

LEGAL PERSPECTIVES

Navigating property laws & regulations

Evolving Environmental Risks & Tools



DAVID RICCO

Environmental due diligence and risk management is again changing and becoming more complex for some commercial property owners. Environmental regulators are looking more closely at the risks of human exposure to environmental contamination through vapor intrusion, and the possibilities of new vapor intrusion risks being created through soil migration and other potential exposure pathways; this means that sites that may have been considered lower-risk just a few years ago may now present certain potential risks and liabilities for owners and may be subject to increased scrutiny from environmental regulators.

So, does a Phase I Environmental Site Assessment (ESA) performed at the time of acquisition adequately address these risks and concerns? Maybe not. Acquisition due diligence is still the critical first step to minimizing and managing potential liabilities.

A Phase I Environmental Site Assessment completed in accordance with ASTM Standard E1527 by a properly licensed and insured environmental consultant prior to site acquisition is essential; but a “clean” Phase I report from a just a few years ago may not mean that a commercial property owner is currently out of the woods in terms of potential liabilities.

Tools for addressing evolving risks

Given the evolving regulatory environment, it may be prudent for a commercial property owner to retain an environmental consultant to update the Phase I ESA completed at the time of acquisition. In particular, consultants and commercial property owners should look at neighboring property uses, both current and historical, in light of current vapor intrusion regulations. The concern is for the potential for contami-

nation released off-site at a neighboring or nearby property to create an exposure risk on-site for occupants and invitees. To adequately address these risks, in addition to researching uses and performing physical inspections, an environmental consultant may also recommend certain soil and groundwater tests to look for evidence of contamination migration and to see whether conditions are right for such migration to occur, as well as indoor air quality evaluation and ongoing monitoring to be sure that exposures are not occurring on-site.

Engineering controls

When environmental contamination is known or suspected to exist, an environmental consultant may recommend the installation of certain engineering controls designed to prevent any on-site exposure of occupants and/or invitees to the contamination. Engineering controls create barriers to prevent exposure to contamination and often provide for the ongoing monitoring of on-site conditions.

Environmental insurance

Premises Pollution Liability (PPL) coverage is offered by a few of the largest

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insurance underwriters to commercial property owners – both as occupants and as landlords – and typically provides a broad spectrum of coverage for environmental liabilities, including exposure risks. The language of policies is not uniform among underwriters; offered coverages and policy action triggers vary, and specific policy terms may even be negotiable with some underwriters. Acquiring an appropriately tailored and effective PLL policy is a process that requires an understanding of the potential risks for a given site as well as the terms of the PLL policies

offered, and perhaps some negotiation. Additionally, owners of multiple commercial sites may benefit from a PLL portfolio policy, which typically offers the ability to spread coverage limits and deductibles over a portfolio of properties, often resulting in a substantial degree of coverage at very economical rates for each property.

What to do

Managing the emerging potential environmental liability risks facing commercial property owners requires proactive involvement of legal, insur-

ance and technical professionals, not just at the time of acquisition, but also throughout the duration of ownership. Landlords and even owner-occupants of commercial property always face the risk of becoming ensnared in a situation caused by the misdeeds of others. Don't wait until environmental regulators contact ownership or a problem emerges. Instead, periodically reevaluate and manage these risks proactively. **P**

David Ricco is a partner in the real estate practice group at Walter | Haverfield. For more information, visit www.walterhav.com.

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