

Brownfields: Municipal Considerations, Tax Lien Foreclosures, Opportunities and Red Flags

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LOCAL GOVERNMENT PROPERTY ACQUISITION: IN REM UPDATE AND ENVIRONMENTAL LIABILITY CONSIDERATIONS

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- > Experience in resolving complex disputes on behalf of her clients using both litigation and non-litigation methods.

REAL PROPERTY TAX: IT'S BORING SO WHY DO WE CARE?

- > Real Property Tax Revenues are one of the largest components of County Budgets
- > Tax revenues and various related economic tools drive development and growth in communities

3

REAL PROPERTY TAX: ESSENTIAL REVENUE SOURCE

- > Levy: RPTL §900 et seq
- > Collection: RPTL §924
- > Interest: RPTL §924, 924-a. Min 12% per year; paid to city or town
RPTL §924(3)
- > Penalty: RPTL §936 – County Levies 5% on returned unpaid taxes
(which it keeps)

4

REAL PROPERTY TAX: LEAVING MONEY ON THE TABLE

- > Collection is essential
- > Counties are required to make Cities and Towns whole RPTL §936
 - Cities and Towns incur no loss of revenue due to unpaid taxes as
 - County must guarantee those payments
- > Small percentage of uncollected real property taxes has an outsized impact on budgets
- > How to collect the unpaid taxes – several methods

5

COLLECTION OF DELINQUENT TAXES: IN REM PROCEEDING, JUDICIAL FORECLOSURE ACTION OR SALES OF TAX LIENS

- > **In Rem Proceeding**
 - Availability:
 - RPTL §1120 et seq/ Local Tax Acts - Available to municipalities only.
 - Unique Vehicle
 - One proceeding for all properties
 - Time: Streamlined and efficient
 - Surplus Monies

6

**COLLECTION OF DELINQUENT TAXES:
IN REM PROCEEDING, JUDICIAL FORECLOSURE ACTION
OR SALE OF TAX LIEN**

> Judicial Foreclosure Action

- Availability:
 - RPTL §1194: Available to a purchaser of tax lien, its successors/assigns.
- Time:
 - Because tax lien foreclosures must be done the same as a mortgage foreclosure, they are far less efficient than In Rem foreclosures

7

**COLLECTION OF DELINQUENT TAXES:
IN REM PROCEEDING, JUDICIAL FORECLOSURE ACTION OR
SALE OF TAX LIENS**

> Sale of Tax Lien

- Availability:
 - RPTL §1190: tax district can sell tax liens to 3rd party for more than face value of lien.
- Time:
 - Because tax lien foreclosures must be done the same as a mortgage foreclosure, they are far less efficient than In Rem foreclosures
- Benefit:
 - Tax district can get more money per lien up front with no collection efforts

8

IN REM TAX LIEN FORECLOSURE PROCEEDING TIMELINE

- > Filing of List of Delinquent Taxes
- > Service of Petition and Notice of In Rem Foreclosure upon interested parties
- > Redemption Date
- > Answer
- > Judgment of Foreclosure and Sale
- > Auction
- > Closing Transactions
- > Surplus Money Proceedings

9

COVID-19 EMERGENCY EVICTION AND FORECLOSURE PREVENTION ACT [EEFPA] OF 12/28/20 AS AMENDED

- > Meant to impose a moratorium on evictions and foreclosures to ameliorate COVID-19 related hardships
- > Applies to tax lien foreclosure proceedings (Part B, Sub B)
- > However, does not prevent municipalities from commencing In Rem foreclosure proceedings

10

COVID-19 EMERGENCY EVICTION AND FORECLOSURE PREVENTION ACT OF 12/28/20 AS AMENDED

- > Relevant portions:
- > Applies to residential real property owned by a natural person who owns ten or fewer dwelling units.
 - Does not apply to commercial property or residential property owned by an entity other than a natural person, or to someone who owns 11 or more dwellings.
 - Specifically excludes vacant and abandoned property.
- > Hardship Declarations
- > Expires August 31, 2021

11

PRACTICE TIPS: WHAT TO WATCH OUT FOR

- > Title Errors
- > Service Errors
- > Terms of Sale Infirmities
- > Unexpected Property Conditions

12

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- > Expertise advising clients on projects, transactions and legal issues in New York State, where he has practiced for his entire career, and on federal issues in Washington, D.C.

13

LOCAL GOVERNMENT PROPERTY ACQUISITION: ENVIRONMENTAL LIABILITY CONSIDERATIONS

- >WHO . . . is liable (and who is protected)?
- >WHAT . . . are they liable for?
- >WHERE . . . does liability rest (federal, state or both)?
- >WHEN . . . does liability begin and end
- >WHY . . . are we talking about this?

14

PRIMARY LAWS OF CONCERN

>Federal

- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*) (CERCLA)

>NY State

- Inactive Hazardous Waste Disposal Sites” laws (ECL Article 27, Title 13 and Public Health Law §§1389-a, *et seq.*) (NYS Superfund Law)
- New York Oil Spill Law (Navigation Law Article 12)

15

OVERVIEW: ENVIRONMENTAL LIABILITY

> CERCLA

- Addressed public concern about abandoned hazardous waste sites
- Allows Federal government to assess and/or clean up contaminated sites
- Liability scheme allowing EPA to order certain parties to conduct or pay for the cleanups

> NYS Superfund Law

- Allows NYSDEC to order and implement cleanups (using State Superfund money with cost recovery) if site presents a “significant threat to the environment”
- Work can be completed by DEC or a responsible party (often via consent decree)

> New York Oil Spill Law

- Prohibits unpermitted petroleum discharge; liability for “any person who has discharged petroleum”

16

POTENTIALLY RESPONSIBLE PARTIES

>CERCLA (§ 107(a))

- Owner or operator of the facility
- Any person who owned or operated any facility at the time of disposal of any hazardous substance
- Any person who arranged for the disposal or treatment, or transport for the disposal or treatment, of a hazardous substance at any facility
- Any person who accepted any hazardous substance for transport to a disposal or treatment facility that such person selected

17

POTENTIALLY RESPONSIBLE PARTIES

>NY Superfund Law (6 N.Y.C.R.R. §375-2.2(i))

- Current owner or operator of site or any portion thereof
- Owner or operator at the time of disposal of the contaminant
- Generator of contaminants disposed at a site
- Transporter of contaminants to a site selected by such person
- Person who disposed of any contaminants at a site
- Arranger for contaminant transportation to or disposal at a site
- Any other person responsible under statutory or common-law liability pursuant to ECL 27-1313(4) and/or CERCLA

18

LIABILITY UNDER FEDERAL AND NY LAW

- >Strict – Liable if within one of the categories of responsible parties (regardless of fault or negligent)
- >Joint and Several –One or more of the liable parties may be held liable for the entire cleanup cost (regardless of contribution)
- >Retroactive – A party may be held liable even if the hazardous substance disposal occurred before laws were enacted or after divesting property.

19

CERCLA: LIABILITIES AND PROTECTIONS

20

CERCLA LIABILITY PROTECTIONS WHEN LOCAL GOVERNMENTS ACQUIRE CONTAMINATED PROPERTY

- > Exemption for local government from the definition of “owner or operator” under specified circumstances (CERCLA § 101(20)(D))
- > Exemption from “owner or operator” liability for knowingly acquiring a contaminated property; must achieve and maintain status as bona fide prospective purchasers (CERCLA §§ 101(40) and 107(r)(1)).
- > Liability protection to parties that acquire contaminated property and meet certain third-party defense requirements and innocent landowner (ILO) criteria (CERCLA §§ 107(b)(3) and 101(35)(A)).

****The method or type of property acquisition by a local government will play a critical role in the application of CERCLA liability protections ****

21

CERCLA § 101(20)(D) LIABILITY EXEMPTION

*The term “owner or operator” does not include a **unit of State or local government** which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment or other circumstances in which the government acquires title by virtue of its function as sovereign.*

The exclusion . . . 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 Act in the same manner and to the same extent . . . as any nongovernmental entity,

**** 2018 BUILD Act removed requirement that properties be acquired “involuntarily.” ****

22

“UNIT OF STATE OR LOCAL GOVERNMENT”

ANY UNIT OF GOVERNMENT WITHIN A STATE, INCLUDING:

County	Land bank
Borough	City
Municipality	Parish
Township	Special district
Local public authority	School district
Intrastate district	Council of governments
Community development agency	Redevelopment authority

23

“BY VIRTUE OF ITS FUNCTION AS SOVEREIGN”

- > Acquiring title by exercising a uniquely governmental authority via a function that is unique to its status as a governmental body:
 - Tax delinquency and tax lien foreclosures
 - Some transfers between governmental units (e.g. tax lien foreclosure acquisition and quit claim deed transfer redevelopment authority.)
 - Tax increment financing transactions
 - Escheat
 - Eminent domain for a public use (e.g., parks, recreation, civic buildings, mass transit)
 - Holding an unexercised right of way
 - Demolition lien foreclosure
 - Foreclosure via a government loan, loan guarantee, or loan insurance program
 - Conservator or receiver under a clear and statutory mandate or regulatory authority
- > No Protections- Acquisition method available to private parties and is not uniquely governmental (e.g., purchase, inheritance, bequest, gift or donation)

24

BONA FIDE PROSPECTIVE PURCHASER PROTECTION (BFPP)

- >BFPP is a person who acquires property after January 11, 2002, and meets the following threshold criteria: (i) performed All Appropriate Inquiry; (ii) no potential liability for response costs before the acquisition and (iii) “no affiliation” with any other party that is potentially liable for response costs at the property.
- >Local governments can layer available liability protections (i.e., establish and maintain BFPP status even when another liability protection may apply).

25

BONA FIDE PROSPECTIVE PURCHASER PROTECTION (BFPP)

- >All Appropriate Inquiry- Process of evaluating a property’s environmental conditions and assessing potential liability for any contamination. All appropriate inquiries must be conducted to obtain certain protections from liability under CERCLA
- >Phase I Environmental Site Assessment
- >Phase II Environmental Site Assessment
 - Following Phase I Recommendation
 - Guides “reasonable steps” obligation (Stop continuing releases; Prevent threatened future releases; and Prevent or limit human, environmental, or natural resource exposure to the hazardous substance release)

26

CERCLA Continuing Obligations

> Continuing obligations criteria for maintaining BFPP status after property acquisition (CERCLA § 101(40)(B)) :

- Exercising appropriate care by taking “reasonable steps” to prevent the release of hazardous substances (e.g., stopping continuing releases, preventing threatened future releases, and/or limiting exposure to earlier hazardous substance releases).
- Demonstrating that all disposal of hazardous substances occurred before the party acquired the property (no disposal after acquisition)
- Complying with land use restrictions and not impeding institutional controls;
- Cooperation, assistance, and access for response actions;
- Complying with information requests and administrative subpoenas; and
- Providing legally required notices.

27

Examples of Reasonable Steps/Due Care

- > Timely Notify Appropriate Authorities of Contamination
- > Comply and Cooperate with Authorities
- > Prevent Public Exposure by Restricting Site Access (e.g., erecting and maintaining signs or fences to prevent public exposure)
- > Contain Releases by Maintaining Existing Elements of a Response Action (e.g., when there is a breach from an existing containment system).
- > Timely Mitigate Newly Discovered Releases and Address Environmental Conditions
- > Appropriately Assess/Inspect the Extent of Contamination
- > Prevent the Exacerbation of Contaminated Site Conditions. (e.g., moving contaminated soils to uncontaminated areas, allowing contaminated water to migrate, installing wells or drainage pumps that alter contaminated groundwater flow.

28

NY SUPERFUND: LIABILITIES AND PROTECTIONS

29

NYS PROTECTIONS WHEN LOCAL GOVERNMENTS ACQUIRE CONTAMINATED PROPERTY

>Municipal exemption (ECL § 27-1323)-

*“(a) For the purposes of this title **no public corporation shall incur any liability from any statutory claims of the state as an owner or operator of a site, or a person responsible for the disposal of a hazardous waste at such site, if such public corporation acquired such site involuntarily, and such public corporation retained such site without participating in the development of such site.***

“(b) This exemption shall not apply to any public corporation that has caused or contributed to the release or threatened release of a hazardous waste from or onto the site, or to any public corporation that generated, transported, or disposed of, arranged for, or that caused the generation, transportation, or disposal of hazardous waste, from or onto the site.”

30

NYS PROTECTIONS WHEN LOCAL GOVERNMENTS ACQUIRE CONTAMINATED PROPERTY

- > “Public corporation”- Includes municipal corporations, local public authority, supervisory district, and County improvement districts
- > “Involuntary”- Includes acquisitions by a public corporation:
 - In its sovereign capacity (e.g., abandonment proceedings or bequest)
 - As conservator or receiver (under statutory mandate / regulatory authority)
 - Through foreclosure and its equivalents
 - In the course of administering a loan, loan guarantee, tax lien, or tax forbearance agreement, or loan insurance program
 - Pursuant to seizure, injunction, condemnation, or forfeiture authority (provided not retained primarily for investment purposes.)

31

STATE LIABILITY PROTECTIONS WHEN LOCAL GOVERNMENTS ACQUIRE CONTAMINATED PROPERTY

- > “Participating in development” - Improvements or environmental investigation/ remediation, not part of a remedial program or for site safety (e.g., fencing or lighting).
- > Does not include:
 - having the capacity to influence management of a site
 - having the unexercised right to control or to regulate the site or operations thereof
 - holding, abandoning, or releasing a security interest or tax lien on such site
 - monitoring or enforcing the terms and conditions of an agreement or tax forbearance agreement;
 - monitoring or undertaking inspections of a site including, but not limited to, boring test wells
 - exercising other remedies available under applicable laws
 - granting permits, certificates of occupancy and variances under law
 - applying for or participating in federal or state statutory programs or benefits
- > Keep protections by notifying NYSDEC of any release of hazardous waste within ten days of actual knowledge, unless a shorter period is required.

32

BROWNFIELD PROGRAM CLEANUP PROTECTIONS

> NY ECL § 27-1323- “Without participating in development” - Improvements or environmental investigation/remediation, ***not part of a remedial program*** or for site safety

> CERCLA § 128(b)- Liability protection known as the “enforcement bar” to parties conducting or that have completed a cleanup in compliance with a state response program

33



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