which “provide funding to capitalize loans that are used to clean up brownfield sites”; Brownfields Cleanup Grants, which “provide funding to carry out cleanup activities at brownfield sites owned by the applicant”; Multipurpose Grants, which “provide funding to conduct a range of eligible assessment and cleanup activities at one or more brownfield sites in a target area”; Job Training Grants, for environmental training “for residents impacted by brownfield sites in their communities”; Technical Assistance, Training and Research Grants, for conducting research and to provide training to address brownfield sites; and State and Tribal Response Programs Grants, to “establish or enhance State and Tribal Brownfields response programs.”<sup>92</sup> Brownfield assessment grants, brownfields job training and redevelopment grants, and brownfield cleanup grants typically are awarded for up to \$200,000.<sup>93</sup> There are also brownfield cleanup revolving loan fund grants to “capitalize loan funds to make loans to public and private sector recipients for the environmental cleanup of brownfields. Since 2003, community RLF recipients may use up to forty percent of these resources to provide direct cleanup subgrants,” which can be awarded for up to \$1 million for use over five years.<sup>94</sup>

### 2. STATE ECONOMIC INCENTIVE PROGRAMS

There are multiple ways that states encourage brownfield redevelopment, the first of which is low-and-zero interest loans. The Indiana Brownfields Program has a low-interest loan incentive program.<sup>95</sup> The identified purpose of the loan program is “to facilitate public or private redevelopment of brownfield sites throughout the state by making low-to-zero interest loans with flexible repayment terms available to eligible Indiana political subdivisions, non-profits, and private, for-profit entities to finance environmental cleanups.”<sup>96</sup> Loan rates range from zero percent to three percent and up to twenty percent of the loan can be forgiven if specific economic development goals are met.<sup>97</sup>

Cleanup grants are also utilized by states to incentivize brownfield redevelopment. For example, Wisconsin’s Ready for Reuse Program provides up to \$200,000 for cleanup activities.<sup>98</sup> The grants are for applicants that own the property who can complete projects in two years.<sup>99</sup> There are required criteria for applicants, including that the sites have to “meet the federal definition of ‘eligible brownfield site,’”<sup>100</sup> the applicant cannot

be liable under CERCLA, the grantor must be able to provide a minimum of twenty-two percent of the requested funds as a match, the applicant must not have caused the contamination, and cleanup must be for hazardous contamination only.<sup>101</sup>

Brownfield-specific tax credits for developers are another incentive states utilize to encourage brownfield redevelopment. New York's Brownfield Cleanup Program provides a brownfield redevelopment tax credit for "taxpayers who incur costs for the remediation or redevelopment of a brownfield site in New York State that is, or will become, a qualified site."<sup>102</sup> For a qualified site, the base tax credit is ten percent.<sup>103</sup> The tax credit has three credit components for site cleanup, groundwater cleanup, and development of the site.<sup>104</sup> Colorado has a similar program that offers a forty percent tax credit for cleanup expenses up to \$750,000 and thirty percent credit on projects that cost greater than \$750,000 to \$1,500,000.<sup>105</sup>

#### IV. OHIO HOUSE BILLS 168 AND 110

##### A. BROWNFIELD REDEVELOPMENT IN OHIO PRIOR TO HOUSE BILLS 168 AND 110

Ohio currently has over 300 federal brownfield sites, with the highest concentration (twenty-nine brownfield sites) located in Cuyahoga County.<sup>106</sup> Other counties—Lucas, Summit, and Franklin—have twenty-two, twenty-seven, and twenty sites, respectively.<sup>107</sup> In 2019, only nine brownfield cleanups were completed in Ohio.<sup>108</sup> At the peak of brownfield redevelopment in Ohio, thirty-five projects were completed in one year.<sup>109</sup> EPA has identified thirty-seven national priority sites within Ohio.<sup>110</sup>

Until House Bills 168 and 110, Ohio's brownfield redevelopment was primarily regulated and incentivized through Ohio's Voluntary Action Program ("VAP").<sup>111</sup> VAP was "created to give companies a way to investigate possible environmental contamination, clean it up if necessary, and receive a legal release from the State of Ohio [indicating] that no more cleanup is needed."<sup>112</sup> The Program allows brownfield property owners to opt-in and receive protections from further legal responsibilities.<sup>113</sup> VAP assigns a certified professional ("CP") to a project to verify that the property is cleaned to the standards required by VAP, without ongoing Ohio EPA involvement.<sup>114</sup> When a CP determines that the property meets the cleanup standards contained in Ohio's Administrative Code chapter 3745-300,<sup>115</sup> they prepare a No Further Action ("NFA") letter that describes "the environmental problems found at the site, how those environmental problems were investigated and how the site was cleaned up," as well as "information concerning the CP's investigation of historical and current uses of the property."<sup>116</sup> This information is gathered before the creation of the NFA letter and used to determine whether Phase II property assessment is required; Phase II property assessment is required when a CP believes that hazardous substances or petroleum has been released from the property.<sup>117</sup> Phase II involves "collecting soil, ground water, surface water and sediment samples from the site as necessary" and comparing that data to the appropriate VAP cleanup standards to determine if a NFA letter can be prepared.<sup>118</sup>

If the participant, called "volunteer" by Ohio EPA, wants a legal release from liability they then have to send the NFA letter to Ohio EPA for review.<sup>119</sup> Review consists of a VAP staff member comparing the NFA letter to program standards to determine if the site is "protective of public health, safety and the environment."<sup>120</sup> If the VAP staff determines such, then the director of the Ohio EPA issues a covenant not to sue ("CNS"); this protects the property owner, operator, and future owners from being legally responsible for further investigation and cleanup of the property.<sup>121</sup>

##### B. OHIO HOUSE BILL 168

Ohio House Bill 168 is a part of Ohio's newfound focus on brownfield redevelopment.<sup>122</sup> The Ohio Legislature unanimously passed House Bill 168 May of 2020, Governor Mike DeWine signed it in June, and it took effect on September 14, 2020.<sup>123</sup> This unanimous decision reflects the recent Ohioan trend towards more efficient and incentivized brownfield redevelopment.

So, what does Ohio House Bill 168 do? It "provides purchasers of brownfield properties who meet certain criteria outlined in the bill with bona fide prospective purchaser defenses."<sup>124</sup> It incorporates the concepts of "bona fide prospective purchasers" from CERCLA into Ohio state law.<sup>125</sup> This means that in asserting their defense, a defendant must first prove that they are a "bona fide prospective perspective purchaser" of the site, by demonstrating that they meet the criteria listed in Section 101(40) of CERCLA.<sup>126</sup> This applies retroactively, protecting all bona fide purchasers of brownfield properties after January 11, 2002.<sup>127</sup> Unlike CERCLA, House Bill 168 does not apply to private citizen's claims against property owners, and it does not protect "from common law claims if contamination is migrating from the property."<sup>128</sup> The legislature, in creating House Bill 168, made it clear that this new provision is meant to be "remedial in nature" for the purposes of making affirmative defenses under CERCLA available in civil actions.<sup>129</sup>

Beyond the VAP program, until the passage of House Bill 168, Ohio did not have any mechanisms that would allow buyers of brownfield sites to assert any legal immunity for the historic release of toxic substances from their property under state law.<sup>130</sup> House Bill 168 is self-implementing, meaning that brownfield property owners do not have to sign up for a program to access defenses in court, and there is no required approval by a government agency.<sup>131</sup> This frees property owners from the steps mandated by the VAP program, a step in the right direction for Ohio in terms of making property liability protection easier to access.<sup>132</sup>

Ohio House Bill 168 places Ohio "on equal footing with neighboring states."<sup>133</sup> Through its Baseline Environmental Assessment program, Michigan – Ohio's neighbor and athletic rival – averaged 1,032 issuances per year between 1995 and 2015; whereas Ohio's VAP only averaged twenty-six per year during that same time.<sup>134</sup> House Bill 168 helps speed up the process by "offering a more cost-effective means for returning brownfields to productive use."<sup>135</sup>

While Ohio House Bill 168 fills an important gap between Ohio state law and federal law and brings Ohio closer to neighboring programs, it does not guarantee protections for brownfield property owners in private actions, fails to protect from common law claims where toxic substances are migrating out of the property, and it does not monetarily incentivize the purchase of brownfield properties.<sup>136</sup> All these factors are serious barriers to redevelopment.

### C. OHIO HOUSE BILL 110

Governor Mike DeWine signed House Bill 110 on June 30, 2021.<sup>137</sup> Ohio House Bill 110 created and funded the Building Demolition and Site Revitalization Program and the Brownfield Remediation Program.<sup>138</sup> Ohio's Department of Development ("ODOD") administers this program.<sup>139</sup> The Building and Site Revitalization Program is also given the ability to award grants, but for the "demolition of commercial and residential buildings and revitalization of surrounding properties on sites that are not brownfields."<sup>140</sup> In House Bill 110, \$150 million is allocated to the Building Demolition and Site Revitalization Fund.<sup>141</sup>

The Brownfield Remediation Program is tasked with "award[ing] grants for the remediation of brownfield sites throughout Ohio," which is funded through the Brownfield Remediation Fund.<sup>142</sup> The Director of ODOD was directed to reserve \$1 million per each of the eighty-eight counties in Ohio.<sup>143</sup> The funds are reserved for one calendar year, after which funds become available to the public.<sup>144</sup> House Bill 110 allocates \$350 million to the newly created Brownfield Remediation Fund.<sup>145</sup> Approximately \$262 million is available on a first-come, first-served basis.<sup>146</sup> Grants provide for up to seventy-five percent of the project's total cost; applicants are required to provide the other twenty-five percent.<sup>147</sup>

All types of property owners are eligible to apply for Brownfield Remediation Program grant money. These include "[u]nits of local government, including counties, townships, municipal corporations, port authorities, conservancy districts, park districts, or other similar park authorities . . . [and others like] county land reutilization corporations, nonprofit organizations, or organizations for profit."<sup>148</sup> Only polluting entities that contributed to the contamination of the properties are barred from applying.<sup>149</sup> Round one of applicants has been initiated.<sup>150</sup>

Ohio House Bill 110 also appropriates \$2.5 million to the Brownfields Revolving Loan Program to be awarded by ODOD.<sup>151</sup> ODOD "administers this program in conjunction with . . . Ohio Water Development Authority."<sup>152</sup> This program "provides low interest loans to private and public entities for demolition, cleanup, and remediation projects on brownfield sites."<sup>153</sup> Funds for this program are typically received by ODOD through grants from the EPA.<sup>154</sup>

## V. RECOMMENDATIONS

Both House Bills further strengthen the ability of property purchasers to remediate brownfield sites. The new grant money available under House Bill 110, coupled with liability defenses awarded to property owners in House Bill 168, will likely

bolster Ohio's brownfield remediation numbers to compete with neighbors like Michigan and Indiana.<sup>155</sup>

There is, of course, always room for improvement. A low interest loan program modeled after the Indiana Brownfields Program could augment brownfield purchasers' ability to secure independent funding outside of federal and state grants.<sup>156</sup> Similarly, brownfield-specific tax credits for developers, as seen in New York and Colorado,<sup>157</sup> would aid Ohio in incentivizing brownfield redevelopment.

Ohio's brownfield sites are near historically underserved communities. According to U.S. Census Bureau data from 2018, Ohio's brownfield sites are concentrated in localities that experience extremely high child poverty rates in the State.<sup>158</sup> Cuyahoga and Lucas counties—which contain 49 of Ohio's 311 brownfield sites<sup>159</sup>—have 17.9% and 18.7% of their populations living below the national poverty line.<sup>160</sup> In 2014, Case Western Reserve University reported that nearly one in three children under the age of six lives in poverty in Cuyahoga County,<sup>161</sup> which ranks eighteenth out of eighty-eight counties in Ohio in highest child poverty as of 2018.<sup>162</sup> Lucas county ranks sixteenth out of eighty-eight counties on Ohio in highest child poverty,<sup>163</sup> and as of 2020, almost twenty percent of Lucas' population lives below the poverty line.<sup>164</sup> Therefore, the potential to revitalize these communities is high.

Having brownfield sites concentrated in impoverished areas is not a phenomenon unique to Ohio. About 27 million people in America live within 0.5 miles from a brownfield site.<sup>165</sup> People residing near brownfield sites are "*more minority, low income, linguistically isolated, and less likely to have a high school education than the U.S. population as a whole.*"<sup>166</sup> On top of environmental justice concerns, these sites have a negative effect on the surrounding communities in terms of health contaminations affecting vulnerable populations, such as minorities, women, and children.<sup>167</sup> For example, some environmental toxins "may aggravate osteoporosis, a disease more common in women . . . [and] many environmental toxins aggravate biological predispositions in minority populations, such as diabetes, chronic liver disease, cardiovascular disease, and chronic respiratory disease."<sup>168</sup> Brownfield sites also tend to be surrounded by areas of increased crime rates and drug use.<sup>169</sup> As previously discussed, brownfield sites in weak market areas are hard to incentivize for redevelopment due to their low demand and the lower possibility of profitability post-redevelopment.<sup>170</sup> Any additional economic incentives to revitalize these communities would certainly help in the long run, but economic incentives to brownfield redevelopment, alone, may not be enough to overcome developers' concerns.

There are additional promising approaches to revitalization of low-to-no market value brownfield sites, where even grants cannot incentivize private brownfield purchasers. These include partnering with land banks, the creation of community land trusts, and partnering with environmental advocacy organizations. Land banks are typically "nonprofit entit[ies] established by either a city or county to address the problems of urban blight and to promote redevelopment"; community land



trusts are generally “private non-profit corporations . . . engaged in social and economic activities, such as to acquire and hold land for affordable housing development.”<sup>171</sup> Either of these types of organizations would be great choices for lower-market-value brownfield properties. For example, Scenic Hudson, an environmental organization located in Poughkeepsie, New York, worked with the Village of Irvington to redevelop contaminated waterfront land to create a public riverfront park.<sup>172</sup> Scenic Hudson has an “urban initiative to acquire, remediate and develop environmentally friendly reuses for derelict riverfront sites.”<sup>173</sup> By working with environmental organizations, particularly challenged or low-market-value brownfield sites are able to be redeveloped and preserved as parks, rather than contributing to further negative impacts of the industrialization of historically underserved communities.

Ohio could work with a similar Ohio-based organization to remediate brownfield sites for environmentally friendly purposes. Ohio has a plethora of environmental groups to collaborate with.<sup>174</sup> In Toledo, one of the larger cities in Lucas County, there are two environmental groups, in particular, that may be especially interested in redeveloping brownfield sites to create parks – Lake Erie Waterkeeper and Toledo Naturalist Association.<sup>175</sup> Ohio could work with either or both of these organizations to get the ball rolling on the redevelopment of brownfields where developers are not interested in purchasing due to a weak market, or where the property is located in riparian or other geographically hard to develop areas. Ultimately, the creation of green spaces in historically underserved

communities works to counter environmental justice concerns and generates community interest in brownfield redevelopment projects. Increased access to green spaces in these areas would be extremely beneficial to these communities. Increased access to green spaces can (1) provide mental health benefits,<sup>176</sup> (2) decrease the disparities in access to clean environment across racial and economic lines,<sup>177</sup> and (3) function to rehabilitate the natural resources of Ohio in areas left behind in the wake of industrial expansion.

## VI. CONCLUSION

Ohio is on the right track for now. Greater liability protection for brownfield purchasers and expanded statewide grant programs are good first steps to strengthen Ohio’s brownfield redevelopment goals. To keep the ball rolling on increased brownfield remediation, Ohio can draw from additional financial incentives modeled by other states across the nation. As Ohio continues towards further redevelopment, it is extremely important not to leave behind the communities that bear the greatest burden of brownfield sites. In addition to providing economic incentives for development, Ohio should create and implement partnership programs to allow for brownfield redevelopment on behalf of non-profit and environmental groups. This would further allow for undesirable, or low-market-value brownfields to be remediated, as well. Ohio should use this momentum to alleviate pressure on low-income communities and increase access to green spaces. This will ultimately lead to a cleaner Ohio. 🌍

## ENDNOTES

<sup>1</sup> See, H.B. 168, 134 Gen. Assemb., Reg. Sess., (Ohio 2021); H.B. 110, 134 Gen. Assemb., Reg. Sess., (Ohio 2021).

<sup>2</sup> H.B. 168, 134 Gen. Assemb., Reg. Sess., (Ohio 2021); H.B. 110, 134 Gen. Assemb., Reg. Sess., (Ohio 2021).

<sup>3</sup> This article chooses to use the term “historically underserved communities” to refer to “populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civil life,” such as people of color, members of religious minorities, LGBTQ+ persons, persons with disabilities, rural communities, and persons otherwise adversely affected by persistent poverty or inequality. See, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

<sup>4</sup> Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, tit. II, § 2011, 115 Stat. 2356, 2361, 2367 (2002) (amending 42 U.S.C. § 9601 and adding 42 U.S.C. § 9628).

<sup>5</sup> *Overview of EPA’s Brownfields Program*, EPA (May 4, 2022), <https://www.epa.gov/brownfields/overview-epas-brownfields-program>.

<sup>6</sup> *Id.*

<sup>7</sup> CHARLES BARTSCH ET AL., UNLOCKING BROWNFIELDS: KEYS TO COMMUNITY REVITALIZATION 3 (2005), <https://www.csu.edu/cerc/documents/Unlocking-Brownfields.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Superfund: National Priorities List (“NPL”)*, EPA (Mar. 11, 2022), <https://www.epa.gov/superfund/superfund-national-priorities-list-npl>.

<sup>10</sup> *Basic NPL Information*, EPA (Mar. 22, 2022), <https://www.epa.gov/superfund/basic-npl-information>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> BARTSCH, *supra* note 7, at 3.

<sup>14</sup> Luis Inaraja Vera, *Assessing the Performance of Voluntary Env’t Programs*, 2020 UTAH L. REV. 795, 814 (2020) (citing Jill S. Litt et al., *Examining Urban Brownfields Through the Public Health “Macroscopic,”* 110.2 ENV’T HEALTH PERSP. 183, 189 (2002)).

<sup>15</sup> *Id.* at 814.

<sup>16</sup> William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 59 (1999).

<sup>17</sup> Oana Mihaescu & Rainer vom Hofe, *The Impact of Brownfields on Residential Property Values in Cincinnati, Ohio: A Spatial Hedonic Approach*, 42(3) J. REG’L ANALYSIS & POL’Y 223, 234 (2021).

<sup>18</sup> EPA, OFF. BROWNFIELD & LAND DEV., ANATOMY OF BROWNFIELDS REDEVELOPMENT 1–2 (2019), [https://www.epa.gov/sites/default/files/2015-09/documents/anat\\_bf\\_redev\\_101106.pdf](https://www.epa.gov/sites/default/files/2015-09/documents/anat_bf_redev_101106.pdf).

<sup>19</sup> *Overview of EPA’s Brownfields Program*, EPA (May 4, 2022), <https://www.epa.gov/brownfields/overview-epas-brownfields-program>.

<sup>20</sup> EPA, OFF. BROWNFIELD & LAND DEV., *supra* note 18, at 1–2.

<sup>21</sup> See discussion *infra* Section V.B.2

<sup>22</sup> Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607 (2001).

<sup>23</sup> Vera, *supra* note 14, at 816–17 (emphasis added).

<sup>24</sup> *Id.* at 816–18.

<sup>25</sup> See, Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107–118, 115 Stat. 2356, 2356 (2002) (codified as amended at 42 U.S.C. §§ 9601, 9604, 9605, 9607, 9622, 9628).

<sup>26</sup> *Id.* § 102 et seq.

*continued on page 27*