

No. 1995-3

AN ACT

SB 11

Limiting environmental liability for economic development agencies, financiers and fiduciaries.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act.

Section 2. Declaration of policy.

The General Assembly finds and declares as follows:

(1) The Commonwealth has provided grant and loan funds to a variety of economic development agencies, all for the purpose of assisting these agencies in their efforts to promote the general welfare of this Commonwealth by encouraging economic development and industrial redevelopment throughout this Commonwealth.

(2) Economic development agencies acquire title to industrial property for financing purposes only and lease or sell the same to industrial occupants who have sole possession of the facilities for an amount of rent or installment payments pursuant to an installment sale contract which is determined solely on a basis of meeting the costs of the financing and other costs associated with ownership unrelated to profit.

(3) Economic development agencies acquire possession of these industrial sites from time to time when the industrial occupant defaults under its obligations to the agencies under its lease or installment sales agreements.

(4) Economic development agencies also acquire industrial property either for the purpose of financing or redevelopment but without a motive for profit or to occupy the property for their own industrial operations.

(5) Economic development agencies are reluctant to acquire title to or other interests in property whether for financing or redevelopment purposes or to secure repayment of obligations unless the economic development agencies are protected from liability for environmental contamination on those sites they seek to assist to develop.

(6) The taking of legal title and any foreclosure or retaking of possession of property by an industrial development agency, area loan organization or industrial and commercial development authority is pursuant to the following acts:

(i) The act of May 17, 1956 (1955 P.L.1609, No.537), known as the Pennsylvania Industrial Development Authority Act, which expressly

requires that the Pennsylvania Industrial Development Authority loan money to industrial development agencies secured by not less than a second mortgage lien.

(ii) The act of August 23, 1967 (P.L.251, No.102), known as the Economic Development Financing Law, which provides for issuance of debt by industrial and commercial development authorities and authorizes these authorities to take title to real property as security for the indebtedness.

(iii) The act of July 2, 1984 (P.L.545, No.109), known as the Capital Loan Fund Act, which requires that its loans be made to area loan organizations with adequate collateral.

(7) The maximum level of economic development and business opportunity and employment and the elimination or prevention of abandoned industrial and commercial property and Federal Government or military lands which can best be provided by the promotion, attraction, stimulation, rehabilitation and revitalization of all types of industry, commerce, manufacturing and business development within this Commonwealth.

(8) To continue and further the stimulation of business opportunities and economic development within this Commonwealth and thereby cause the reuse and rehabilitation of industrial and commercial property, it is necessary to ensure various means of financing to promote economic growth and the availability of fiduciary services to persons within this Commonwealth.

(9) Lenders are reluctant to provide funding for business opportunities and economic development, and fiduciaries are reluctant to provide services to persons with environmental problems, because of catastrophic risks of environmental liability and remediation costs under environmental laws relating to releases and contamination which were not caused by lenders and fiduciaries.

(10) When borrowers default on loans, lenders are reluctant to foreclose upon commercial property with environmental problems because lenders may be forced to assume costly environmental liabilities; thus, commercial property is being abandoned in this Commonwealth and new businesses are unable to obtain financing to purchase such properties.

(11) Family businesses are unable to establish trusts to convey their business interests to the next generation, and other businesses are unable to receive retirement, investment and other trust services from fiduciaries, when fiduciaries in their personal or individual capacities may be held liable for environmental contamination caused by other persons merely by virtue of owning property in their trustee capacities and providing fiduciary services.

(12) In order to continue to stimulate growth and continue the use or reuse of industrial and commercial property, it is necessary to provide protection to lenders, fiduciaries and economic development agencies from

environmental liability and remediation costs under environmental laws for releases and contamination caused by others.

(13) Environmental liability for lenders, fiduciaries and economic development agencies shall be limited in scope as specifically provided in this act, and this act shall be interpreted as broadly as possible in order to preempt any laws, regulations or ordinances imposing environmental liability on such persons in order to promote economic development.

Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Board.” The Environmental Hearing Board of the Commonwealth.

“Borrower.” A person who has received an extension of credit. The term includes, but is not limited to, a debtor, a lessor, a lessee or an obligor.

“Conservancy.” A charitable corporation, charitable association or charitable trust registered with the Bureau of Charitable Organizations and exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501(c)(3)) or other Federal or Commonwealth statutes or regulations, the purpose or powers of which include retaining or protecting natural, scenic, agricultural or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational or open-space use; protecting natural resources and wildlife; maintaining or enhancing land, air or water quality; or preserving the historical, architectural, archaeological or cultural aspects of real property.

“Department.” The Department of Environmental Resources of the Commonwealth.

“Economic development agencies.” The term includes:

(1) Any redevelopment authority created under the act of May 24, 1945 (P.L.991, No.385), known as the Urban Redevelopment Law.

(2) Any industrial development agency as that term is defined in the act of May 17, 1956 (1955 P.L.1609, No.537), known as the Pennsylvania Industrial Development Authority Act.

(3) Any industrial and commercial development authority created under the act of August 23, 1967 (P.L.251, No.102), known as the Economic Development Financing Law.

(4) Any area loan organization as that term is defined in the act of July 2, 1984 (P.L.545, No.109), known as the Capital Loan Fund Act.

(5) Any other Commonwealth or municipal authority which acquires title or an interest in property.

(6) Municipalities or municipal industrial development or community development departments organized by ordinance under a home rule charter which buy and sell land for community development purposes.

(7) Tourist promotion agencies or their local community-based nonprofit sponsor which engage in the acquisition of former industrial sites as part of an “Industrial Heritage” or similar program.

(8) Conservancies engaged in the renewal or reclamation of an industrial site.

“Environmental acts.” Collectively and separately, the act of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams Law, the act of January 8, 1960 (1959 P.L.2119, No.787), known as the Air Pollution Control Act, the act of July 7, 1980 (P.L.380, No.97), known as the Solid Waste Management Act, the act of October 5, 1984 (P.L.734, No.159), known as the Worker and Community Right-to-Know Act, the act of July 13, 1988 (P.L.525, No.93), referred to as the Infectious and Chemotherapeutic Waste Law, the act of October 18, 1988 (P.L.756, No.108), known as the Hazardous Sites Cleanup Act, the act of July 6, 1989 (P.L.169, No.32), known as the Storage Tank and Spill Prevention Act, the act of December 7, 1990 (P.L.639, No.165), known as the Hazardous Material Emergency Planning and Response Act, and the act of June 11, 1992 (P.L.303, No.52), known as the Oil Spill Responder Liability Act, and all such acts as they may be amended from time to time, and any Federal, State or local law, statute, regulation, rule, ordinance, court or administrative order or decree, interpretation or guidance, now or hereafter in existence pertaining to employees, occupational health and safety, public health or safety, natural resources or the environment.

“Environmental due diligence.” Investigative techniques, including, but not limited to, visual property inspections, electronic environmental data base searches, review of ownership and use history of the property, environmental questionnaires, transaction screens, environmental assessments or audits.

“Fiduciary.” Any person which is considered a fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 (Public Law 93-406, 29 U.S.C. § 1002(21)) or who acts as trustee, executor, administrator, custodian, guardian of estates, conservator, committee of estates of persons who are disabled, personal representative, receiver, agent, nominee, registrar of stocks and bonds, assignee or in any other capacity for the benefit of another person.

“Foreclosure.” The date upon which title vests in property through realizing upon a security interest, including, but not limited to, any ownership of property recognized under applicable law as vesting the holder of the security interest with some indicia of title, legal or equitable title obtained at or in lieu of foreclosure, sheriff sales, bankruptcy distributions and their equivalents.

“Fund.” Collectively and separately, any special fund of Commonwealth moneys administered by the Commonwealth or the Department of Environmental Resources, including, but not limited to, the Hazardous Sites Cleanup Fund and the Underground Storage Tank Indemnification Fund, as well as any other fund of Commonwealth moneys now or hereafter in existence created for the funding or reimbursement of costs and damages such as response costs, emergency response measures and their equivalent relating to natural resources or the environment.

“Guarantor.” The term includes guarantors and sureties of security interests, securities and other obligations, issuers of letters of credit and other credit enhancements, title insurers and entities which directly or indirectly acquire indicia of ownership in the course of protecting a security interest or acting as such guarantors, sureties, issuers of letters of credit or other credit enhancements or title insurers. The term includes guaranties, surety bonds, title insurance policies, letters of credit and other credit enhancements, and other agreements with a guarantor relating to the obligations described in this definition. The term directly or indirectly includes any interest in property, security interest, indicia of ownership title or right to title held or acquired by a fiduciary or similar entity for the benefit of a holder of a security interest.

“Indicia of ownership.” Any legal or equitable interest in property acquired directly or indirectly:

(1) for securing payment of a loan or indebtedness, a right of reimbursement or subrogation under a guaranty or the performance of another obligation;

(2) evidencing ownership under a lease financing transaction where the lessor does not initially select or ordinarily control the daily operation or maintenance of the property; or

(3) in the course of creating, protecting or enforcing a security interest or right of reimbursement of subrogation under a guaranty.

The term includes evidence of interest in mortgages, deeds of trust, liens, surety bonds, guaranties, lease financing transactions where the lessor does not initially select or ordinarily control the daily operation or maintenance of the property, other forms of encumbrances against property recognized under applicable law as vesting the holder of the security interest with some indicia of title.

“Industrial activity.” Commercial, manufacturing, public utility, mining or any other activity done to further either the development, manufacturing or distribution of goods and services, intermediate and final products and solid waste created during such activities, including, but not limited to, administration of business activities, research and development, warehousing, shipping, transport, remanufacturing, stockpiling of raw materials, storage, repair and maintenance of commercial machinery and equipment and solid waste management.

“Industrial site.” A site which now has or once had an industrial activity on it.

“Lender.” Any person regulated or supervised by any Federal or State regulatory agency and any of its affiliates or subsidiaries, successors or assigns, including its officers, directors, employees, representatives or agents, and any Federal or State banking or lending agency or its successors, including, but not limited to, Resolution Trust Corporation, Federal Deposit Insurance Corporation, Federal Reserve Bank, Board of Governors of the Federal Reserve System, Federal Home Loan Bank, National Credit Union Administrator Board, Office of the Comptroller of the Currency, Office of

Thrift Supervision, Farm Credit Administration and Small Business Administration or similarly chartered Federal instrumentality. The term also includes the initial lender and any subsequent holder of a security interest or note, guarantor, lease financier or any successor or a receiver or other person who acts on behalf or for the benefit of a holder of a security interest. The term includes an economic development agency.

“Occupant.” A party which occupies or has the right to occupy property owned by an economic development agency by any instrument, including, but not limited to, a lease, mortgage, installment sale contract, disposition agreement or trust agreement.

“Person.” An individual, partnership, corporation, business trust, joint-stock fund, estate trust, banking association, governmental, administrative or regulatory agency, institution or any other type of legal entity whatsoever.

“Property.” All types of real and personal and tangible and intangible property.

“Redevelopment.” Undertakings and activities made under the act of May 24, 1945 (P.L.991, No.385), known as the Urban Redevelopment Law, including, but not limited to, planning, acquisition, site preparation, demolition, rehabilitation, renovation, conservation, reuse, renewal, improvement, clearance, sale and lease of real property and improvements thereon.

“Regulated substance.” Any element, compound or material which is subject to regulation under the environmental acts or any element, compound or material defined as a hazardous, toxic, regulated infectious chemotherapeutic substance or chemical contaminant, waste, any type of pollution or condition or any equivalent under the environmental acts.

“Release.” Any spill, rupture, emission, discharge, other action, occurrence, condition or any other term defined as a “release” or other threat of release or operative word or event which would trigger compliance requirements or liability under the environmental acts.

“Response action.” An action, including, but not limited to, a response or interim response, remedial response or remedy or corrective action, closure or any other action under the environmental acts in response to a release, such as testing, inspections, sampling, installations, corrective action, removals, closure, response costs, assessments or any types of claims, damages, actions, fines and penalties.

“Security interest.” An interest in property created or established for the purpose of securing a loan, right of reimbursement or subrogation under a guaranty or other obligation or constituting a lease financing transaction. The term includes security interests created under 13 Pa.C.S. (relating to commercial code), mortgages, deeds of trust, liens, lease financing transactions in which the lessor does not initially select or ordinarily control the daily operation or maintenance of the property, trust receipt transactions and their equivalents. Security interest may also arise from transactions such as sales and leasebacks, conditional sales, installment sales, certain assignments, factoring agreements, accounts receivable, financing

arrangements and consignments if the transaction creates or establishes an interest in property for the purpose of securing a loan, right of reimbursement or subrogation under a guaranty or other obligation. The term also includes a confession of judgment or money judgment whereby a lender commences an execution on such judgments with a writ of execution and thereby causes property to be levied and attached.

Section 4. Limitation of economic development agency environmental liability.

An economic development agency that holds an indicia of ownership in property as a security interest for the purpose of developing or redeveloping the property or to finance an economic development or redevelopment activity shall not be liable under the environmental acts to the department or to any other person in accordance with the following:

(1) An economic development agency shall not be liable in an action by the department, as a responsible person, unless the economic development agency, its employees or agents directly cause an immediate release or directly exacerbate a release of a regulated substance on or from the property.

(2) An economic development agency which forecloses on or assumes possession of a property shall remain within the exemption from liability under this section.

(3) An economic development agency that conducts a remedial action in accordance with a written agreement with the department shall not be liable as a responsible party, owner, operator or occupier in any action by the department for a release or potential release of any regulated substance.

(4) There is cooperation with governmental agencies performing a remedial action, as follows:

(i) An economic development agency and any of its successors and assigns may take no action that would disturb or be inconsistent with remedial response that is proposed, approved or implemented by the Federal Environmental Protection Agency.

(ii) An economic development agency and any of its successors and assigns shall permit access to Federal and Commonwealth agencies and other parties acting under the direction of these agencies to evaluate, perform or maintain a remedial action.

(iii) An economic development agency or any of its successors and assigns shall perform, operate and maintain remedial actions pursuant to State laws as directed by the department.

Section 5. Limitation of lender environmental liability.

(a) **Scope of lender liability.**—A lender who engages in activities involved in the routine practices of commercial lending, including, but not limited to, the providing of financial services, holding of security interests, workout practices, foreclosure or the recovery of funds from the sale of property shall not be liable under the environmental acts or common law equivalents to the

Department of Environmental Resources or to any other person by virtue of the fact that the lender engages in such commercial lending practice unless:

(1) the lender, its employees or agents directly cause an immediate release or directly exacerbate a release of regulated substances on or from the property; or

(2) the lender, its employees or agents knowingly and willfully compelled the borrower to:

(i) do an action which caused an immediate release of regulated substances; or

(ii) violate an environmental act.

(b) **Limitation of lender liability.**—Liability pursuant to this act shall be limited to the cost for a response action which may be directly attributable to the lender's activities as specified in subsection (a). Liability shall arise only if the lender's actions were the proximate and efficient cause of the release or violation. Ownership or control of the property after foreclosure shall not by itself trigger liability. No lender shall be liable for any response action if such response action arises solely from a release of regulated substances which occurred prior to or commences before and continues after foreclosure, provided, however, that the lender shall be responsible for that portion of the response action which is directly attributed to the lender's exacerbation of a release. A release of regulated substances discovered in the course of conducting environmental due diligence shall be presumed to be a prior or continuing release on the property.

Section 6. Limitation of fiduciary environmental liability.

(a) **Scope of fiduciary liability.**—Any person who acts or has acted as a fiduciary to another person shall not be liable in its personal or individual capacity under the environmental acts or common law equivalents to the department or to any other person by virtue of the fact that the fiduciary provides or provided such services unless:

(1) during the time when the fiduciary services were actively provided, an event occurred which constituted a release of regulated substances according to the environmental acts at the time of such event;

(2) the fiduciary had the express power and authority to control property which was the cause of or the site of such release as part of actively providing services; and

(3) the release was caused by an act or omission which constituted gross negligence or willful misconduct of the fiduciary according to the law or standard practices at the time of the release.

(b) **Limitation of fiduciary liability.**—Liability under this act shall be limited to only the cost for a response action which is directly attributable to the fiduciary's activities as specified in this section. Under subsection (a)(2), control of property shall be deemed to be in the lessee and not the lessor for leased property. No fiduciary shall be liable for any response action if such response action arises from a release of regulated substances which occurred prior to or commences before and continues after the fiduciary takes action as specified in subsection (a). Notwithstanding the foregoing, a fiduciary shall

be responsible for that portion of a response action which is directly attributable to exacerbating a release. A release of regulated substances discovered in the course of conducting an environmental due diligence shall be presumed to be a prior and continuing release on the property.

(c) Estate claims.—Nothing in this section shall prevent claims against the fiduciary in its representative capacity.

Section 7. Defenses to liability.

A lender, fiduciary or economic development agency can avoid liability under the environmental acts or the common-law equivalents by showing evidence that a release or threatened release of regulated substances for which the lender or fiduciary otherwise is responsible under sections 4, 5 and 6 was caused by any of the following:

- (1) An act of God.
- (2) An intervening act of a public agency.
- (3) Migration from property owned by a third party.
- (4) Actions taken or omitted in the course of rendering care, assistance or advice in accordance with the environmental acts or at the direction of the department.
- (5) An act of a third party who was not an agent or employee of the lender, fiduciary or economic development agency.
- (6) If the alleged liability for a lender or economic development agency arises after foreclosure and the lender or economic development agency exercised due care with respect to the lender's or economic development agency's knowledge about the regulated substances and took reasonable precautions based upon such knowledge against foreseeable actions of third parties and the consequences arising therefrom. A lender, fiduciary or economic development agency can avoid liability by proving any other defense which may be available to it under the environmental acts or common law.

Section 8. Savings clause.

Nothing in this act shall affect the rights, immunities or other defenses that are available under other applicable law to a lender, fiduciary or economic development agency, including, but not limited to, rights of contribution and indemnity. Nothing in this act shall be construed to create any new, different or additional liability for or create a private right of action against any lender, fiduciary or economic development agency.

Section 9. Apportionment of liability.

Notwithstanding anything to the contrary, if two or more persons acting independently cause distinct harm or a single harm for which there is a reasonable basis for division according to the contribution of each, a lender, fiduciary or economic development agency shall be subject to liability only for the portion of the total liability that is directly attributable to the lender, fiduciary or economic development agency.

Section 10. Construction of act.

The terms and conditions of this act are to be liberally construed so as to best achieve and effectuate the goals and purposes of this act. Liability shall

be based on proximate and efficient causation. This act preempts and eliminates all present liability standards, including, but not limited to, the concept of a person who, without participation in the management of property, holds indicia of ownership primarily to protect a security interest. Under all provisions herein, the burden of proof shall be upon the person seeking to have a lender, fiduciary or economic development agency held liable for a response action or damages.

Section 11. Severability.

The provisions of this act are severable. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Section 12. Repeals.

To the extent that any environmental acts are inconsistent with this act or pose liability as addressed in this act, such provision of those laws are preempted and deemed repealed so that the provisions of this act may be enforced. No environmental law enacted after this act shall be applied retroactively to impose liability upon lenders, fiduciaries or economic development agencies unless there are express repealers which explain the extent of the repeal.

Section 13. Applicability.

The provisions of this act shall apply to the following:

(1) All indicia of ownership, including those presently or subsequently acquired or those acquired prior to the date of enactment that are held primarily to protect a security interest in the property.

(2) Each fiduciary with respect to any services provided by the fiduciary, including those presently or subsequently provided and those rendered prior to the date of enactment.

(3) All administrative actions, actions, suits or claims against lenders, fiduciaries or economic development agencies not yet finally resolved by the department or any court or administrative hearing board having any action, suit or claim pending before it or an appeal from a lower court, regardless of when the release or interest in the subject property occurred.

Section 14. Effective date.

This act shall take effect immediately upon the effective date of the act of May 19, 1995 (P.L.4, No.2), known as the Land Recycling and Environmental Remediation Standards Act.

APPROVED—The 19th day of May, A.D. 1995.

THOMAS J. RIDGE