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MEMORANDUM

To: P. Jeremy McCallion
Associate Brownfield Planner

From: Curtis N Hedger *CNH*
Office of Corporation Counsel

Re: Due Care Obligation of the County for Tax Forfeited Property

Date: November 28, 2007

You have asked my office to review and comment on what "due care" obligation, if any, the County incurs when it assumes involuntary ownership of an environmentally contaminated parcel through the property tax forfeiture process.

Under Michigan law, if delinquent property taxes for any particular parcel remain unpaid for more than one year, that parcel is subject to forfeiture by the County Treasurer who is considered the "foreclosing governmental unit" under the Tax Foreclosure Statute. This Statute addresses the situation where a forfeited piece of property is environmentally contaminated. For example, MCLA 211.78(g)(7) requires that if the foreclosing governmental unit has reason to believe that a forfeited property is environmentally contaminated, he/she shall notify the state department of environmental quality ("MDEQ") and provide the department with all information concerning that parcel. MCLA 211.78(m), in turn, provides that if the forfeited property is a "facility" as defined by Natural Resources and Environmental Protection Act (MCLA 324.20101 et seq)("NREPA") the MDEQ shall take possession of the property and place it into the state's land bank fast track authority if the following three conditions are met: (1) the MDEQ determines that conditions on the parcel are "an acute threat to the public health, safety and welfare, to the environment or to other property;" (2) MDEQ proposes to undertake or is undertaking state-funded response activities at the property; and (3) MDEQ determines that the sale, retention or transfer of the property under the general tax forfeiture process would interfere with MDEQ's response activities for that parcel.

Practically speaking, the MDEQ rarely exercises its right under MCLA 211.78(m) to transfer an environmentally contaminated parcel from the delinquent tax forfeiture process into the state's land bank fast track authority for state clean-up. Thus, the question remains, what "due care" duty, if any, does the County and/or the County Treasurer acting as the County's foreclosing governmental unit, incur when environmentally contaminated land involuntarily comes into County ownership as part of the delinquent tax forfeiture process?

NREPA specifically addresses what "due care" obligations a property owner must undertake for environmentally contaminated property which rises to the level of a "facility" under the Act. MCLA 324.20107a provides that owners of such property must take action to prevent exacerbation of the existing contamination, undertake response activity necessary to mitigate unacceptable exposure to hazardous substances sufficient to protect public health and safety and take reasonable precautions against reasonably foreseeable acts or omissions of a third party that could adversely affect the property. Significantly, subpart (4) of this section provides that the "due care" obligations stated above do not apply to the state or to a local unit of government that is not liable for response activity costs under MCLA 324.20126(3)(a)

Subsection (1) of MCLA 324.20126 generally provides the framework for who must pay for response activity costs for property defined as a "facility" NREPA MCLA 324.20126(3)(a), however, states:

Notwithstanding subsection (1), the following persons are not liable under this part unless the person is responsible for an activity causing a release at the facility:

- (a) The state or a local unit of government that acquired ownership or control of a facility involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function... or the state or a local unit of government that acquired ownership or control of a facility by seizure, receivership, or forfeiture pursuant to the operation of law or by court order.

Reading MCLA 324.20107a and MCLA 324.20126(3)(a) together, it is my opinion that, as a general rule, the County and/or the County Treasurer as the foreclosing governmental unit, would have no "due care" obligations under NREPA for tax forfeited environmentally contaminated property that involuntarily came into County ownership as part of a delinquent tax forfeiture, provided the County and/or Treasurer were not directly responsible for an activity causing a release at the site