AMO REPORT ON BROWNFIELDS REDEVELOPMENT
WHAT HAS BEEN ACHIEVED, WHAT REMAINS TO BE DONE

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Association of
Municipalities
of Ontario

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RECOMMENDATIONS SUMMARY

Recommendation 1

That the Federal Government prioritize contaminated sites in consultation with municipalities and on the basis of impact of these lands on adjacent uses, with particular emphasis on the impact to human health and safety.

Recommendation 2

That the Federal Government notify and consult with municipalities on Federal "contaminated" sites prior to making decisions on the level of remediation and redevelopment.

Recommendation 3

That the Federal Government work with municipalities prior to the remediation process to ensure that the remediation is consistent with the long term plans of the municipality.

Recommendation 4

That the Province provide for explicit municipal liability protection in perpetuity, by amendment to applicable legislation, including the *Building Code Act*, the *Limitations Act,* and the *Environmental Protection Act*.

Recommendation 5

That new legislation ensure some certainty, in the same way that the Building Code and Fire Code do, that once a site has been cleaned up to the statutory and regulatory provisions of the day, absent negligence, the property owner will not be subject to meet new regulatory standards developed at a future point in time as long as the use remains unchanged.

Recommendation 6

That the Province consider establishing an annuity or insurance fund to be drawn upon to address future claims.

Recommendation 7

It is paramount that legislative changes be made to ensure protection from orders, penalties and prosecutions between the time the lands are acquired and cleanup is finished with a Record of Site Condition filed, at minimum, 10 years.

Recommendation 8

Implement revisions to the RSC documentation including the Qualified Person Affidavits and

the RSC recording process to acknowledge the proposed land use and the standards to which it was remediated to provide certainty, and less risk exposure to municipalities when making land use planning decisions.

Recommendation 9

Provide a clear definition and guidance on what constitutes impacted soil through changes to Ontario Regulation 347. The Province should ensure that such a definition does not expand the current scope of waste soil to prevent the creation of more Brownfield sites.

Recommendation 10

Encourage recycling and reuse of soil from Brownfield sites to reduce unnecessary use of capacity in landfill sites. The Province should allow the material to be reused within the urban area provided it meets specific requirements and proper land use criteria.

Recommendation 11

Province consider expansion of what constitutes inert material.

Recommendation 12

Ensure that new legislation and regulations, such as the *Clean Water Act*, must be based on sound, universal science and should not inadvertently create new Brownfield sites or sites that cannot be remediated by definition.

Recommendation 13

That new legislation ensure some certainty, in the same way that the Building Code and Fire Code do, that once a site has been cleaned up to the statutory and regulatory provisions of the day, absent negligence, the property owner will not be subject to meet new regulatory standards developed at a future point in time as long as the use remains unchanged.

Recommendation 14

That liability must be limited to meeting the standards of the day. Where the property use changes, the standards in place at the time of the change in use should apply and the owner who proposes the change in use, as the only party who has control over this, is the party who should be held liable for future damages that may result.

Recommendation 15

That change in use should not be authorized, especially if the change is to residential, without mandatory insurance coverage to guard against future liabilities.

Recommendation 16

That the *Land Titles Act* and the *Registry Act* be amended to allow for the registration on title

of warnings clauses related to the former use of the property and restriction on future uses based on the level of remediation undertaken.

Recommendation 17

That the *Planning Act* be amended to restrict decision makers from approving residential or other sensitive land use on contaminated sites, as defined by regulation.

Recommendation 18

That legislation such as the *Negligence Act, the Environmental Protection Act and the Municipal Act* be re-examined to determine how they can be modified to limit municipal liability.

Recommendation 19

The Province of Ontario has the authority over property and civil rights. There is a need to:

"Grandparent" those Brownfield remediations undertaken and approved in accordance with the statutory and regulatory provisions of the day.

Recommendation 20

That, in exchange for the successful remediation of a contaminated property, as evidenced by the posting of a bona fide Record of Site Condition (RSC) on the Ministry of the Environment's Brownfield Environmental Site Registry, all the owners of the subject property subsequent to the date of the RSC Web Site Posting, shall be held harmless and immune from civil legal action which relates to the "on-site" contamination specifically cited and addressed in the filed RSC.

Recommendation 21

Establish a fixed time period from the date of filing a Record of Site Condition or from the time a remediation plan is filed with the Ministry of the Environment (MOE) for parties to obtain insurance against third party claims to protect themselves while they are undertaking remediation.

Recommendation 22

Subject to the argument in Section 4.2, distinguish those "non-polluting owners" from a polluting owner by definition in the applicable statute. Persons who are wronged should have the right to seek a remedy from a responsible party, a polluter or a person who aggravates an existing condition.

Recommendation 23

Provide statutory improvements to strengthen the innocent, non-polluting landowner defence, provided all reasonable actions were taken to contain the contaminant.

Recommendation 24

AMO strongly supports the Federation of Canadian Municipalities (FCM) recommendation that:

The Federal and Provincial governments proceed with the development of a process with clear and consistent criteria to facilitate the removal of liens on brownfield sites.

Recommendation 25

That the applicable bankruptcy and corporations legislation be amended to prevent Trustees in bankruptcy from registering a quitclaim deed in respect of a contaminated parcel of real estate owned by a bankrupt.

Recommendation 26

Alternatively, both levels of government might amend its legislation to provide that, where a quitclaim is issued, in circumstances where a property would be left in limbo, an escheat would be triggered and the property would immediately become vested in the Crown.

Recommendation 27

Adequate funding be provided to the designated Ministry(s) to provide for reasonable management of the escheat properties until they are sold or remediated.

Recommendation 28

That Section 228 of the *Canada Business Corporations Act* be amended so it is consistent with the Ontario legislation, which provides that land can be sold free and clear of the Crown that arose from the escheat.

Recommendation 29

That the Federal and Provincial governments develop a fund to address contamination and remediation on federally and provincially escheated properties.

Recommendation 30

The Public Trustee be given control of contaminated sites and be given the mandate to take necessary actions and a budget to protect the public from environmental harm from these sites.

Recommendation 31

That the authority be restored in the *Municipal Act* to allow municipalities to write-off taxes if it considered them uncollectible.

Recommendation 32

That the legislation be changed to allow municipalities to reduce the cancellation price and do another tax sale without going through a further one year process.

Recommendation 33

That the Province develop a fairer way to address the Crown Liens on tax sales.

Recommendation 34

That the Province work with the Federal government to ensure that arrangements are made to remove the Federal Crown liens as they also survive tax sales.

Recommendation 35

That the federal government amend Sections 18 and 20(1) of the *Income Tax Act* to allow remediation expenses to be treated as a deductible expense in computing income.

Recommendation 36

That the provincial government permit the deductions for remediation expenses in the calculation of provincial income taxes.

Recommendation 37

That the Federal and Provincial governments review all the taxation policies relevant to brownfields to ensure a level playing field.

Recommendation 38

That legislative amendments be made to various statutes, including but limited to the *Negligence Act*, *Limitations Act*, and the *Environmental Protection* Act to address third party civil liability as it pertains to environmental contamination and RSCs. There will always be reluctance to remediate contaminated sites when the interested parties do not have some immunity from civil liability especially when they were not the polluters.

Recommendation 39

The Ministry of the Environment provide a sign off on the RSCs to provide certainty and protection to municipalities from future litigation.

Recommendation 40

That the Ministry of the Environment issue Acknowledgement letters for RSCs only after the Ministry's entire review process, including the audit function has been concluded.

Recommendation 41

That RSC procedures be revised so that RSCs can only be posted on the Ministry Web-site following the completion of the audit process, should MOE believe an audit process is required.

Recommendation 42

The Province of Ontario should Amend Section 168 of the *Environmental Protection Act* and Ontario Regulation 153/04 providing explicit language of protection for municipalities relying upon an RSC.

Recommendation 43

The Province of Ontario should reconsider its current role and become actively involved in the following areas:

- Reviewing scientific data associated with the RSC
- Providing direct regulatory sign-off on RSC.

Recommendation 44

It is recommended that the Province be requested to provide clarity in the application of the potable and non-potable water standard in the context of Regulation 153/04.

Recommendation 45

It is recommended that the Province be requested to provide clarification of the provisions of Regulation 153/04 in the context of the requirements of the proposed *Clean Water Act, 2005.*

Recommendation 46

That the Province work with the Federal Government to undertake toxicological research to update current science and technology to facilitate Brownfield clean up.

Recommendation 47

That the Federal and Provincial Governments encourage the development of new Canadian technologies for Brownfield clean-up.

Recommendation 48

That the Federal and Provincial Governments actively undertake assessment of existing technologies, both national and international and provide an analysis of their effectiveness, applicability, acceptability and commercial viability for the redevelopment of Brownfield projects.

Recommendation 49

That excavated soils not necessarily be immediately considered as waste but rather that new guidelines be developed defining “recyclable” soil and environmental remediations to encourage recycling and re-use wherever practical.

Recommendation 50

AMO recommends that the definition provided in the Provincial Policy Statement be the standard used by all orders of government, which reads:

“undeveloped or previously developed properties that may be contaminated. They are usually, but not exclusively, former industrial or commercial properties that may be underutilized, derelict or vacant.”

Recommendation 51

It is further recommended that a minimum standard for “clean up” be developed by the Province to be applied to particular uses or groups of uses.

Recommendation 52

That there be a concerted effort on the part of the Province to shift focus from **regulator** to **facilitator** through education, mentoring and support**.**

Recommendation 53

That the Province designate the Ministry of Municipal Affairs and Housing as the “one-window” for Provincial facilitation and support in the redevelopment and remediation of brownfield sites.

Recommendation 54

That the Risk Assessment process focus only on sites with extensive and/or complex contamination.

Recommendation 55

That the Province ensure the provision of adequate staffing and resources to ensure the timely review of risk-based approaches to site assessment and management.

Recommendation 56

That funding be set aside to provide for continued education for provincial and municipal staff in conjunction with private sector stakeholders to build up their understanding, expertise and confidence in Brownfield redevelopment.

Recommendation 57

It is recommended that the Province develop and implement training plans in consultation with municipalities to educate Municipal Service Office staff and municipal staff on remediation and redevelopment issues.

Recommendation 58

It is recommended that the Province provide guidelines to assist municipal staff in the development of local level policies and guidelines.

Recommendation 59

That the program be reviewed and improved in consultation with municipalities with a view to establishing a workable program.

Recommendation 60

That the funds from BFTIP be transferred to a new improved and workable program.

Recommendation 61

That the Province keeps AMO and the Brownfields Task Force apprised on an ongoing basis of the change in legislation and pilot projects status.

Recommendation 62

That the Province provide for the use of the TIF tool to those municipalities wishing to use it.

Recommendation 63

That TIFs be limited to the use for Brownfield redevelopment.

Recommendation 64

That Section 28 of the *Planning Act* be amended as proposed in Bill 51.

Recommendation 65

That the Province contribute its share of the local tax bill, of up to 49% to be used in formulating a workable TIF.

Recommendation 66

That Community Improvement Plans be used as vehicles to integrate TIF and BFTIP into a one-window approach of obtaining funding.

Recommendation 67

That the Province and CMHC engage in a concerted effort to resolving the outstanding issues in respect to the RSCs and the Risk Assessment process.

Recommendation 68

That CMHC provide mortgage guarantees on Brownfield redevelopment sites for the provision of housing.

Recommendation 69

That the CMHC mandate be expanded to also provide mortgage insurance for commercial and industrial Brownfield redevelopment sites in addition to residential.

Recommendation 70

That the Province consider the appropriateness and applicability of Quebec Bill 72 in the Ontario context.

Recommendation 71

That a legislative provision be implemented at the front-end of the application process requiring remediation plans for those industries and commercial enterprises that are likely to use substances or engage in practices that could potentially contaminate lands and/or structures under their ownership/use or to the surrounding properties. That these plans have financial security attached to them to ensure that remediation is undertaken.

Recommendation 72

That any such industries and commercial enterprises also be required to fund a program to be used for any remediation of existing abandoned contaminated properties.

Recommendation 73

That municipalities be permitted to regulate the development of new gasoline service stations, with specific powers to require the remediation of a closed gasoline service station prior to the development of a new facility.

INTRODUCTION

This is a third position paper that AMO has undertaken on the issue of Brownfields redevelopment. The first paper was the policy report "Promoting Municipal Leadership in Brownfield Redevelopment" in October of 2000. The second paper was the response to "Bill 56 – *The Brownfields Statute Law Amendments Act*" in August of 2001 and the subsequent presentation to the Standing Committee on General Government.

This third paper is intended to look at where we have been, what has been requested, what has been accomplished and what remains outstanding. It is with this last issue, of what remains outstanding, that we need to address and determine a path to move the initiative forward. The timing of this position paper is particularly appropriate as the Minister of Municipal Affairs and Housing, the Hon. John Gerretsen, has recently been appointed as the lead on the resolution of many outstanding issues in relation to Brownfield redevelopment. It is important to note that most of the issues discussed in 2000 and 2001 still remain to be addressed. It is equally important to highlight the positive steps that have been taken by the Federal and Provincial governments to enable a certain level of activity in relation to remediation of contaminated lands.

1. FEDERAL INITIATIVES CURRENTLY IN PLACE

1.1 Green Municipal Funds

In the 2005 Federal budget, the Government of Canada allocated $150 million, for Brownfield remediation, which is being administered by the Federation of Canadian Municipalities (FCM). Annual funding caps were established which set a limit on the number of projects that can be processed. The first annual RFP for Brownfields included $20 million in low interest loans and closed at the end of November 2005. In addition, grants are available for feasibility studies and field tests. However, it must be noted that Ontario municipalities compete with municipalities across the country for funding. Nevertheless, it is a positive recognition by the Government of Canada that municipalities need financial assistance to address the Brownfield situation.

1.2 Sustainable Technologies Canada Funding (STDF)

The STDF was established by the Government of Canada, with an investment fund of $350 million, to support the development and demonstration of Canadian Clean Technologies. Applications to fund new technologies, including those new technologies dealing with Brownfield remediation, can be submitted to Sustainable Development Technology Canada. The actual processing of the application takes approximately 1 year to complete. The application is evaluated on effectiveness and applicability of the technology. The technology is tested for up to 5 years prior to final decision. To date, there have been no applications related to Brownfield remediation.

1.3 The Federal Contaminated Sites Action Plan

The Federal Government has its share of contaminated sites such as its military bases, harbours, airfields, on lands owned, leased or otherwise under their responsibility. There are 4300 known contaminated sites but this number could grow to well over 6000 as more sites are assessed.

The Federal Government formed a Contaminated Sites Management Working Group in 1995, comprised of the Department of National Defence and Environment Canada. The Federal Government developed a Federal Contaminated Sites Action Plan to complete the assessment and remediation or risk management of the 97 highest-risk Federal contaminated sites. The Action Plan was to be completed in 15 years.

We understand that an inventory of all federally-owned contaminated sites reported to the Federal Treasury is updated annually and is posted in the Directory of Federal Real Property.

We also understand that many of the sites are situated outside of urban areas and as such do not necessarily fit the meaning conveyed by the term “Brownfield”, that of a site within a community area that could have potential for development or redevelopment to a higher use. While this may be a sound reason to separate out those sites outside the urban areas, those inside the urban areas, such as military sites, lab facilities and port lands, are an integral part of the communities.

Accordingly, if provided an incentive to remediate the property, these sites could indeed become prime redevelopment properties. The Federal Government must consult with municipalities on any Federal “contaminated” land holdings and in partnership decide on the best course of action to be taken for these lands. The government needs to come to appreciate that their land holdings are integrated within the fabric of Ontario communities and, the government needs to be cognizant of the community’s needs and long-term plans. One illustration of this need for co-operative consideration and decision-making is in the port land areas. Many communities have long term plans to redevelop these areas for public access to the waterfront, including recreation, residential and cultural uses. At the same time, these lands and adjacent water are used for shipping and industry. The government, in accordance with the current policies, would only appear to require clean-up to the level required for the current government use, which would not necessarily take into consideration the long-term community plans. A need for dialogue is clearly required where the interests of the community and the broader interests of the Federal government can be accommodated. We are confident that the Government of Canada has interests in enabling growth through redevelopment within the existing fabric of Ontario communities.

Recommendation 1

That the Federal Government prioritize contaminated sites in consultation with municipalities and on the basis of impact of these lands on adjacent uses, with particular emphasis on the impact to human health and safety.

Recommendation 2

That the Federal Government notify and consult with municipalities on Federal "contaminated" sites prior to making decisions on the level of remediation and redevelopment.

Recommendation 3

That the Federal Government work with municipalities prior to the remediation process to ensure that the remediation is consistent with the long term plans of the municipality.

2. PROVINCIAL INITIATIVES CURRENTLY IN PLACE

2.1 Brownfield Statute Law Amendment Act, 2001

The *Act* provides incentives to both the municipalities and the landowners to clean up Brownfield properties, through tax incentives and grants/loans. The *Act* amends sections of the *Environmental Protection Act, Ontario Water Resources Act, Planning Act, Municipal Act, 2001* and resulted in a number of regulations. This legislation amended the existing statutes with the intent to establish:

- Rules for the assessment and remediation of contaminated sites;
- Rules and limitations for environmental regulatory liability;
- Mechanisms for quality cleanup of contaminated sites and;
- Planning and financial tools to support brownfield redevelopment

The *Act* has been implemented in phases with the development of supporting regulations. The final legislative provision came into effect on October 1, 2005.

The benefit of undertaking the remediation and offering these initial incentives is increased assessment through redevelopment, public health and safety and removal of blight. This is a good first step.

2.2 Record of Site Condition – Reg. 153/04

Regulation 153/04 came into effect October 1, 2005. This new requirement spells out the requirements for undertaking and filing Records of Site Condition and the direction when a change of use and or building permit can be issued. The requirements for filing a RSC include:

- Standards for Phase I and Phase II Environmental Site Assessments;
- Site condition (clean up) standards for contaminants in soil, ground water and sediment based on the intended use at the property;
- Standards for preparing risk assessments;
- Acceptable analytical (sampling and laboratory) procedures; and
- Reporting and certification requirements for RSC's.

The RSC process was intended to provide a level of certainty, transparency and an assurance that the remediation was undertaken to Provincial Standards by:

- Requiring the filing of MOE *acknowledged* RSCs to an electronic Registry accessible by the public;
- Providing for MOE approval of risk assessments and issuance of certificates of property use;
- Providing a definition for qualified persons;
- Requiring mandatory filing of RSCs for higher risk changes in property use;
  - ❏ An RSC is required before a change from industrial or commercial to a more sensitive property use, including residential, parkland or agricultural uses;
  - ❏ Construction related to a restricted property use change is prohibited prior to filing a RSC;
  - ❏ Construction must be consistent with the requirements in a Certificate of Property Use.

Also, filing an RSC intends to provide limited liability protection from administrative orders. It is the intent that specific orders under the *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* (OWRA) will not be issued to the owners or subsequent owners of a property in relation to historic contaminants. However, we understand that it is not clear that orders, penalties and prosecution are not to be issued to parties during the timeframe of the property investigation and the term of the clean up. In our view, municipalities have raised additional issues with the Regulation that need to be addressed. Please refer to Regulatory Barriers in section 5.

2.3 Current Qualified Persons (QP) Requirements

The regulation currently specifies qualifications, including certain professional designations, for Qualified Persons based on 4 types of activities required for Record of Site Condition (RSCs).

- Conduct or supervise a Phase I Environmental Site Assessment (ESA)
- Conduct or supervise a Phase II ESA
- Prepare or supervise a risk assessment; and
- Make certain certifications in an RSC

However, the Qualified Persons requirements are currently under review by the Ministry of the Environment. Regulatory changes are anticipated for the Summer/Fall of 2006. Municipalities agree that ESA/RSC should be conducted by qualified persons with their own liability insurance.

2.4 Brownfield Financial Tax Incentive Program (BFTIP)

BFTIP became available to municipalities in the Fall of 2004. This program allows municipalities to cancel municipal taxes and, if approved by the Province, educational taxes

on contaminated lands for remediation of the property. The tax cancellation program must be included in an approved Community Improvement Plan (CIP).

2.5 *Places to Grow Act, 2005*

The *Act* provides for the preparation of growth plans by the Ontario government. The first of these Growth Plans is for the Greater Toronto Area. The main thrust of the growth strategy is the containment of "Greenfield" development and the encouragement of redevelopment. To realize this government interest, redevelopment of Brownfields becomes crucial. However, a full integration of the Brownfield redevelopment strategy must be made with the growth policy if the two priorities are to be fully realized.

2.6 Provincial Coordination on Brownfields

The Ministry of Municipal Affairs is taking the lead in coordinating provincial action on Brownfield issues. The Minister of Municipal Affairs and Housing meets monthly with the Ministers of G8, which include the Ministers of Public Infrastructure Review, Finance, and the Ministry of the Environment, to discuss Brownfields. Also, the Brownfield Directors' Inter-Ministry Committee has recently been established which meets monthly to discuss provincial Brownfields-related activities and initiatives. The government has also designated a Provincial Brownfields Coordinator, who will coordinate provincial Brownfields activities, foster working relationships with stakeholders and provide a single point of access on Brownfields. All these initiatives present a positive and proactive presence of the Province in Brownfield clean up.

2.7 Brownfields Website

The government launched a "Brownfields Ontario" website in December of 2005 to provide a one-window access to existing Brownfield programs and legislation. (Located at: http://www.mah.gov.on.ca/userfiles/HTML/nts_1_3305_1.html)

3. RECENT INITIATIVES NOT YET COMPLETED

3.1 Establishment of a Provincial Brownfields Stakeholder Group

The first meeting of the Stakeholder Group was on February 10th, with 2 representatives from AMO. And one from FCM The mandate of the Stakeholder Group is to provide strategic advice and feedback to senior inter-Ministry staff on policy, technical and legislative issues related to land use planning, environmental protection and financing.

The Stakeholder Group:

- Discussed matters relating to current public and private practices, activities, policies and programs that may form barriers to Brownfield cleanup and redevelopment activities in Ontario.

- Provided input and advice on Brownfields cleanup and redevelopment obstacles and

opportunities in Ontario.

3.2 Risk Assessment Procedure Guidelines (MOE)

Guidelines are currently under development.

3.3 Qualified Persons Certification Program (MOE)

These guidelines are currently under development. Regulations are anticipated for Summer/Fall 2006.

3.4 Proposed *Planning Act* Changes – Bill 51

Municipalities appreciate the changes to the *Planning Act* the Government is proceeding with, which will assist with brownfield remediation and redevelopment. Proposed provisions in Section 28 of the *Act* will expand the definition of a community improvement area to include as many activities as could potentially occur in a planning / development / redevelopment/ construction situation. It also proposes to expand the grant and loan provisions beyond the "rehabilitating" of land and buildings to the entire eligible costs related to the community improvement area, which includes new construction on these lands.

It also makes provision for an upper tier municipality to make grants or loans to the lower-tier municipality for carrying out a community improvement plan that has come into effect. Municipalities support this provision.

The proposed *Act* also makes numerous other changes in relation to the decision-making of municipal councils, the processing and approvals of applications, and changes to the Ontario Municipal Board. The changes are envisioned to provide for greater public consultation and decision-making, creating a more transparent land-use planning process and making the OMB more effective and user-friendly. AMO is very supportive of the changes being proposed by the government.

3.5 Growth Plans

The 1st of the Proposed Growth Plans was released for comment in November of 2005. The plans objectives appear to:

- Create more livable communities where people are close to shops, parks and jobs
- Revitalize downtown neighbourhoods
- Provide greater choice in housing types
- Curb urban sprawl and preserve valuable greenspaces and agricultural lands
- Get better use from public infrastructure investments in schools, hospitals, and water and sewage systems.

WHAT STILL NEEDS TO BE DONE

4. LIABILITY AND OTHER LEGAL BARRIERS

Municipalities acquire land for a wide range of public uses including municipal facilities, roads and parks. Municipalities are also responsible for granting planning approvals and issuing building permits. Some municipalities conduct peer review Phase I and Phase II Reports and RSC documentation for private properties. In each of these functions, municipalities are exposed to liability for site contamination.

4.1 Municipal Liability Protection

Municipalities require protection for brownfield situations that expose municipalities to liability, including properties that municipalities acquire voluntarily. Municipalities are concerned that when a municipality vests ownership of a property after a failed tax sale, it assumes environmental liability associated with that property even though it has carried no actions that contributed to the environmental contamination. Municipalities must be exempt from liability in these situations. Municipalities should be able to go after past owners, who contributed to the contamination, for the clean up of the lands in cases where they are still viable corporations**.** Further, municipalities become exposed to liability when they issue planning and building approvals or conduct peer reviews, for which they require protection. This liability protection can only come from the Province through legislative amendment.

Municipalities would also benefit from stronger provisions in the legislation to limit the liability exposure of private sector property owners and the municipality in those situations, where subsequent owners change the use on the property to a more sensitive use, not originally contemplated. For example, if a contaminated property is remediated to a commercial standard and sold, the landowner selling should not be responsible for the potential increase in liability that will occur if a new owner develops the property for residential purposes. The original property owner loses control over the property at the time ownership changes yet, remains potentially liable for damages that result from the change in use. The original owner had no say in or control over the ensuing change in use and should therefore not be held liable. The original owner's risk of liability should cease upon any subsequent more sensitive change of use and the potential for liability should rest with the owner implementing the change of use.

Recommendation 4

That the Province provide for explicit municipal liability protection in perpetuity, by amendment to applicable legislation, including the *Building Code Act*, the *Limitations Act,* and the *Environmental Protection Act*.

Recommendation 5

That new legislation ensure some certainty, in the same way that the Building Code and Fire Code do, that once a site has been cleaned up to the statutory and regulatory provisions of

the day, absent negligence, the property owner will not be subject to meet new regulatory standards developed at a future point in time as long as the use remains unchanged.

Recommendation 6

That the Province consider establishing an annuity or insurance fund to be drawn upon to address future claims.

4.2 Regulatory Liability

The property owner of a contaminated site continues to be subject to the imposition of Environmental or Administrative Orders. Two Statutes that primarily relate to the issue of Brownfield clean up and redevelopment are the *Environmental Protection Act* and the *Water Resources Act*. Provisions of these Statutes enforce environmental protection through orders, penalties and prosecution, which is supported by municipalities. However, these Statutes, and there may be others such as the proposed *Clean Water Act*, need to recognize the unique process that is undertaken during the Brownfield clean up. Issuance of orders, penalties and prosecution to those parties attempting to improve the quality of a contaminated site must be prevented during the timeframe of the property investigation and the term of the remediation. Legislation should be changed to recognize this need.

Further, there is a concern that lands remediated by the original polluter/owner for one purpose may result in the development of a more sensitive use by subsequent owners and may ultimately result in lawsuits to the original owners. This potential threat from future lawsuits serves as a disincentive to owners of contaminated sites from remediating the lands, as there is too much uncertainty and liability attached to any positive action on their part. In instances where an owner of a contaminated site remediates a property to a level where it could appropriately be used for higher use such as commercial, they have no protection that sometime in the future there may be a lawsuit against them because a new, more sensitive use was developed, by subsequent owners, on those same lands. The issue is that there is no current mechanism that owners of contaminated sites can rely on to prohibit the development of a more sensitive use by subsequent owners. Therefore, even if the site was remediated for a use such as commercial, the end use could actually be residential. This needs to be legislatively addressed through warnings on title to protect the future users of the property, the municipalities for their approval role and the owners of contaminated sites, who may wish to undertake a certain level of environmental clean-up of their lands. In the future, if there is adequate technology to address the contaminant(s), the legislation could also be changed to remove the warnings. This would act similarly to the current noise warning clauses on title to properties seriously impacted by the airports. Another option may be to amend the *Planning Act* to restrict decision makers from approving residential development or other sensitive uses on those contaminated sites determined to be inappropriate for these types of uses.

There should also be flexibility and opportunity to deal with less substantive but, nevertheless, important issues such as the definition of waste to conserve expenses and also prevent inert material from having to be disposed, rather than re-used on site. Currently there is no clear definition/guidance on what constitutes impacted soil. Regulation 347 (the definition of waste) includes all soil, concrete and other material unless they meet certain

criteria. As such, there appears to be no incentive to either recycle soil and other materials on site or use it safely off site. This needs to change as municipalities already have grave issues relative to waste and capacity at landfill sites. The objective should be to reuse and recycle the soil rather than dispose in landfills. There are any number of measures that, taken together, could substantively assist municipalities and proponents in providing a smoother, more financially cognizant approach to bringing Brownfields to a higher productivity.

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It is paramount that legislative changes be made to ensure protection from orders, penalties and prosecutions between the time the lands are acquired and cleanup is finished with a Record of Site Condition filed, at minimum, 10 years.

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That new legislation ensure some certainty, in the same way that the Building Code and Fire Code do, that once a site has been cleaned up to the statutory and regulatory provisions of the day, absent negligence, the property owner will not be subject to meet new regulatory standards developed at a future point in time as long as the use remains unchanged.

Recommendation 14

That liability must be limited to meeting the standards of the day. Where the property use changes, the standards in place at the time of the change in use should apply and the owner who proposes the change in use, as the only party who has control over this, is the party who should be held liable for future damages that may result.

Recommendation 15

That change in use should not be authorized, especially if the change is to residential, without mandatory insurance coverage to guard against future liabilities.

Recommendation 16

That the *Land Titles Act* and the *Registry Act* be amended to allow for the registration on title of warnings clauses related to the former use of the property and restriction on future uses based on the level of remediation undertaken.

Recommendation 17

That the *Planning Act* be amended to restrict decision makers from approving residential or other sensitive land use on contaminated sites, as defined by regulation.

4.3 Joint and Several Liability

With Joint liability, all parties are liable for the full portion of the liability. With Several liability, on the other hand, parties are liable on a proportional basis, therefore, if a party has one percent of the stake in a matter, they are liable for that one percent only. In the cases of Joint and Several liability, one party, can end up paying 100% of the costs even if they are responsible for 1% of the loss. This is a very serious disincentive for municipalities when they deal with a normal practice such as the issuance of building permits.

A municipality in Ontario was sued 35 years after the development of a subdivision because contamination was found under a number of the homes and the municipality had issued Building Permits for these homes. In that case, the original consultants and developer were long gone; the municipality, being the only party remaining, had to defend the action without recourse to the other parties. The matter was eventually settled by the municipality which resulted in the municipality acquiring a number of properties and remediating the land, the cost of which were borne from the property tax base.

The Provincial Government has the constitutional authority over property and civil rights and can alter the provisions to limit liability of a municipal government in their normal approval role.

Recommendation 18

That legislation such as the *Negligence Act, the Environmental Protection Act and the Municipal Act* be re-examined to determine how they can be modified to limit municipal liability.

4.4 Civil Liability

The current and past property owners are fully open to lawsuits from any party that believes they have been negatively affected by the environmental condition of the site. This threat exists even if you are the current owner who has cleaned up the site to the new standards, and you have a completed Record of Site Condition. Protection from civil liability must be addressed if there is to be a level of certainty provided to municipalities and proponents at the completion of Brownfield remediation. Consistent with the recommendations of the National Round Table on the Environment and the Economy (NRTEE), there needs to be a limitation on the liability for a party that remediates a Brownfield site. As a non-polluting owner, we understand the proponent also needs a legislative strengthening of the innocent landowner defence, provided, of course, that all reasonable action was taken to contain the contaminant (proper due diligence).

Finally, to provide greater certainty, the government should consider the establishment of an industry funded compensation or annuity pool to be used for that purpose.

Recommendation 19

The Province of Ontario has the authority over property and civil rights. There is a need to:

"Grandparent" those Brownfield remediations undertaken and approved in accordance with the statutory and regulatory provisions of the day.

Recommendation 20

That, in exchange for the successful remediation of a contaminated property, as evidenced by the posting of a bona fide Record of Site Condition (RSC) on the Ministry of the Environment's Brownfield Environmental Site Registry, all the owners of the subject property subsequent to the date of the RSC Web Site Posting, shall be held harmless and immune from civil legal action which relates to the "on-site" contamination specifically cited and addressed in the filed RSC.

Recommendation 21

Establish a fixed time period from the date of filing a Record of Site Condition or from the time a remediation plan is filed with the Ministry of the Environment (MOE) for parties to obtain insurance against third party claims to protect themselves while they are undertaking remediation.

Recommendation 22

Subject to the argument in Section 4.2, distinguish those "non-polluting owners" from a polluting owner by definition in the applicable statute. Persons who are wronged should have the right to seek a remedy from a responsible party, a polluter or a person who aggravates an existing condition.

Recommendation 23

Provide statutory improvements to strengthen the innocent, non-polluting landowner defence, provided all reasonable actions were taken to contain the contaminant.

4.5 Federal and Provincial Liens

Currently, municipalities can proceed with a tax sale process when a property is in tax arrears for 3 years. These properties tend to be difficult to sell as they are abandoned and left in a deteriorated state, are perceived as contaminated, whether that is true or not. If not sold, these properties become a burden on municipal resources through the provision of fire, police, inspection and enforcement services. However, once the property goes through the tax sale process, all property tax arrears, penalties and interest are cancelled, including any liens against that property. Federal and Provincial Crown liens cannot be removed. Depending on the amount of the lien, some municipalities have found it difficult to dispose of properties with Crown liens. A Federal or Provincial lien, or both, is frequently enough to discourage a potential purchaser even if the land is sold for nominal fee. The result is the property sits idle and the opportunity to develop is lost.

It is our understanding that the Province is working with the Federal Government to develop a set of clear criteria to delineate the circumstances under which to lift lien. A commitment in the 2005 Provincial Budget spoke to this initiative, which is well on its way to being developed. A small Advisory Group of municipal experts has been convened to assist the Province, through focused workshops, with the development of the criteria. Also, a consultant has been retained to assist the Province with the process.

Recommendation 24

AMO strongly supports the Federation of Canadian Municipalities (FCM) recommendation that:

The Federal and Provincial governments proceed with the development of a process with clear and consistent criteria to facilitate the removal of liens on brownfield sites.

4.6 Orphaned Sites

FCM noted in "Greening Canada's Brownfields", that Brownfield sites caught up in bankruptcy proceedings, also need to be addressed. It is our understanding that under the Federal *Bankruptcy Act*, a trustee in a bankruptcy has the ability to quitclaim assets. The Trustee in a Bankruptcy, which administers the assets of a bankrupt company, uses the power under the

Bankruptcy Act to register a quitclaim deed in respect to a contaminated parcel of real estate owned by the bankrupt. This action leaves the property in "limbo" with no trustee in bankruptcy responsible for the property and a bankrupt owner. With no owner receiving back the property, it becomes an orphaned site. The property is thereafter abandoned, and municipalities ultimately are left to deal with repercussions, including fires and other forms of vandalism. This would not be an issue, if the Trustee in Bankruptcy had not been able to place the lands into "limbo" through the registration of the quitclaim deed. This situation needs to be corrected. The legislation needs to be changed to prevent a Trustee from placing the lands into such a position. Alternatively, the property should vest with the Crown. If it should be decided that the property vest with the Crown, it is also important to provide the designated Ministry with adequate funding to manage those sites until they are remediated or sold.

Recommendation 25

That the applicable bankruptcy and corporations legislation be amended to prevent Trustees in bankruptcy from registering a quitclaim deed in respect of a contaminated parcel of real estate owned by a bankrupt.

Recommendation 26

Alternatively, both levels of government might amend its legislation to provide that, where a quitclaim is issued, in circumstances where a property would be left in limbo, an escheat would be triggered and the property would immediately become vested in the Crown.

Recommendation 27

Adequate funding be provided to the designated Ministry(s) to provide for reasonable management of the escheat properties until they are sold or remediated.

4.7 Federally, Provincially Escheated Properties

In addition to Federal lands, the Federal Government is also responsible for sites that are escheated to the Crown. Escheating occurs when a dissolved corporation has assets, resulting in the title to these assets being passed to the Crown pursuant to Section 228 of the *Canada Business Corporations Act*. There is a corresponding section in Ontario legislation for provincially incorporated businesses. This title is still subject to any encumbrances against the original assets including liens and mortgages, and for this reason the Crown's title to these lands will often be a bare title without any "real" equity. Even so, the legal title is vested in the Crown. Due to the very low or no "real" value of these lands, no Crown agency will automatically take responsibility of these assets and even the public trustee will only become involved in the transfer of the lands to someone else. In other words, these lands are more trouble than they are literally worth.

Some idea of the scope of this problem can be seen by looking at the Ontario Gazette in any given week, which publishes hundreds of dissolved corporations. If any of these dissolved corporations have assets, and most probably do not, the assets are, said to be, escheated to

the Crown. One cannot necessarily determine from the posted information whether or not they are also contaminated.

The assets that are escheated to the Government are probably encumbered and are probably not worth much, if anything. Performing a search on the corporation to determine whether or not there are assets would have been excessively difficult prior to the e-Registry. This continues to be the case for those parts of Ontario, where reliance on paper records continues to be the standard practice. Not surprisingly, there has been a "build up" of the number of escheated properties which never had a search performed. This is unfortunate but reflects on the inferior tools of the recent past, and in some cases, current practices.

Municipalities are not interested in every property escheated to the Province or to the Federal Government; our interest rests with those lands that are contaminated and pose a problem for our communities. It is those select lands that we ask the Province and the Federal Government to direct their efforts to addressing. This will be a difficult task, as there are potentially a large number of properties that need to be addressed. Municipalities are not asking either the Federal or Provincial government to undertake a complete inventory of all escheated properties in Ontario, nor are we asking them to determine whether or not these properties are contaminated. What we are asking is that there be a strategy and a commitment in place to address contamination and remediation when controversy arises, such as fires, at one of these properties.

With respect to the Province, one way to approach this could be to simply change the policy under which the Public Trustee operates. The Public Trustee should be given the mandate to take control of contaminated sites and to take the necessary actions to protect the public from environmental harm from these sites. At present, the office of the Public Trustee does not accept any mandate to protect the public from these sorts of harm, no matter how compelling the case or great the potential harm.

On the Federal government side, it is our understanding that once any lands, including escheated properties, are identified and registered publicly with the Directory of Federal Real Property (DFRP), Public Works Canada reports on that ownership annually under the directive of the Treasury Board Policy. Once the lands are registered and reported, the Public Works Department dealing with contaminated sites (Environmental and Sustainable Development Services) undertakes an exhaustive 1 to 2 year process to determine if and to what level the property is contaminated in accordance with the Canadian Standards Association procedure. The results are posted and can be searched by municipal address.

However, the conditions of sale of escheated lands at the Federal level and in Ontario differ. The *Municipal Tax Sales Act* allows lands to be sold for tax arrears when there has been an escheat under the *Business Corporations Act*. If the lands were incorporated under Ontario legislation, the land can be sold free and clear of the interest of the Provincial Crown that arose from the escheat. There is no such provision for the Federal escheated interest, and that needs to change.

In Ontario, an Inter-Ministerial Committee led by PIR is looking into the issue of escheated properties and how better to provide a coordinated response on the matter. The first step is the co-ordination of several Ministries to develop ways of identifying these properties ahead

of an emergence of an issue. Secondly, the government needs to determine how to deal with these properties operationally once they have been identified. AMO supports the government in undertaking this initiative. Finally, we encourage the government to prepare a management plan to possibly link the remediation and availability of certain lands with the timeframe of the Growth Plans.

Recommendation 28

That Section 228 of the *Canada Business Corporations Act* be amended so it is consistent with the Ontario legislation, which provides that land can be sold free and clear of the Crown that arose from the escheat.

Recommendation 29

That the Federal and Provincial governments develop a fund to address contamination and remediation on federally and provincially escheated properties.

Recommendation 30

The Public Trustee be given control of contaminated sites and be given the mandate to take necessary actions and a budget to protect the public from environmental harm from these sites.

Tax Sales

There are several issues to be considered.

Firstly, municipalities cannot write-off taxes under any circumstances, even if there is no possibility of a successful tax sale for the statutory cancellation price, until after a failed tax sale. Under the old *Municipal Act*, a municipality could write-off taxes if it considered them uncollectible. This authority should be restored.

Secondly, if a municipality conducts a tax sale and it is unsuccessful because there were no bids, the municipality does not have the ability to immediately try again with a second tender process under the tax sales provisions of the *Act*. The municipality can, of course, register a notice of vesting and try to sell the lands, but it would be preferable in many cases (and almost always when contaminated properties are involved) for municipalities to be able to transfer the lands without having to take ownership. As the legislation now reads, if a municipality wants to go through a second tax sale process after an unsuccessful attempt to sell lands at a first tax sale, it would need to cancel the first process and then begin the entire process again from the beginning. This is a great waste of time and resources, and would take at least an additional year. It would make more sense if municipalities were allowed, after an unsuccessful tax sale, to reduce the cancellation price and immediately re-tender the lands under the tax sale process. This would make it more likely that municipalities could sell contaminated lands using the tax sale process, without having to go into possession or become the owners of the lands.

Thirdly, the *Municipal Act* causes any Crown interests to survive any tax sale, including Crown liens, which can be exerted against a municipality if it chooses to vest lands in itself. Also, some liens (such as liens under the *Retail Sales Tax Act*) may actually require municipalities to pay the entire proceeds of a tax sale over to the Province even when a tax sale is successful. The Province needs to develop a fairer way to address the Crown Liens on tax sales. We understand that the Ministry of Finance is engaged in the consideration of such changes. AMO hopes that the Ministry of Finance will continue with this important work until a conclusion is reached.

Lastly, the Province needs to work with the Federal government to ensure that arrangements are also made to remove the Federal Crown liens as they also survive tax sales. (Refer to 4.5)

Recommendation 31

That the authority be restored in the *Municipal Act* to allow municipalities to write-off taxes if it considered them uncollectible.

Recommendation 32

That the legislation be changed to allow municipalities to reduce the cancellation price and do another tax sale without going through a further one year process.

Recommendation 33

That the Province develop a fairer way to address the Crown Liens on tax sales.

Recommendation 34

That the Province work with the Federal government to ensure that arrangements are made to remove the Federal Crown liens as they also survive tax sales.

Miscellaneous Tax Implications

The Federal and Provincial governments need to review all the taxation policies when dealing with brownfields to ensure a level playing field between these lands and greenfield development. As a way of illustrating inequities, let's consider the current tax regime, where a proponent who buys a brownfield site spends $500,000 on assessment and clean-up and is unable to deduct those expenses from other income, but must add those expenses to the cost of the land and amortize it over a number of years. This tax policy reduces the availability of funds for the proponent and is a considerable disincentive as it adds to the high up-front costs for brownfield redevelopment, with little recognition.

Interestingly enough, if the land belongs to an oil company that cleans its own properties as part of its operations, the oil company can expense the costs as part of their ongoing business. This adds a further inequity for proponents who are not in the oil industry. What we are asking is that the Federal and Provincial Governments bring a leveling of the playing field between developing on a Greenfield, where there are no costs of assessment and

remediation, and brownfields, where there can be substantial up-front costs. AMO agrees and supports the recommendations of the FCM in respect of the above noted tax implication.

Recommendation 35

That the federal government amend Sections 18 and 20(1) of the *Income Tax Act* to allow remediation expenses to be treated as a deductible expense in computing income.

Recommendation 36

That the provincial government permit the deductions for remediation expenses in the calculation of provincial income taxes.

Recommendation 37

That the Federal and Provincial governments review all the taxation policies relevant to brownfields to ensure a level playing field.

5. REGULATORY BARRIERS

5.1 Further Improvements to the RSC Process

We are now operating under the new RSC rules, those being Ontario Regulation 153/04 and EPA 168. It's a rather circuitous process, which has municipalities questioning the actual value of the Record of Site condition reports.

Municipalities grant Planning and Building Approvals, but prior to doing so are now consulting the ESR Website to monitor the posting of Records of Site Condition reports (RSC) which are prepared and posted by the Qualified Persons (QP). Concurrently, municipalities are also accepting full copies of the Phase I and Phase II reports, where the owners are applying for assistance under the Brownfields Community Improvement Plan, a Section 28, *Planning Act* provision. Municipalities are finding that the RSC reports are accompanied by disclaimers from the Qualified Persons, which help to protect them from future liability, should future contamination issues arise.

Where does that leave municipalities? Municipalities feel exposed to liability even though they were assured through the development and implementation of Bill 56 and the new RSC regulations that municipalities could fully rely upon the submitted RSC as the authoritative document declaring that a subject property now meets all prescribed Provincial Regulations and requirements appropriate to the intended use. This reliance is critical to municipalities, as they need to confidently grant Planning and Building approvals without fear of being involved in future litigation.

The MOE Audit Division randomly audits RSC's, submitted by Qualified Persons throughout the Province, as a measure of quality control on the process and submissions. However, the selection of files for audits is occurring after the RSC has been posted on the Ministry's Website. Meanwhile, municipalities are issuing Planning and Building approvals without the

knowledge that an audit is underway, assuming that the RSC is complete and bona fide. The potential exists for municipalities to grant approvals for development on sites, which MOE may ultimately not find satisfactory through their audits.

Recommendation 38

That legislative amendments be made to various statutes, including but limited to the *Negligence Act*, *Limitations Act*, and the *Environmental Protection* Act to address third party civil liability as it pertains to environmental contamination and RSCs. There will always be reluctance to remediate contaminated sites when the interested parties do not have some immunity from civil liability especially when they were not the polluters.

Recommendation 39

The Ministry of the Environment provide a sign off on the RSCs to provide certainty and protection to municipalities from future litigation.

Recommendation 40

That the Ministry of the Environment issue Acknowledgement letters for RSCs only after the Ministry's entire review process, including the audit function has been concluded.

Recommendation 41

That RSC procedures be revised so that RSCs can only be posted on the Ministry Web-site following the completion of the audit process, should MOE believe an audit process is required.

5.2 The Brownfields Environmental Site Registry

To compound the problem of the Qualified Person (QP) disclaimer, the Ministry of the Environment (MOE) also has a disclaimer of its own. This disclaimer reads: "However the Government of Ontario assumes no responsibility and Users of the Site should verify the information from other sources prior to making decisions or acting upon it". The only conclusion that can be reached with respect to the MOE disclaimer is that Ontario Government is not taking any responsibility for the RSCs posted in the registry. The question is, where should municipalities go to "verify the information" as is suggested by the disclaimer? Was not the purpose of the registry to avoid having to "verify the information" elsewhere?

This issue must be addressed. Municipalities should not be unwittingly placed in a position of future litigation and liability.

Recommendation 42

The Province of Ontario should Amend Section 168 of the *Environmental Protection Act* and Ontario Regulation 153/04 providing explicit language of protection for municipalities relying upon an RSC.

Recommendation 43

The Province of Ontario should reconsider its current role and become actively involved in the following areas:

- Reviewing scientific data associated with the RSC
- Providing direct regulatory sign-off on RSC.

5.3 Non-Potable vs. Potable Water

Ontario Regulation 153/04 provides tables for groundwater and sediment chemical quality standards for defined land uses as well as potable and non-potable groundwater.

As currently provided by the regulation, the “non-potable” standards can only be applied to a site under certain conditions such as:

- All properties within 100 meters of the boundary of the site must be connected to a municipal drinking water system;
- The site is not a well head designated area in an Official Plan or if it is in such an area, the municipality has agreed to the non-potable water standard’
- The upper or the lower tier municipality has not provided a “Written Notice of Objection” to the use of the non-potable groundwater standard.

The Regulation is very minimalist in terms of what a proponent needs to provide to a municipality, should he/she apply for a non-potable water standard, and leaves the responsibility at the municipal door to object to any such request. The non-potable water standard does not include a value for petroleum hydrocarbons but does refer to no visible sheen or odour. This is particularly disconcerting to municipalities as the lack of a defined standard presents substantive difficulties to undertake an appropriate level of review.

To take this one step further, the proposed *Clean Water Act, 2005*, has recently received first reading and it deals with sources of drinking water. Without trying to delve into this further, suffice it to say that the issue of non-potable water standards must also be examined in the context of this impending legislation. Clarity and guidance are paramount on this issue, particularly for those municipalities like Waterloo Region, which depends on ground water as a source of its municipal drinking water. The Region has been requesting that any redevelopment site clean up to the standard of potable water. With considerable Brownfield lands in its community areas, potentially every redevelopment proposal may now be required to meet potable water standard.

Recommendation 44

It is recommended that the Province be requested to provide clarity in the application of the potable and non-potable water standard in the context of Regulation 153/04.

Recommendation 45

It is recommended that the Province be requested to provide clarification of the provisions of Regulation 153/04 in the context of the requirements of the proposed *Clean Water Act, 2005.*

6. TECHNICAL BARRIERS

6.1 New Technology

There is an acute need for the government to become a World Leader in toxicological research to update current science, technology, provide advice, and in the treatment of contaminated soils and water. The current predominant practice of dig and dump must be replaced by more sustainable, cost-effective solutions. Further, the Province and the Federal Government need to place a concerted effort to the task of bringing new, state of the art international solutions to Canada, but should also encourage and foster home-grown technologies and solutions that can address the issue of contaminant clean up of our brownfields. The use of the Sustainable Technologies Canada Funding is a program that may be used to encourage the development of Canadian Technologies.

We appreciate the work of the non-profit organization the Ontario Centre for Environmental Technology Advancement (OCETA), which was established in 1993 by the Federal government to strengthen and grow Canada's environmental industry. This organization's core mandate is to provide business services to small and medium-sized enterprises (SMEs) to commercialize new technologies. However, what is also needed is a concerted effort by the Federal and Provincial government to undertake assessment of existing technologies, both national and international, and provide an analysis of their effectiveness, applicability, acceptability and commercial viability to the local brownfield redevelopment projects. Time is very important; we cannot wait for a private company to come up with a solution to a particular problem. We must actively seek the solution and both the Federal and Provincial governments must step in and make it happen.

Recommendation 46

That the Province work with the Federal Government to undertake toxicological research to update current science and technology to facilitate Brownfield clean up.

Recommendation 47

That the Federal and Provincial Governments encourage the development of new Canadian technologies for Brownfield clean-up.

Recommendation 48

That the Federal and Provincial Governments actively undertake assessment of existing technologies, both national and international and provide an analysis of their effectiveness, applicability, acceptability and commercial viability for the redevelopment of Brownfield projects.

Recommendation 49

That excavated soils not necessarily be immediately considered as waste but rather that new guidelines be developed defining “recyclable” soil and environmental remediations to encourage recycling and re-use wherever practical.

6.2 Definition of Terms

It is important to have a clear understanding of what a Brownfield site is. This understanding or definition must be shared by all orders of government, whether Federal, Provincial or Municipal, if they are to communicate in a common language. As part of this understanding, consistent standards for remediation must be developed. There should be clarity, transparency and ease of comparison of remediations undertaken on any Federal or Provincial lands.

Recommendation 50

AMO recommends that the definition provided in the Provincial Policy Statement be the standard used by all orders of government, which reads:

“undeveloped or previously developed properties that may be contaminated. They are usually, but not exclusively, former industrial or commercial properties that may be underutilized, derelict or vacant.”

Recommendation 51

It is further recommended that a minimum standard for “clean up” be developed by the Province to be applied to particular uses or groups of uses.

7. ADMINISTRATIVE BARRIERS

7.1 Facilitating Brownfield Redevelopment

It has long been a criticism by proponents that the government is not supportive of efforts to clean up contaminated sites and bring them to a productive use. The critics do have a point. We are all so inundated by the statutory and regulatory requirements that we might be missing the bigger picture of bringing those contaminated and derelict lands and buildings back into the fabric of our communities as newly rejuvenated assets. We must look to municipalities like Kitchener, Hamilton, Brantford, Kingston, Parry Sound, Toronto and others, who are at the forefront of facilitating Brownfield redevelopment, for insight and inspiration.

They have taken great interest of guiding Brownfield projects through the rough and rocky requirements of the regulatory environment to approval.

It is our collective role, provincial and municipal, to articulate the requirements of the Statutes, the Regulations, the Guidelines and the process to the proponent, to the public, to any interested parties. It is our collective responsibility to lend more to this initiative than act as regulator. We must all put a concerted effort to facilitate proposals though the diligent exercise of our responsibilities. Brownfield redevelopers should be seen as customers, be provided assistance and good customer service.

This can be done but we need to work on a “road map” to guide any Brownfield proposal through the obstacles of the complex system that is in place and wherever possible, simplify the process, shorten the timelines, and facilitate a smoother approval.

Recommendation 52

That there be a concerted effort on the part of the Province to shift focus from **regulator** to **facilitator** through education, mentoring and support**.**

Recommendation 53

That the Province designate the Ministry of Municipal Affairs and Housing as the “one-window” for Provincial facilitation and support in the redevelopment and remediation of brownfield sites.

Recommendation 54

That the Risk Assessment process focus only on sites with extensive and/or complex contamination.

Recommendation 55

That the Province ensure the provision of adequate staffing and resources to ensure the timely review of risk-based approaches to site assessment and management.

Recommendation 56

That funding be set aside to provide for continued education for provincial and municipal staff in conjunction with private sector stakeholders to build up their understanding, expertise and confidence in Brownfield redevelopment.

7.2 Guidance & Training

It is recognized that the Provincial government has increased its efforts to provide greater clarity and guidance in the area of Brownfield remediation and redevelopment. A Brownfields Coordinator has recently been hired to help coordinate the various Ministries involved with this issue and to act as a one-window resource for external stakeholders and municipalities. A new centralized Brownfields website has been posted under the Ministry of Municipal

Affairs and Housing site as a clearing house for provincial resources and legislation, and includes links to external resources on Brownfields.

Regulation 153/04 under the *Environmental Protection Act (EPA)* outlines the requirements for Records of Site Condition, the standards for Phase I and II Environmental Site Assessments, Qualified Persons, risk assessments and when potable and non-potable standards should be used.

An excellent tool that is available to municipalities is the Ontario Brownfields Redevelopment Toolbox, a guide and resource to assist municipalities with urban renewal, redevelopment and revitalization. This toolbox is available on the *About Remediation* website (www.aboutremediation.com/Toolbox/default.asp) and it is understood that provincial and municipal staff assisted in the development of this resource.

Although progress has been made, some outstanding issues remain. First, many municipalities are struggling with the development of policies and guidelines to implement the above requirements at a local level. For example, which development applications should be screened for potential contamination issues and when should records of site conditions be required? Should municipalities be requiring third party reliance for environmental reports and records of site conditions? Every Brownfield site has its own unique and often complex problems, and therefore, solutions are not always black and white. Not every municipality has the internal expertise to deal with these types of development applications.

Further to this issue is providing training opportunities for frontline staff that deal with development applicants to ensure that they are familiar with often complicated requirements. Some applicants have raised concerns that requirements differ between municipalities. This also relates to provincial staff, ensuring that MMAH Municipal Service Office staff are properly trained. It has been noted by some stakeholders and municipal staff that knowledge in this area can differ widely between the Ministry's Municipal Service Office (MSO) staff and offices. However, it is noted that the Central Ontario MSO is dealing with the issue of Brownfields at its next conference in 2006.

Some municipalities are being proactive on educating their staff on Brownfield remediation and redevelopment issues by:

- attending conferences,
- inviting provincial staff to speak on legislated requirements
- inviting consultants to speak on remediation standards:
- developing Brownfield redevelopment strategies

Perhaps further training plans and opportunities could be developed and provided by the Province, particularly for those municipalities with limited resources.

Recommendation 57

It is recommended that the Province develop and implement training plans in consultation with municipalities to educate Municipal Service Office staff and municipal staff on remediation and redevelopment issues.

Recommendation 58

It is recommended that the Province provide guidelines to assist municipal staff in the development of local level policies and guidelines.

8. FINANCIAL

8.1 Brownfields Financial Tax Incentive Program (BFTIP)

In the Fall of 2004 the Province introduced the Brownfield Financial Tax Incentive Program (BFTIP). The BFTIP is a good first step and a win-win for municipalities and the Brownfield owners. The current Program however, has a number of drawbacks to municipalities and the resulting number of funded projects is very low. The program is ineffective, underutilized and cumbersome. The Provincial Brownfield Coordinator should review the BFTIP in consultation with municipalities with a view to establishing a workable brownfields program using the resources that are currently allocated to BFTIP.

Recommendation 59

That the program be reviewed and improved in consultation with municipalities with a view to establishing a workable program.

Recommendation 60

That the funds from BFTIP be transferred to a new improved and workable program.

8.2 Tax Increment Financing – Developing a Model for Ontario (Discussion Paper, Ministry of Finance, September, 2005)

In the 2005 Budget the government committed to examining options to develop potential legislation to implement TIF as a tool to promote Brownfield redevelopment and infrastructure investments. In September 2005, the government released a discussion paper on this issue, which was followed by a series of consultation workshops in October 2005.

Municipal governments are seeking means to revitalize their communities in value-added ways, and are evaluating what needs to be restored and rehabilitated – aging downtowns, older neighborhoods, waterfronts, former manufacturing lands, warehousing districts and heritage structures – but the complexities and expense of such projects can be daunting.

Tax Increment Financing (TIF) is a new financial tool that may assist to encourage new growth and generate revenues in areas facing serious challenges that would not otherwise attract private sector investment without targeted improvements.

TIF can assist local governments to pay for all or part of a development or redevelopment project without necessarily relying on Federal or Provincial funding and without payments out of their general budget. Thus, TIF is referred to as a “self-financing tool” that in theory distributes new benefits without imposing any costs, albeit over an extended period of time.

While TIF started in California in 1951 and has become increasingly prevalent across the U.S., the application of TIF in Canada is very recent and the experience is limited.

How TIF works?

TIF is a method of facilitating development or redevelopment of defined areas of property by utilizing anticipated future tax revenues to pay for all or some of the necessary improvements. TIF operates on the assumption that a redevelopment area property value will likely increase, as will property tax revenues, based on higher assessed value. The process is relatively straightforward:

- Municipalities identify specific areas in which new development or redevelopment could occur and drafts a plan for the area;
- The area is determined to be eligible for TIF designation (i.e. TIF district) based on clearly defined, usually legislated, criteria);
- The specific area is designated as a TIF district for a predetermined length of time, usually decades, and its property tax base is frozen;
- The taxes being paid on the original property values before the redevelopment continue to be paid and go to the local government taxing body as before;
- The increase in taxes resulting from the new development and higher property values – the "tax increment" – gets paid into a special fund, which becomes a grant, and is used to subsidize all or some portion of the redevelopment in the designated TIF district;
- Upon expiry of the TIF designation, all incremental property tax revenue from that point forward reverts to the originating taxing bodies.

For example, if a proposed redevelopment will generate $10 million in *additional* taxes each year, that $10 million could be pledged over a block of time (e.g., 20 years) to re-pay an investment amount (e.g., $90 million). That investment could then be available immediately to cover the costs of the redevelopment as well as to encourage private sector investment, which may help to stimulate new growth and generate revenues in areas where economic development is inhibited due to local circumstances.

- Usually TIF subsidies pay for new infrastructure (e.g., streets, sewers, parking facilities) or for land acquisition. Other uses include planning expenses (e.g., legal fees, studies, surveys, engineering fees), job training, career education, and to support affordable housing and neighborhood revitalization. TIF has also been used to clean up contaminated areas (i.e., Brownfields) or to pay for private development expenses.

Are there risks to using TIF?

- The experience with TIF in the United States has been mixed and somewhat controversial. TIF projects have been used to revitalize struggling communities and bring growth to areas with little hope of traditional market-driven development. But, in some cases, TIF has been criticized as providing excessive subsidies to business; encouraging unproductive competition between communities; and, failing to properly consider the

impact on local residents. For example:

- ❏ Development stimulated by TIF funding may not always benefit low-income residents of distressed areas because workers are not prepared for or properly trained for the new jobs. Community and neighborhood groups need to be involved in the planning process;

- ❏ TIF is vulnerable to political favoritism as owning land in a TIF district may be a financial windfall as the area will get special treatment from diverted tax revenues. Parameters for eligibility must be clearly established on the use of TIF as an economic development tool;

- ❏ Creation of a TIF district can create substantial disruption within the surrounding community where a TIF project results in the destruction or redevelopment of residences and businesses in the district, not to mention tax increases;

- ❏ Diverting increased tax revenues can be problematic where a TIF program is cutting into valuable tax revenues that would otherwise go to the region's other taxing bodies. School boards usually express the greatest concerns – a successful TIF district can increase the area's population and number of students, with resulting pressure on existing educational budgets, but the tax base remains frozen. Some states have addressed this by excluding all or part of the school board revenues from TIF districts, or requiring that the school board be a part of approving new TIF agreements.

What about use of TIF in Ontario?

As announced in the 2006 Budget, the government intends to introduce legislation enabling Tax Increment Financing (TIF) as a financial tool to promote brownfield redevelopment and encourage investment in public infrastructure projects in support of the provincial growth plan.

If the legislation passes, two pilots will commence: the subway expansion involving York Region and the City of Toronto, and the West Don Lands, a brownfield redevelopment initiative that is part of the revitalization of Toronto's waterfront.

Recommendation 61

That the Province keeps AMO and the Brownfields Task Force apprised on an ongoing basis of the change in legislation and pilot projects status.

8.3 Current Ontario Experience – Tax Incremental Equivalent Grant

The City of Kitchener has opted to use the TIF approach through the use of Section 28 of the *Planning Act*. They found the TIF approach preferable to cash grants for the following reasons:

1. TIFs allow a municipality to be involved financially without providing upfront funding;
2. TIFs allow the risk of development to logically fall with the proponent;

3. TIFs are easier on the municipal budget system than providing upfront cash grants.

The benefit of the TIF system is that the proponent is compensated, in time, for the cost they incurred for clean-up. The municipality benefits because it has a site cleaned up, and put back into productive use. Similarly, the municipality, in time, will get an increased level of taxes.

In Kitchener's case, the renewal of a commercial site would result in the following tax split: City – **20.5%**, Region – **30.5%,** and the Province (Education) – **49%.** Note that there are three organizations directly benefiting from the clean up and renewal of a property, but only the lower tier is currently directly contributing from its 20%. We anticipate this changing with the proposed changes in Bill 51 in respect to the upper tiers and their potential contribution of up to 30%. This will then leave the Province, which could make a sizable contribution with their 49% share.

In the two tier systems, municipalities can only work with 20% of the local tax bill to formulate a workable TIF, which severely limits them by the amount of assistance they can provide. While the upper tiers are currently legislatively prohibited by the *Planning Act* from participating, we must respectfully note that the Province has never been legislatively prohibited from financial participation.

Recommendation 62

That the Province provide for the use of the TIF tool to those municipalities wishing to use it.

Recommendation 63

That TIF's be limited to the use for Brownfield redevelopment.

Recommendation 64

That Section 28 of the *Planning Act* be amended as proposed in Bill 51.

Recommendation 65

That the Province contribute its share of the local tax bill, of up to 49% to be used in formulating a workable TIF.

Recommendation 66

That Community Improvement Plans be used as vehicles to integrate TIF and BFTIP into a one-window approach of obtaining funding.

8.4 CMHC and Mortgage Insurance for Brownfield Sites

One of the most pressing barriers for proponents of Brownfield redevelopment is to obtain the financial backing for site assessment and clean up. This is a particular issue with the

proponents of smaller sites, requiring less than $1 million in financing. Due to the nature of the undertaking, financial institutions are reluctant to expose themselves to potential liability associated with Brownfields and request insurance guarantees for taking a risk. Other sources of mortgage funding such as pension plans, charge higher rates which is a disincentive to potential Brownfield redevelopment. Unfortunately, very few insurance options are actually available, and those that are, request a premium so high that it is not a viable option.

CMHC has traditionally provided the guarantee for higher-risk mortgage financing and has at times provided direct lending for certain circumstances. Considering the reluctance by the Canadian banks and other financial institutions to lend funds to Brownfield redevelopment sites, the government is the only vehicle that can step up and set an example of promoting these types of projects. It is our understanding that CMHC was originally reluctant to provide any mortgage insurance for a Brownfield property because of the Record of Site Condition process and MOE's lack of "sign-off" and were looking for a comfort letter. We understand that this may be less of a concern as CMHC has reached a better comfort level with RSCs where clean up meets the generic standards. Still outstanding is their concern with the Risk Assessment process, which allows clean up to a lesser standard, provided the risk can be managed. The Province and CMHC need to find an approach to resolve the outstanding issues to pave the way for CMHC to provide the much needed mortgage guarantee. Full-cost recovery mindset should be relaxed for Brownfield redevelopment.

As a first step, CMHC can and must provide mortgage insurance for those sites providing housing. This is certainly within its existing mandate under the *National Housing Act*. To expand that mandate to take in commercial and industrial redevelopment of Brownfield sites would, of course, be that much more of a catalyst to revitalize our communities, and municipalities fully would support it. As a leader in this area, CMHC would likely, by its actions, encourage the traditional lenders to venture into this area with less hesitation and fear.

Recommendation 67

That the Province and CMHC engage in a concerted effort to resolving the outstanding issues in respect to the RSCs and the Risk Assessment process.

Recommendation 68

That CMHC provide mortgage guarantees on Brownfield redevelopment sites for the provision of housing.

Recommendation 69

That the CMHC mandate be expanded to also provide mortgage insurance for commercial and industrial Brownfield redevelopment sites in addition to residential.

9. STIGMA, EDUCATION AND AWARENESS

BARRIERS

- ❏ Lack of easily accessible and understood information on Brownfield redevelopment
- ❏ Issue has not been elevated, not on radar screen
- ❏ Fear of liability makes it safer to let prime development sites sit
- ❏ Technology

WHAT'S NEEDED

- ❏ Publicize successful projects in the media
- ❏ Public outreach programs to educate participants, neighbours and public (benefits, risks)
- ❏ Provide Brownfields training and Capacity Building at the Municipal Level – as per previous AMO position paper

10. PREVENTING FUTURE BROWNFIELDS FROM OCCURING

Unless more active attention is placed on preventative measures, newly created brownfields will continue to appear threatening the environment with the contamination of water and soil.

10.1 Existing Activities

The province of Quebec has taken proactive action and in 2003 proclaimed Bill 72 – a*n Act to amend the Environment Quality Act and other legislative provisions with regard to land protection and rehabilitation,* along with the *Soil Protection and Rehabilitation Regulation.*

The *Act* requires, among other things, that companies who have ceased operations in industries such as pulp mills, petrochemical manufacturing, forging and stamping, perform an environmental investigation of site soil and ground water. This undertaking must be performed within six months of ceasing operations and the results be submitted to the Ministry of the Environment. If the soils are contaminated above the regulated quality values established for specific uses such as residential, commercial or industrial, a rehabilitation plan must be submitted to the Ministry of the Environment for approval.

Recommendation 70

That the Province consider the appropriateness and applicability of Quebec Bill 72 in the Ontario context.

10.2 Future Activities

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There is a need to develop a long-term policy to ensure that decisions of today do not leave a detrimental legacy for future generations.

Municipalities count on the Federal and Provincial governments to regulate industrial and commercial sectors. They also count on the government to approve technologies that avoid spills, prevent and punish illegal dumping, promote safe processes, ensure safe storage and transportation of potential contaminants. There needs to be a concerted effort and adequate funding to remediate sites following closure, whether that be land, buildings or both. The *Aggregate Act* and the *Mining Act* have set a precedent by requiring rehabilitation of their operations. The aggregate industry is required to provide rehabilitation plans of the operations to ensure the return of the lands to an acceptable post-extraction condition. These plans are financially secured to ensure that rehabilitation is undertaken as envisioned. The mining industry has a similar, but more rigorous financial assurance process. Similar requirements need to be implemented for those industry and commercial sectors that have the potential to leave a legacy of contaminated lands and structures.

Municipalities are strongly in support of prevention, not a cure approach to future Brownfields. By way of example, Ontario municipalities are increasingly experiencing the closure of gasoline service stations without the lands being remediated. These contaminated lands leave key intersections vacant and unused, with little prospect for renewal for a new productive land use. This must not be allowed to continue.

Recommendation 71

That a legislative provision be implemented at the front-end of the application process requiring remediation plans for those industries and commercial enterprises that are likely to use substances or engage in practices that could potentially contaminate lands and/or structures under their ownership/use or to the surrounding properties. That these plans have financial security attached to them to ensure that remediation is undertaken.

Recommendation 72

That any such industries and commercial enterprises also be required to fund a program to be used for any remediation of existing abandoned contaminated properties.

Recommendation 73

That municipalities be permitted to regulate the development of new gasoline service stations, with specific powers to require the remediation of a closed gasoline service station prior to the development of a new facility.