

New Tools & Potential Risks in Environmental Due Diligence

An examination of environmental insurance and vapor intrusion

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Most commercial real estate transactions involve some degree of environmental due diligence. Hiring a qualified environmental consultant to conduct a Phase I environmental site assessment (ESA) is a basic but critical step in any property transaction. An ESA can provide vital information as to the nature and extent of existing contamination, the risk of future releases of hazardous substances, the owner or purchaser's legal exposure, and possible remediation costs.

Beyond the Phase I ESA, however, developers should be aware of new tools for managing and evaluating environmental risks, such as environmental insurance. Additionally, parties to real estate transactions should understand the health and environmental risks of vapor intrusion, which has become a significant concern in Ohio and across the country. Keeping up-to-date on emerging issues in environmental due diligence can increase the likely success of any project.



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Environmental insurance

An effective way to manage environmental risks and unknowns at acquisition is acquiring an environmental insurance policy applicable to the property to be effective upon closing. Premises Pollution Liability (PPL) policies are available from numerous insurers; policy terms, conditions, exclusions and premiums vary widely, so be sure to work with a well-informed broker and with experienced legal counsel.

The basic purpose of this type of insurance is to address the property and liability insurance coverage exclusions for pollution releases and/or exposures emanating from or occurring within the property. A properly placed PPL policy can provide money for bodily injury, cleanup costs, property damage, business interruption losses and for legal

defense costs. PPL policies are typically single-premium, with a term of five to 10 years; premiums, deductibles and available liability limits vary greatly by insurer. A policy can be acquired for

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a single site, and portfolio policies are available. Industry-specific and other special endorsements are offered by many insurers, and coverage is often available for known conditions in addition to unknown conditions. Also, many policies now include coverage for indoor environmental exposure.

A PPL policy is often an excellent way to address information gaps in due diligence and to enable financing and other investment when environmental conditions within a property may be unknown and even in certain circumstances where recognized environmental conditions (RECs) are known to exist. PPL policies are written in a fairly unregulated insurance environment, so policy language and terms vary significantly and must be carefully reviewed, and perhaps negotiated, to be sure that the intended coverages are secured. When shopping for a policy, it is important to be represented by legal counsel experienced in environmental matters that is also familiar with the property to be insured and experienced with placing environmental insurance policies.

Vapor intrusion

Vapor intrusion – the contamination of indoor air by volatile chemicals in soil and ground water – is a hot issue in Ohio. It occurs when vapor-forming chemicals migrate from any subsurface source into an overlying building, just like radon gas seeping into homes. Property owners and developers should know enough about vapor intrusion to converse intelligently with their environmental professionals about the risk.

To start, vapor intrusion results from the presence of vapor-forming

chemicals, including volatile organic compounds (VOCs), such as trichloroethylene and benzene; select semivolatile organic compounds; elemental mercury; and some PCBs and pesticides. In addition to the obvious health hazards of long-term exposure to toxic fumes, vapor intrusion can result in dangerous explosions. These risks can be exacerbated by the presence of other vapor-causing chemicals inside the building, such as industrial solvents and gasoline.

The Ohio EPA issued a guidance on vapor intrusion in 2010 that was significantly revised in 2016, reflecting a dramatic increase in national attention on the risks associated with contaminated indoor air. Under the Ohio EPA guidance, if an initial site assessment indicates the possible presence of VOCs or toxic substances in soil or ground water, a

further evaluation should be conducted to identify any potential vapor intrusion “pathway.” If a potential pathway exists, then subsurface soils (including sub-slab) and ground water should be

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tested to determine whether the pathway is “complete” and, if so, whether it presents an imminent hazard to building occupants. A further assessment of the exposure risk may be necessary depending on the sampling results. A qualified environmental consultant can

design and conduct an effective vapor intrusion assessment and recommend appropriate actions that comply with both state and federal standards.

Developers who stay abreast of new risk management tools and environmental risks can avoid costly and potentially deal-killing remediation issues. Environmental insurance is an effective tool for managing environmental risks and potentially even enabling transactions. Moreover, as the scientific understanding of vapor intrusion increases and Ohio EPA tightens its assessment and cleanup criteria, savvy developers must be prepared to address the risk. **P**

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