

## FORECLOSING ON POLLUTED SITES – WHO IS LIABLE

In a recent decision the Vermont Supreme Court addressed the issue of who is liable when an entity forecloses on property that is known to contain a polluted site. *Pownal Development Corp. v. Pownal Tanning Co., Inc.*, *Vt. Nos. 98-577 (November 17, 2000)*. Aspects of this decision relate to the potential liability a town may have when it acquires property through mechanisms such as foreclosure or tax sales.

The facts of the case were not materially in dispute. The Pownal Development Corporation purchased, at a substantial discount, a mortgage note on ten lots once owned by the Pownal Tanning Company. The Tanning Company used the lots as security for a loan it obtained in 1984 from the First National Bank of Boston. The tannery ceased operation in 1990. The Pownal Development Corporation purchased the mortgage note from the First Bank of Boston in 1995.

One of the ten lots purchased by the Pownal Development Corporation was contaminated by industrial waste from the former tannery operation. The lot is a listed “Superfund” site, which the Vermont Agency of Natural Resources has targeted for cleanup.

Realizing that one of the ten lots is a polluted site that it did not wish to own and be responsible for, the Pownal Development Corporation foreclosed only on the nine lots that were not polluted. The Vermont Agency of Natural Resources (Agency), seeking an owner that could be made responsible for cleanup of the “Superfund” site, challenged the Pownal Development Corporation’s legal right to choose not to foreclose on the tenth polluted site. The Agency also took the position that regardless of whether the Pownal Development Corporation foreclosed on the lot, it is liable for cleaning up the site because the site is part of a larger “facility” the Corporation purchased when it foreclosed on the other nine lots.

The Vermont Supreme Court rejected the Agency’s argument that it is illegal to foreclose on less than all of the mortgaged property. The Court simply found that there was no legal authority to support the Agency’s argument. Accordingly, partial or selective foreclosure is clearly legal in Vermont.

The Court also rejected the Agency’s argument that it would be inequitable or unfair to allow the Pownal Development Corporation to avoid liability by closing on all of the lots except for the contaminated site. The Court found that the Pownal Development Corporation is merely a holder of a loan instrument and bears no responsibility for the polluted site. Accordingly, the Court found it would not be unfair to allow the Pownal Development Corporation to choose not to foreclose on the polluted site in order to avoid liability.

Municipalities should note the Court’s decision regarding partial foreclosure and equitable considerations. This ruling may apply to situations in which a municipality wishes to avoid purchasing all lots available at a tax sale to avoid liability or if a municipality finds itself in a position to foreclose on a piece of property.

Finally, noting that a mortgagee who commences a foreclosure is only a secured lender until foreclosure becomes final after the redemption period, and that the redemption period had not yet expired at the time of the lawsuit, the Court found that it could not rule on whether or not the Development Corporation became owner of the entire “facility. (The Agency’s interest in the outcome of this question is based on state law that makes the owner of a “facility” liable for remediation costs associated with the entire “facility.”)

With the definition of “facility” still an open question, the Law Center must add to its longstanding advice to municipalities not to purchase properties that may be polluted: *municipalities should also avoid purchasing unpolluted properties that are contiguous to polluted lots.*

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