

Brownfields Study Group - Lender Subgroup Meeting Minutes

September 6, 2016, 10:00 a.m. to 12:00 p.m.

Room 513, GEF 2 Building, 101 South Webster, Madison, WI (and via teleconference)

Attendees:

Erica Lawson, Ramaker & Associates

Christopher H. Valcheff, True North Consultants, Inc.

Adam Gallagher, Dane County Treasurer

Marita Stollenwerk, TRC Environmental Corporation

Tina Reese, Avantii Environmental Group

Jodie Peotter, Ramaker & Associates

Mark Thimke, Foley & Lardner, LLP

Jennifer Drury BuzECKy, Husch Blackwell

Michael Prager, DNR

Darsi Foss, DNR

Jessica Kramer, DNR

Mark Miller, Investors Community Bank (by phone)

George Marek, Quarles & Brady (by phone)

Diane Marchik, Godfrey Kahn, S.C. (by phone)

Ben Peotter, Ayres Associates (by phone)

Arron Millonzi, American Risk Management Resources Network, LLC (by phone)

Minutes:

ITEM 1: Introductions and agenda repair.

Meeting participants introduced themselves. Mark Thimke stated that the next full Brownfields Study Group (BSG) meeting was tentatively scheduled for early October. One item that will be discussed is the legislative agenda for the upcoming session, including recommendations from the 2015 Brownfields Study Group that have not yet been addressed; therefore, this group should develop its legislative recommendations soon.

ITEM 2: General update and discussion by Lender Liability Exemption Subgroup members regarding further issues to address, led by Jennifer BuzECKy.

Jennifer BuzECKy provided background information on the lender subgroup formation and its progress at past meetings, stating that minutes from these meetings were available on the BSG web page (<http://dnr.wi.gov/topic/brownfields/bsg.html>). She asked for thoughts on key issues the subgroup should be addressing. Lenders in attendance suggested two ideas: to redefine “bank” to include wholly owned subsidiaries and to allow exemptions to be assigned to acquiring banks in mergers.

ITEM 3. Discussion of definitions related to the Wis. Stat. § 292.21 exemption for lenders within Wis. Stat. § 292.01, led by Mark Thimke. Definitions that will be discussed include, but are not limited to, the following terms:

- a. “Lender”;
- b. “Lending activities”; and
- c. “Representative”.

The subgroup discussed the definition of lender and lending activities.

Lenders in attendance stated that the current inability to transfer the exemption or qualify for the exemption as a limited liability corporation (LLC) causes difficulty for lenders due to the many reasons, including that banks do not acquire or retain property as the bank, and for other liabilities, including tort liability. Banks may prefer to take title in a separate LLC or subsidiary to provide insulation and protections for the bank’s assets, not to avoid environmental liability. This situation comes up a lot with lender liability situations.

Mark Thimke stated that the BSG prioritized cleanup and redevelopment of brownfields, and sought to encourage and assist lenders in providing loans on brownfields properties; therefore the focus for this subject area would be whether a given proposal assists brownfields redevelopment.

Lenders and attorneys in attendance stated that where a property is contaminated and a bank can’t protect itself from environmental liability, the bank would not take the property; therefore the “subsidiary” issue is connected to redevelopment. The outcome of not being able to safely foreclose on a property means that a bank will not provide the loan in the first place. The issue had come up with several clients.

Mark Thimke asked whether the subsidiary would need to be wholly owned or partially owned and whether making a distinction would work. Lenders in attendance replied that partially owned subsidiaries could be problematic. Darsi Foss stated that she was concerned about whether DNR staff would have adequate resources to verify whether a bank owned a LLC. She added that allowing LLCs to be deemed as “banks” could be difficult in a regulatory context in situations where the LLC doesn’t have assets other than the contaminated property; they may not have sufficient assets to deal with underground storage tanks, emergency removals, or other possibilities. DNR has had situations where a LLC’s assets were insufficient and DNR was not able to reach beyond the LLC.

An attendee asked how banks typically move property to a LLC. Lenders and attorneys in attendance stated various methods: banks sometimes have a deed-back situation, or can assign ownership to LLC in a foreclosure. If the LLC is created with the permission from Dept. of Financial Institutions (DFI), there is a cap on assets in the LLC. If a bank forecloses on an operating entity – a hotel for example – holding the property puts the whole bank at risk. A bank would want to capture this risk inside a subsidiary; if the bank keeps the property in the bank’s name, it exposes all bank capital.

Mark Thimke asked where funds would come from to cover the items that Darsi Foss had listed. Lenders in attendance stated that the bank would cover the costs. Darsi Foss asked what a bank might

do for properties requiring protective cap maintenance or the operation of a vapor mitigation system if the only available assets were the properties within a LLC.

Lenders and attorneys in attendance asked whether a bank could provide documentation to DNR that a subsidiary was created with approval of DFI to address DNR's concerns. Wholly owned subsidiaries would be the preferred option for inclusion in the exemption, but if there are other actions needed at the property, the bank itself has to deal with those responsibilities.

Mark Thimke asked whether an expanded definition of lender would be just be added for the acquisition section of the exemption law or whether it would apply to the rest of lender exemption sections, too. He stated that there were possible issues, and asked would this change would really help with tort issue when the LLC has strict ties to the lender.

Darsi Foss stated that DNR would need a bright line that is clear for implementation. She asked how an applicant for a lender liability clarification letter would verify the uses of its LLC to DNR staff, and whether there would be sufficient evidence via documentation or an online listing. She stated that DNR doesn't have resources to spend time evaluating each LLC.

An attendee asked whether it was common practice for banks to hold contaminated properties in LLCs. Lenders and attorneys in attendance stated that it was common practice for some firms and businesses; however, other firms/businesses only put clean sites in LLCs because of the way the lender exemption works.

An attendee asked what banks would typically do if they couldn't get an exemption and if the property is in a subsidiary. Attendees replied that a bank could sell the note on a discounted basis to attempt recoupment, it could hold a fire sale, use a guarantee through SBA or other loan guarantee, or walk away.

Darsi Foss stated that exemptions did not protect lenders from RCRA citizen suit risk. She asked whether LLCs were typically deemed eligible for federal liability exemptions for lenders. Mark Thimke asked whether an attendee would research the topic.

Attorneys and lenders in attendance stated that on the federal side, lenders would have the All Appropriate Inquiry / Bona Fide Prospective Purchaser protections.

An attendee suggested that an authorization letter from DFI could be submitted to DNR. Another attendee suggested looking at federal and state tank laws; generally lenders are not protected from following state tank regulations.

Mark Thimke stated that the subgroup's focus was examining what has changed in 20 years since the time this law was passed; he asked for clarification on what had changed in lending practices that warranted looking at this subject at this time. Attendees discussed the relevance. While banks has worked with the LLC structure since the 1980s, the concerns surrounding the impacts of foreclosures had then been hypothetical, whereas the 2008 economic crash made a lot of these concerns real – banks had to foreclose on many properties. Also, new bank regulations and FDIC enforcement has

changed. These entities do much more detailed reviews of banks to make sure they meet the safety and soundness standard.

Mark Thimke asked whether any attendees would be willing to present a proposal, formatted as a one-page summary of the issue similar those in the 2015 BSG Report (available at: <http://dnr.wi.gov/files/PDF/pubs/rr/RR615.pdf>). The BSG would be looking at other legislative issues being brought up to from other BSG subgroups as well. Mark Miller stated that he would take the lead on writing up the proposal, and would include a recommendation to include assignability. Mark Thimke stated that the ideal timeframe would be to complete the proposal by end of September in order to pass it along to this group for input. Diane Marchik offered to look into the federal exemption issue.

The subgroup then discussed the “Representative” definition. In the mid-1990’s, people were worried that they could be personally liable if they were a trustee. The exemption clarifies that the state can’t personally go after a trustee but trust or company in receivership is still liable.

Attendees did not raise concerns about the “representative” definition or exemption, except to discuss the application of the definition to a bankruptcy trustee.

Attendees then discussed the definition of “lending activities”. An attendee asked whether a property acquired by deed in lieu of foreclosure would be eligible for the exemption, due to its use in common practice. Darsi Foss stated that the DNR, under the local government exemption, allowed the equivalent of deed in lieu of foreclosure for tax foreclosures cases. She stated that DNR will follow up to confirm whether it has allowed deed in lieu of foreclosure as an acceptable method for acquisition for the purpose of providing lender liability clarification letters.

ITEM 4. Update on recent outreach activities relating to Wis. Stat. § 292.21.

Molly Schmidt stated that the Wisconsin Banker’s Association (WBA) had done outstanding outreach regarding the lender liability exemption over the last few months, including:

- Discussion in past Government Relationship conference calls which reached over 50 bankers.
- Discussion in Stevens Point Compliance Forum, Wisconsin Dells Compliance Forum, and Milwaukee Compliance Forum which reached nearly 200 bankers.
- Inclusion in WBA Compliance Journal May 2016 (see page 17) which is emailed to at least 750 bankers and is separately downloaded by others from the WBA website.
- Inclusion as past articles in Wisconsin Banker issues in July and August. The Wisconsin Banker publication is a membership-wide publication.
- Inclusion in teaching materials for WBA Loan Compliance School and WBA Real Estate Compliance School DNR's March 2016 fact sheet.

She thanked Heather MacKinnon, Jon Turke, and Daryll Lund for helping DNR reach WBA members with information on the exemption, and offered assistance in working together on outreach efforts in the future. Attendees discussed other outreach ideas for helping lenders understand and remain aware of the exemption. Tina Reese stated that the Federation of Environmental Technologists (FET) may be able to reach consultants with this information through seminars or other methods.

ITEM 5. Next steps.

Mark Thimke asked whether there were additional issues for the subgroup to examine regarding Wis. Stat. § 292.21 and its relevance to current lending practices. Darsi Foss offered two ideas: to clarify the responsibility of lender at properties where there is a continuing obligation (pump and treat, vapor mitigation system, or other), that is, whether lenders need to follow those ongoing obligations; and to clarify the limitations related to the lender running the business of the borrower, that is, why there is a difference between the requirements for personal property acquisition and land acquisition and why the different requirements are in place.

Jennifer Buzacky and Mark Thimke clarified the next steps for the subgroup and attendees. DNR will follow up regarding whether it has issued lender liability clarification letters to lenders for acquisitions done through deed in lieu of foreclosure [*response: DNR has issued liability clarification letters for acquisitions done through deed in lieu of foreclosure*]. Mark Miller will prepare issue paper recommendation and if attendees are interested in providing input or assistance they may contact Mark Miller; the paper will be sent out to the subgroup for input prior to the BSG meeting. Diane Marchik will research how the federal exemptions for lenders deal with wholly-owned subsidiaries, LLCs, and assignability. The full BSG will discuss this topic at its meeting in October and then the next meeting of the lender subgroup will be in early November.