

Are Conduit Debt Issuers Liable for Unpaid Water Rents and Building Code Violations for the buildings they “own” due to bond financing; Court of Appeals to decide

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Court of Appeals oral argument live streamed

On February 10th, 2021 the [New York State Court of Appeals](#) will hear oral arguments on whether an IDA, “conduit debt issuer”, is liable for unpaid water rents and building code violations for the building they “own” due to bond financing. (attached) The oral argument will be live streamed and available for viewing on the [Court of Appeals You Tube page](#).

HCIDA becomes nominal “owner” of property for the purposes of bond financing

In 1988, the [Herkimer County Industrial Development Agency \(HCIDA\)](#), entered into a PILOT agreement with a private developer which included tax exemptions and the financing of bonds for capital improvements to the developer’s industrial facility. As the conduit issuer of the debt, the HCIDA took nominal title to the property and the developer paid monthly rents to the IDA which were used to pay off the cost of the tax-exempt bonds issued on behalf the developer.

Private Developer stops paying rents and maintaining the property

In 2004 and 2005, the private developer failed to pay its water rents to the [Village of Herkimer](#) and stopped upkeep of the property. The private developer filed for bankruptcy. After several legal challenges to collect the water rents debt from the private developer failed; the Village brought an action to collect the [unpaid water rents from HCIDA](#) since it was the nominal owner of the property due to the bond financings. The Village building code inspector also began to find structural issues with the property and issued building code violations to the IDA. “We submit that HCIDA’s decade and a half of denial of all responsibility for this property has been completely unjustified,” wrote Michael J. Longstreet, of Longstreet and Berry, LLP, in the Village of Herkimer’s Appellate brief. “There is no basis to grant broad new legal protections to Industrial Development Agencies.”

Unpaid Water Rents are converted to a lien on the property that is paid by the owner

NYS Village Law authorizes villages to convert unpaid water rents into taxes on the property and then to convert the unpaid taxes into a lien on the property. The lien on the property will ultimately be paid by the owner of the property even if it was a tenant of the property that “used” the water. This is a rare situation in law where the owner of the property is responsible for paying an unpaid debt of their tenants.

The Village argued that since the private developer was a “tenant” of the property for the purposes of the bond financings and that the HCIDA was the “owner”, that the law authorizes the Village to collect the

unpaid water rents from the HCIDA. The lower courts have agreed with the village and have held the HCIDA liable for payment of the unpaid water rents.

HCIDA commences legal action for declaratory finding that it is not liable for the unpaid water rents and building code violations because it is only a “nominal owner” due to bond financing

The 4th Department Appellate court, affirming the trial court, held that the HCIDA was the property owner and therefore was liable to the village for the unpaid water rents. The HCIDA has appealed to New York State’s highest court, the NYS Court of Appeals to reverse the lower courts finding. The Court of Appeals should not “overturn decades of precedent holding that IDAs are nominal title holders only and are not liable for damages or debts of private companies that have received economic incentives,” wrote [Charles W. Malcomb](#), of Hodgson Russ LLP, in his Appellate brief for the HCIDA.