

CONTAMINATED PROPERTY DOESN'T HAVE TO MUDDY UP YOUR DEAL

TIPS FOR THE SAVVY BUYER/SELLER

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Commercial real estate transactions often occur under fast-paced conditions with multiple moving parts. Contaminated properties can bring a layer of complexity that requires specialized attention, but I have found in my practice that when parties to a transaction face this potential roadblock, it does not have to short circuit the deal. There are some relatively simple and practical ways to get your arms around the most important environmental risks early on so that you can be well positioned from the start as you move through the transaction.

CONSIDER ENVIRONMENTAL ISSUES AT EARLIEST STAGE

Get a leg up on property conditions

Find out what you can about the property conditions before due diligence begins to help prevent surprises during the due diligence period or in later stages of the deal. Get your hands on relatively cheap and readily available information by doing a FOIA request and a regulatory database search. These efforts will arm you with some level of useful information about historic and existing land use, past and current operators, and prior or existing cleanups/regulatory cases at or near the property.

Have an informed due diligence plan

Taking into account what you have or have not discovered about the property in advance, make sure you have enough due diligence time in the contract, a right to extend, and a right to terminate. You also want the right to perform intrusive work. In addition, ensure that you are obtaining all property documents, which are not simply environmental-type reports (i.e. phase I, phase II, and tank closure reports). Consider documents such as geotechnical reports and building plans, which are items that people frequently forget to look at but can identify the presence of things like product in soil and site features relevant to your environmental assessment (i.e. tanks, pits, and trenches).

And if you're selling the property, you need to know what you are putting on the table. Understand what reasonable buyers might ask for in order to get comfortable with the purchase, and how to satisfy them without allowing them to conduct a fishing expedition on your property. Draft the contract so that you are in control of whether you will receive any environmental data generated by the buyer during due diligence. You may ultimately choose to ask for the data for practical reasons, but don't let the buyer just walk away and hand you Pandora's Box.

Don't let environmental insurance be an afterthought

Consider pollution legal liability insurance early on. It's actually more affordable and more available than most people think. If you are buying a property that's already gone through a cleanup, for example, carriers may issue a PLL policy based on the prior regulatory sign-off. And if that's the case, you may want to rethink whether to perform any due diligence. But certainly, in the more traditional scenario where you've gone through due diligence, and either received a clean bill of health or only identified a discrete set of known issues, this is a good time to price out a PLL policy to see whether it's a worthwhile investment to narrow your exposure. Keep in mind that the market is always fluctuating on these policies, and buyers and sellers will often agree to split the premium.

As to you sellers that may still have your head in the sand on a property you're afraid to dispose of due to possible contamination, look for your pre-1986 (pre-pollution exclusion) commercial general liability policies because they frequently cover environmental contamination, and are frequently assignable to a buyer in a deal.

STAFF YOUR ENVIRONMENTAL TEAM PRODUCTIVELY

Spend a few bucks in the short term for long-term benefits

It's obvious that staffing a project properly is worth its weight in gold. Nobody wants to overstaff their transaction and receive five different professional bills each month. But, it's probably worth buying a few hours of time from an environmental lawyer that is knowledgeable on the environmental requirements applicable to the property and can help you get staffed appropriately. I can't tell you how many times I've reviewed a set of documents that have been presented to me as a costly environmental problem, only to find that the facts fit squarely into a regulatory scheme that allows you to leave the contamination in place, or can be argued away as a background issue, all at a price tag that is a fraction of what the parties thought.

And, while you're buying a few hours of time from environmental counsel, check with him or her as to whom they think the right environmental consultant is for the job, because consultants have different practice strengths. Make sure your consultant is not only skilled, but is also presents well in a room, since he or she might need to make the case to the buyer's consultant that things are not as bad as they think. On the flip side, hire a consultant who is well-versed in the nuances of the environmental require-

ments and can poke the right holes in the seller's cleanup to make sure that you are not getting a raw deal.

I'll touch on financial incentives below, but consider having someone on your team that knows all the relevant incentives and who can tell you whether any of them are applicable to your project, because they can, at times, be the saving grace on an otherwise cost-prohibitive deal.

There is no "I" in team

Expect and encourage collaboration between your environmental counsel, environmental consultant, and other members of your team. Consultants sometimes tend to forget that there are business consequences to the type of cleanup that is ultimately implemented. Counsel has your deal structure and end game in mind; you want the cleanup tailored to your deal needs, and everybody needs to be aware of the options and to ultimately get on the same page.

MIND YOUR RISK TOLERANCE, BUT DON'T MISS THE DIAMOND IN THE ROUGH

Use regulatory structure to your advantage

Regulatory mechanisms can reduce cleanup costs by permitting you to leave contamination in place under certain controls that are protective against direct exposure. How you make the best use of them, of course, will vary depending on your deal and the end use of the property. Buyers will frequently allow their site improvements to serve as the control at a great cost savings to the seller.

Keep in mind that controls are frequently permitted on properties regardless of use, even residential use.

Explore financial incentives

Clearly, if the deal involves an environmental problem, there will be additional costs incurred to get the project completed. But don't forget that there are federal and state incentive programs that reimburse cleanup costs, or provide tax credits or other tax incentives, which can offset not only environmental costs, but a broad array of development costs including for acquisition, infrastructure, and construction. People often write off these programs as too cumbersome, but that is not always the case. So, as I mentioned above, get someone on your team that has the ability to give these incentives the right consideration. And, because programs like these are often in flux and have very specific application deadlines, if someone is going to take a look, make sure they know what they are doing.