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REAL ESTATE AND LAND USE ALERT

Environmental Contamination and Brownfields Development

Recovery of Response Action Costs and Attorneys' Fees

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Property owners and their environmental consultants recently received good news from the Massachusetts Supreme Judicial Court. In June 2008, the Court confirmed that an owner of contaminated property was entitled to recover its costs to clean up the contamination from the party who caused the contamination in the first place, including attorneys' fees tied to the clean-up. Therefore, an innocent owner of contaminated property, such as a "Brownfields" development, should be able to recover its consultant and attorneys' fees from the responsible party.

In the case titled Bank v. Thermo Elemental, Inc., a Waltham owner spent more than \$800,000 to address contamination that was caused by its tenants. Ironically, after that large sum was spent on investigations and studies, it was determined that the property was not contaminated enough to warrant an actual clean-up.

The responsible party refused to reimburse the owner's response action costs, claiming that the owner's consultant did not completely follow the clean-up regulations. The responsible party also claimed that the owner's attorneys' fees of \$90,000 were not reimbursable as response action costs.

After approximately twelve years of litigation, the SJC finally ruled in favor of the owner, awarding response action costs including attorney fees related to the response action. The SJC said that, under Chapter 21E, an owner could recover even if its consultants did not completely comply with the clean-up regulations. The SJC found that the two areas of noncompliance did not have a bearing on whether the response action was properly performed. Some noncompliance is tolerated where it does not

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negatively affect the clean-up, by increasing the cost or requiring additional work, as long as there is “substantial compliance” with the regulations.

The SJC also said that an owner could recover its attorneys’ fees that were closely tied to the response action. Thus, an owner should be reimbursed for experienced environmental counsel that assists in the management of the clean-up. In addition, the Court confirmed that attorneys’ fees may be recovered if an owner is required to file a lawsuit to enforce Chapter 21E.

The Bank case is important because it confirms that the person responsible for the contamination is also responsible for the clean-up costs, including attorneys’ fees tied to the clean-up. An innocent owner is entitled to reimbursement from the responsible party even if the owner’s consultants do not exactly comply with the clean-up regulations.

This communication is intended to provide general information about an area of law. It is not legal advice. You should consult with legal counsel for advice specific to your circumstances.

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