



State of Vermont
Department of Taxes
133 State Street
Montpelier, VT 05633-1401

Agency of Administration

March 21, 2016

To Vermont Real Estate Attorneys:

The Vermont Department of Taxes has recently received a request for clarification of the status of a current use lien when it has been subordinated and the encumbered property is subsequently foreclosed upon. As you may know, a lien arises on property enrolled in the Current Use Program to secure the payment of land use change tax. The Commissioner of Taxes has discretion to subordinate the lien in favor of a lender's mortgage in circumstances in which a subordination is an active condition of the loan and the State's interests are protected. For a more detailed explanation of the process required to apply for a subordination, as well as the Department's process for reviewing CU-306 subordination applications, please review the Subordination of Current Use Lien Regulation at <http://tax.vermont.gov/sites/tax/files/documents/Subordination%20of%20Current%20Use%20Lien%20Regulation.pdf>.

Land use change tax is only due when development takes place or when the lien is removed from the property. A foreclosure proceeding will transfer ownership of the property but will not foreclose the current use lien. The statute expressly states that a current use lien runs with the land. 32 V.S.A. § 3757(f) ("The land use change tax and any obligation to repay benefits paid in error shall not constitute a personal debt of the person liable to pay the same, *but shall constitute a lien which shall run with the land.*") (emphasis added). Because it runs with the land, the lien remains with the property no matter how it is transferred. It cannot be foreclosed and is binding upon subsequent holders of the property. The definition of "owner" in the current use statute makes it clear that the Legislature intended a current use lien to survive a foreclosure proceeding. It states in pertinent part: "When enrolled land is mortgaged, the mortgagor shall be deemed the owner of the land for the purposes of this subchapter, until the mortgagee takes possession, either by voluntary act of the mortgagor *or foreclosure, after which the mortgagee shall be deemed the owner.*" 32 V.S.A. § 3752(10) (emphasis added). This language demonstrates that in the event of foreclosure, the lien would survive the foreclosure.

This has consistently been the Department's position for many years. On occasion, a mortgagee has sought the foreclosure of the Department's current use lien in a judicial foreclosure. The Department has successfully sought the dismissal of the Department as a defendant from foreclosure actions on this basis. *E.g., Merchants Bank v. Darling, J., et al*, Chittenden Superior Court, Docket No. S 0277-95 CnC, Entry Order (Levitt, J., July 24, 1995).

After a foreclosure, a mortgagee will receive title of the property subject to the current use lien. The mortgagee may choose to do one of the following:

- Remove the lien and pay the land use change tax.





State of Vermont
Department of Taxes
133 State Street
Montpelier, VT 05633-1401

Agency of Administration

- Withdraw the property from current use enrollment but the lien remains and no land use change tax is due at that time. Tax will instead be due when development occurs.
- Keep the property enrolled (as long as the property continues to meet the requirements of the Current Use Program).
- Sell the property subject to the lien.

The Department will only subordinate a current use lien when it is satisfied that the State's interests are protected—meaning that enough equity exists in the property to pay for land use change tax in addition to the mortgage interest that would take priority. The enrolled land must also be in compliance with the current use program requirements. The Department researches compliance with program requirements for every subordination request and will not subordinate a lien if the enrolled land is not in compliance.

You should be aware of the following other effects of current use lien subordination, which may impact your real estate practice:

If you apply to subordinate a current use lien, you should familiarize yourself with the Subordination of Current Use Lien Regulation so you are acquainted with the factors the Department will consider when determining whether to accept or deny a subordination request.

If you are part of a real estate transaction involving the subordination of the current use lien, you should know that the process for reviewing a subordination request is an involved process that requires time and research in order to protect the State's interests. Accordingly, you should plan for a necessary delay.

If you have any questions or concerns, please contact the Director of Property Valuation and Review, Douglas Farnham, at (802) 828-6829.

