AMENDMENT FORM

COMMITTEE: FINANCE/EXECUTIVE **PAGE NUMBER(S):** _____

COMMUNICATION I.D.#: _____ **CAPTION:** ☒ YES ☐ NO

ORDINANCE I.D.#: _____ **SECTION(S):** Caption

RESOLUTION I.D.#: 09-R-1565 **PARAGRAPH(S):** _____

AUTHORIZING SIGNATURE: [signature] **DATE:** 9-16-2009

Amend to strike the word "potential" in the caption and insert in lieu thereof the words "proposed amendment to ... to

A RESOLUTION BY

A RESOLUTION AUTHORIZING THE CITY OF ATLANTA ("CITY") TO ENDORSE A LETTER TO U.S. REPRESENTATIVES IN SUPPORT OF POTENTIAL FEDERAL LEGISLATION REAUTHORIZING THE ENVIRONMENTAL PROTECTION AGENCY ("EPA") BROWNFIELDS PROGRAM AND AMENDING THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA") TO PROVIDE FOR GREATER CLARITY AND A HIGHER LEVEL OF PROTECTION FOR PUBLIC ENTITIES WHEN THEY ACQUIRE CONTAMINATED LAND; AND FOR OTHER PURPOSES.

WHEREAS, the City of Atlanta has an interest in maintaining the health, safety and welfare of the citizens of the City of Atlanta and its visitors; and

WHEREAS, in response to environmental tragedies such as Love Canal, located in Niagara Falls, New York, where in the late 1950s a community of about 100 homes and an elementary school were built on a former chemical waste dump site resulting in severe health consequences to the community, federal legislation was proposed; and

WHEREAS, in the year 1980, the U.S. Congress enacted CERCLA in an effort to protect communities from environmental threats; and

WHEREAS, CERCLA established prohibitions and requirements concerning closed and abandoned hazardous waste sites; provided for liability of persons responsible for releases of hazardous waste at these sites; and established a trust fund to provide for cleanup when no responsible party could be identified; and

WHEREAS, CERCLA includes liability defenses and exemptions that *may* protect local governments that "*involuntarily*" acquire Brownfield sites; and

WHEREAS, a report by the National Association of Local Government Environmental Professionals concluded the term "involuntary acquisition" is subject to wide interpretation that may leave municipalities vulnerable to incurring liability for contamination they had no role in creating or releasing; and

WHEREAS, these varied interpretations of the legislation have caused a chilling effect on local government acquisitions; and

WHEREAS, some Brownfield sites are unlikely to be redeveloped through private investment due to the size and scope of the projects and the only option available is public acquisition; and

WHEREAS, local governments are able to acquire contaminated properties through a variety of means including tax liens, foreclosures and eminent domain, in order to remediate environmental hazards, address public health and safety concerns and prepare the properties for future safe use; and

WHEREAS, proposed amendments to CERCLA (42 U.S.C. §9601(20) (d) / CERCLA §101 (20) (d)) would:

- Eliminate the term "involuntary" in describing the protected activities.
- Add a plain language exemption for local governments that acquire contaminated properties for redevelopment purposes, as long as the governmental entities have not created or released the contamination.
- Modify and expand the current protections under the category of "rendering care and advice" to include actions taken by local government to address public health and safety issues at sites, so long as the governmental entity acts responsibly in doing so (See attachment A); and

WHEREAS, the National Brownfields Coalition has drafted a letter to support reauthorization of the EPA Brownfields Program and request consideration of an amendment to CERCLA to clarify and expand liability protections for public entities that acquire contaminated Brownfield sites where the public entities had no involvement in the contamination (See attachment B); and

WHEREAS, the City desires to join with other municipalities (New York, Chicago, Cleveland, Orlando and Milwaukee) and organizations (such as the National Brownfields Coalition, US Conference of Mayors and others) to endorse the CERCLA Proposed Amendment Letter that will be forwarded to United States Representatives to express support for reauthorization of the EPA Brownfields Program and bolstering local government protections.

NOW, THEREFORE BE IT RESOLVED that the Council of the City of Atlanta commits the City to joining with other interested municipalities, organizations and individuals towards the adoption of the above referenced and attached CERCLA amendments.

Proposed Revisions to 42 U.S.C. §9601(20)(J) / CERCLA §101 (20)(d)

Abstract: The purpose of the proposed revision is to clarify that a unit of state or local government should not be liable under CERCLA as an owner or operator of a brownfield unless it caused or contributed to the release or threatened release of a hazardous substance from the facility, although liability to third parties under state or local law would be unaffected.

101(20)(D) The term "owner or operator" does not include a unit of State or local government:

i. which acquired ownership or control ~~involuntarily~~ through:

a. bankruptcy, tax delinquency, abandonment~~,~~; or

b. other circumstances in which the government ~~involuntarily~~ acquires title by virtue of its function as sovereign~~.~~; or

ii. which owns or controls a Brownfield site, as defined by section 101(39), for the purpose of expansion, redevelopment, or reuse.

The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. Nothing in this paragraph (D) is intended to affect the liability of a State or local government under applicable state or local laws.

A

July 15, 2009

The Honorable Ed Markey
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone, Jr
U.S. House of Representatives
237 Cannon Building
Washington, D.C. 20515-3006

The Honorable Joe Sestak
U.S. House of Representatives
1022 Longworth House Office Building
Washington, DC 20515

Dear Representatives Markey, Pallone, and Sestak:

RE: EPA Brownfields Reauthorization and Public Entity Liability

We understand that your offices are considering taking a lead sponsor role on a bill to reauthorize the U.S. Environmental Protection Agency (EPA) Brownfields program. We, the undersigned individuals and organizations, are writing to express our support for reauthorization of the EPA Brownfields Program and request consideration of an amendment that would clarify and bolster liability protections for public entities when they acquire contaminated land.

America's communities face a daunting but critically important task in attempting to clean up brownfields sites for new uses. Cities are in the process of transitioning their economies from industry and manufacturing to new sources of economic growth. The most environmentally responsible way to accommodate the new engines of growth is to locate the new uses right where the old industrial plants were established, with infrastructure in place and the workforce nearby. However, with an estimated 450,000 to 1,000,000 brownfields sites nationally, the task at hand faces numerous obstacles. Some of those obstacles would be significantly reduced if Congress adopts the recommendations of the National Brownfields Coalition in reauthorizing the EPA Brownfields Program.

One of the Coalition's proposals is to clarify and expand liability protections for public entities that acquire contaminated brownfields sites where the public entities had no involvement in the contamination. This proposal is of great interest to the many localities that are, out of necessity, taking ownership of brownfields properties. Some brownfields sites are unlikely to be redeveloped through private investment. If these sites are blighting influences that prevent neighborhood revitalization, the only option that will work is public acquisition.

B

Through a variety of means including tax liens, foreclosures, purchase, and the use of eminent domain, local governments can take control of brownfields in order to clear title, consolidate multiple parcels into an economically viable size, conduct site assessments, remediate environmental hazards, address public health and safety issues, and otherwise prepare the property for development by the private sector or for public and community facilities.

Although property acquisition is a vital tool for facilitating the development of brownfields, many local governments have been dissuaded by fears of incurring liability for contamination they had no role in creating or releasing. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes liability defenses and exemptions that may protect local governments that "involuntarily" acquire brownfields. However, the majority of the sites acquired by local government are either unprotected (which is the case for voluntary acquisition), or are subject to widely varying interpretations of what is meant by "involuntary acquisition." Even properties acquired through tax delinquency (one of the examples cited in the law and often presumed to be protected) may not necessarily be exempt if the local government took affirmative ("voluntary") steps in the tax delinquency process.

A 2006 report by the National Association of Local Government Environmental Professionals concluded that the term "involuntary acquisitions" is subject to wide interpretation and local governments find it "inconsistent, ambiguous, and confusing." The report further finds that EPA's various guidance documents on the subject only serve to "muddy the waters."

This lack of clarity and certainty has a chilling effect on strategic acquisition-redevelopment activities. In some cases, local governments have adopted conservative policies that strictly limit the acquisition of contaminated properties. These policies keep localities out of the courtroom, but they also leave many contaminated sites as neglected blighting influences on their surrounding communities. In other cases, local governments have taken a risk by acquiring properties, essentially "rolling the dice" in favor of community revitalization.

A secondary problem is that many potential brownfields projects on publicly-owned sites have been ruled ineligible for EPA funding because the localities cannot satisfy the requirements to establish "involuntary acquisition." Aside from the loss of funding, localities rightly fear that, if EPA has determined them to be ineligible for funding, that is tantamount to determining that the locality is a potentially responsible party.

The undersigned organizations favor amending CERCLA to provide for greater clarity and a higher level of protection for acquisition activities that clearly serve public purposes. The amendments should:

- Eliminate the term "involuntary" in describing the protected activities.
- Add a plain language exemption for local governments that acquire contaminated properties for redevelopment purposes, as long as the governmental entities have not created or released the contamination.
- Modify and expand the current protections under the category of "rendering care and advice" to include actions taken by local government to address public health and safety issues at sites, so long as the governmental entity acts responsibly in doing so.

We encourage you to consider improving liability protections so that governmental entities will not have to "roll the dice" when pursuing activities that are so clearly benefitting the public – addressing public health and safety concerns, attracting jobs and investment to distressed communities, and re-positioning vital assets for environmentally-responsible economic growth.

If you have any questions, please contact Chuck Thompson at the International Municipal Lawyers Association (202-742-1016, CThompson@imla.org), Evans Paull at the Northeast-Midwest Institute (202-329-4282, epaull@nemw.org), or Judy Sheahan at the U.S. Conference of Mayors (202-861-6775, jsheahan@usmayors.org).

Sincerely,

Chuck Thompson
Executive Director
International Municipal Lawyers Association

Don Borut
Executive Director
National League of Cities

Evans Paull
Senior Policy Analyst
Northeast-Midwest Institute

Suzanne Malec-McKenna,
Commissioner of Environment
City of Chicago Department of Environment

Judy Sheahan
Environment Director
U.S. Conference of Mayors

Larry Naake
Executive Director
National Association of Counties

Jessica Cogan Millman
Executive Director
National Association of Local Government Environmental Professionals

cc: The Honorable Henry A. Waxman
The Honorable Joe Barton
The Honorable Edward J. Markey, Chair
The Honorable Fred Upton, Ranking Member
Members of the House Energy and Commerce Committee

Legislative White Paper

Committee of Purview: **Public Safety Committee**

Caption

Council Meeting Date:

Legislation Title: **A RESOLUTION AUTHORIZING THE CITY OF ATLANTA ("CITY") TO ENDORSE A LETTER TO U.S. REPRESENTATIVES IN SUPPORT OF POTENTIAL FEDERAL LEGISLATION REAUTHORIZING THE ENVIRONMENTAL PROTECTION AGENCY ("EPA") BROWNFIELDS PROGRAM AND AMENDING THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA") TO PROVIDE FOR GREATER CLARITY AND A HIGHER LEVEL OF PROTECTION FOR PUBLIC ENTITIES WHEN THEY ACQUIRE CONTAMINATED LAND; AND FOR OTHER PURPOSES.**

Requesting Dept.: **Law**

Contract Type: **N/A**

Source Selection:

Bids/Proposals Due: **N/A**

Invitations Issued: **N/A**

Number of Bids/ Proposals Received: **N/A**

Bidders/Proponents: **N/A**

Justification Statement: **This resolution will allow the Mayor of the City of Atlanta to endorse a letter drafted by the National Brownfields Coalition to support reauthorization of the EPA Brownfields Program and request consideration of an amendment to CERLCA to clarify and expand liability protections for public entities that acquire contaminated Brownfield sites where the public entities had no involvement in the contamination.**

Background: The U.S. Congress enacted CERLCA in 1980 in an effort to protect communities from environmental threats. It included liability defenses and exemptions for public entities that acquired Brownfield sites where the entities had no involvement in the contamination. A recent report by the National Association of Local Government Environmental Professionals found that some of the terms in the law were disputable and subject to varying interpretations that may leave municipalities vulnerable to incurring liability for others' contamination. Because these interpretations were unsettled, it led to a chilling effect on local government acquisitions.

Fund Account Center: N/A

Source of Funds: N/A

Fiscal Impact: N/A

Term of Contract: N/A

Method of Cost Recovery:

Approvals:
DOF:
DOL:

Prepared By: Tressa P. Marryshow

Contact Number: 404-330-6206

TRANSMITTAL FORM FOR LEGISLATION

TO: MAYOR'S OFFICE **ATTN: GREG PRIDGEON**

Legislative Counsel (Signature): Roger Bhandari / Tressa Marryshow

Contact Number: (404) 330-6206

Originating Department: Department of Law

Committee(s) of Purview: Public Safety and Legal Administration

Council Deadline: Cycle 15 / September 1, 2009

Anticipated Committee Meeting Date(s): September 15, September 29, 2009

Anticipated Full Council Date: October 5, 2009

Commissioner Signature
Jerry L. De Loach

Chief Procurement Officer Signature N/A

CAPTION

A RESOLUTION AUTHORIZING THE CITY OF ATLANTA ("CITY") TO ENDORSE A LETTER TO U.S. REPRESENTATIVES IN SUPPORT OF POTENTIAL FEDERAL LEGISLATION REAUTHORIZING THE ENVIRONMENTAL PROTECTION AGENCY ("EPA") BROWNFIELDS PROGRAM AND AMENDING THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA") TO PROVIDE FOR GREATER CLARITY AND A HIGHER LEVEL OF PROTECTION FOR PUBLIC ENTITIES WHEN THEY ACQUIRE CONTAMINATED LAND; AND FOR OTHER PURPOSES.

Financial impact (if any): N/A

Mayor's Staff Only

Received by CPO: _____ (date) Received by LC from CPO: _____ (date)

Received by Mayor's Office: 9/1/09 (date) Reviewed by: _____ (date)

Submitted to Council: _____ (date)