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**PROJECT L.U.S.T.**  
(Liability for Underground Storage Tanks)

Addressing Pierceton's Solutions To An Abandoned Gas Station



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## I. INTRODUCTION

In the heart of Pierceton sits a dilapidated, half-razed building which once housed a gas station and a machine shop. This pile of bricks looks out of place among the antique shops the town is known for and most observers are likely perplexed by the seeming lack of progress over the past several years to remove this unsightly structure. Unfortunately, the good faith efforts of towns people and local government to address this situation have been confounded by a variety of legal and financial constraints common to abandoned properties with underground storage tanks. By researching the laws governing underground storage tanks and interviewing community leaders, neighboring businesses and government officials, this KLA group has endeavored to take a comprehensive look at this problem and to develop some creative solutions for restoring this property.

## II. HISTORY

From the 1940's until the late 1960's, the property located at the corner of State Road 13 and Market Street in Pierceton was an active gas station with underground storage tanks. In the 1970's the property was converted to a machine shop which operated until sometime around 1990. It is unknown whether the underground tanks were used to store petroleum products after the gas station ceased operations.

For the past ten years the property has been vacant and the owners have failed to pay the real estate taxes. Although the property has been offered at tax sale on two occasions there have been no interested buyers. The County has offered to "take" the property for non-payment of

taxes and convey it to the Town of Pierceton. However, due to environmental laws governing underground storage tanks, both the County and the Town of Pierceton are fearful that ownership of the property could subject them to liability for removing the tanks and cleaning the site. The Town Council is also reluctant to set a precedent for clearing up abandoned buildings belonging to private landowners.

On July 2, 1997 the south end of the dilapidated building collapsed causing bricks to fall into the street. The Town of Pierceton, fearing potential liability for exercising control over the property, simply pushed the rubble back onto the site and roped off the area. The north end of the buildings still stands and is used by the Town of Pierceton as a maintenance and storage facility. The common wall that formerly separated the structures has collapsed however and it is no longer practical to restore the remaining structure. According to an architect who has examined the remaining building, it is unsafe for its current use even though children have been found playing nearby in the basement of the collapsed portion.

The property's demise has attracted considerable attention from local newspapers and many town residents have voiced concerns about the safety hazards and aesthetics of allowing the collapsed to remain on the property.

Until recently, little was known about the storage tanks buried on the property and the extent to which leakage from the tanks had contaminated the surrounding soil and ground water. In 1997 the Indiana Department of Commerce awarded the Town of Pierceton a planning grant of up to \$ 24,100 to obtain a Phase 1 test of the soil to estimate the clean-up costs.

Environmental consultants hired by the Town found that petroleum hydrocarbons had been released in the soil and reported that clean-up costs could range from "negligible" to

“substantial” depending on the level of contamination. In consideration of these variables, the consultants further recommended the Town budget \$125,000 for a *moderate* remediation effort and that Phase 2 testing also be performed to more accurately determine the clean-up costs.

In August 1998, a Phase 2 study was performed by the same consulting firm which had previously tested the property. This study revealed that gasoline is the most likely material released at the site and that only the soil and ground water in the immediate vicinity of the tanks has been affected. The study also concluded that the health and environmental risks from this contamination are negligible and that as a result, remediation of the soil and ground water is no longer warranted. The report cautions, however, that contamination directly beneath the tanks cannot be fully evaluated until they are removed and that this could potentially affect their recommendations. The consultants offer no cost estimates for the removal and disposal of the tanks and surrounding soil, although these costs are believed to be in the neighborhood of \$50,000.

Following the Phase 2 study, the Town of Pierceton submitted a grant application to the Indiana Department of Commerce seeking funds to remove the tanks, clean up the property and build a senior citizens center. In its application, the Town claims that a multi-purpose community building to serve as a senior center with additional storage space for town equipment and vehicles would be the best use of the property. However, this application was recently denied and the Town is now hoping the next round of IDOC grant reviews in June 1999 will provide a different result.

### III. LEGAL CONSIDERATIONS

Abandoned property is a headache for any town. However, property becomes even more troublesome when it is contaminated with hazardous substances. Although Indiana law permits counties to request title to such properties when the taxes are delinquent, counties often will not take title due to fears of assuming cleanup responsibilities, especially when the clean-up costs exceed the fair market value of the property.

Indiana law permits municipalities to by-pass direct ownership and transfer title to a person willing to remove the environmental hazard in return for forgiveness of the delinquent taxes and other assessments against the property. These costs typically pale, however, in comparison to the expenses of clean-up and it can be very difficult to find a willing purchaser to assume these costs.

In 1988, Indiana enacted the Indiana Underground Storage Tank Act ("Act"), which governs the ownership, use, and control of underground storage tanks. Several thousand underground storage tanks are registered with the Indiana Department of Environmental Management, and an unknown number of unregistered tanks are also in place dating back fifty years or more. Registered tanks are subject to an array of regulatory controls. IDEM estimates there are thousands of leaking tanks in Indiana. These leaks can come directly from the tanks, the piping from the tanks, or overfills and spills which can occur during the delivery of fuel by tanker trucks.

Briefly summarized, the Act provides that "owners" and "operators" of a UST are responsible for undertaking corrective action for leaking tanks and that they can also be liable to

the State for the correction costs. Owners and operators are also liable to any person who undertakes a corrective action for a leaking tank, whether undertaken voluntarily or under an order from the State. The only exception to this rule occurs in rare instance where the releases are proven to have resulted from an act of God, war, or negligence by the government.

The Act further provides, that if the tank was in use on or after November 8, 1984 an "owner" includes any person who owned the UST during a release. In cases where the tank was in use prior to November 8, 1984, an "owner" is the person who owned the tank immediately before the discontinuation of its use.

"Operators" of underground storage tanks can also be liable for releases from tanks. An operator is defined as any person in control of, or having responsibility for, the daily operation of an underground storage tank. Therefore, an operator could include the installer of the tank or the party who removes the tank. The issue of what degree of control is necessary to be considered an operator has not been clearly defined by the Indiana appellate courts, and as a result, this question remains a significant source of uncertainty and litigation.

In addition to the liabilities imposed under the Act, there are also state common laws and federal laws as well which can subject storage tank owners and operators to liability for the clean-up of contaminated soil and groundwater.

#### IV. ALTERNATIVE SOLUTIONS

A. Hope the grant application is approved or revise the grant application.

Obviously, the easiest solution would be for the Indiana Department of Commerce to approve the Town's grant application in June. This would provide the funds necessary to remove the tanks, clean up the property and also build a senior citizens center. If the grant application is denied (which would be the second such denial) the Town must determine whether their chances of grant approval can be significantly improved by revising their application (i.e. requesting funds for a use other than a senior citizens center or requesting a lesser amount) or whether it would be more productive to consider the alternatives discussed below.

B. Organize volunteers to work with the current owners to remove and dispose of the rubble.

A partial, and relatively inexpensive, solution would be to simply organize volunteers to remove the above-ground rubble and debris from the property while leaving the underground tanks alone. This would eliminate the potential risk of injury to children playing in the area and it would also remove the unsightly structure from the Town's landscape. This alternative would not, however, restore the property to a useful purpose given the continued presence of the underground tanks. The principal risk associated with this alternative is the Town's potential exposure to liability for tank releases and clean up costs resulting from exercising too much "control over the property" as defined by Indiana's Underground Storage Tank Act. While there is little case law to offer much guidance on this point, it seems unlikely that an Indiana Court

would find the Town to be a fuel tank "Operator" under the Act simply because it took measures to safeguard the premises and to eliminate a public nuisance. As a further precaution to avoid liability under the Act, the clean-up volunteers could work with, and under the direction of, the current property owner rather than the Town. This would confine liability for fuel tank clean up costs to the property owner who already bears this responsibility.

C. Lobby state legislators to modify existing law to allow for leniency/immunity under the Act for municipalities saddled with abandoned gas stations.

A long term solution would be to lobby state lawmakers for an amendment to Indiana's Underground Storage Tank Act which would provide small towns with limited immunity for clean up costs in instances where abandoned properties with underground tanks are subject to tax sale. While this would restrict the recovery rights of future land owners, it could enable small towns like Pierceton to at least address unsightly and dangerous above-ground structures without fear of bankrupting the town at a later date.

D. Award long-term tax abatements and market the property to prospective buyers willing to assume the costs of remediation.

A final possibility for redeeming this property could be to offer tax abatements to prospective buyers as an incentive for them to assume the costly remediation costs of removing the underground tanks. Although we did not research whether this alternative is a legally viable option, tax abatements have been used successfully in Warsaw and other communities throughout the state to entice developers to invest in economically depressed areas similar to the



Pierceton property.

## V. CONCLUSION

This highly visible property and the lack of progress over the past couple of years to clear the dilapidated building attracted the attention of this KLA group and motivated us to see if we could contribute some new ideas for solving what appeared to be a relatively simple problem. After considerable efforts meeting with community leaders, researching the property's history and the law regarding underground storage tanks, we discovered the Town of Pierceton has been stymied by legal and financial constraints that are common to small towns saddled with abandoned gas stations. We also learned important problem solving skills which should enable us to better serve the Kosciusko County community in the future.

Clearly, the Indiana Underground Storage Tank Act is not friendly to small towns with limited resources and the fear of liability under the Act for exercising "control" over a potentially contaminated property paralyzes common sense clean-up efforts. Although it would be easy to advocate a more aggressive approach to this problem we certainly appreciate the reasons for the Town's conservative approach. However, if the pending grant application is denied in June the Town may wish to assume some risks and consider the alternative solutions outlined in this paper. Hopefully the immediate safety concerns and public policy reasons for clearing the above-ground debris will not completely frustrate efforts to redeem this property.