

Environmental Issues in Buying Real Estate

Last month I wrote about premises liability, i.e. the liabilities and duties associated with business operations and the various types of individuals who enter onto the premises. This month I would like to highlight some of the environmental issues of real estate ownership stemming from the past use of a property.

Most people could easily recognize a potential problem with a property formerly connected with an environmentally damaging use. Such as sites used for lead smelters, dumps, or similar obviously “dirty” business uses. But what a lot of people do not realize when it comes to real estate purchases, is that some sites that seem to be clean may still contain environmental issues. For example, a site used as a dry cleaners purchased by a new owner for an unrelated use, such as a retail store.

Well, what most people don’t recognize is that dry cleaners use regulated chemicals for cleaning which have to be disposed of properly under environmental regulations. If an unscrupulous dry cleaner may have disposed of chemicals and wastes improperly, say by pouring them in a drainage ditch on the property, it may not be readily apparent to the potential purchaser that chemicals may be present in the soils on the property.

A recent *Dallas Morning News* article highlights a worse case scenario. The story covers that case of Lucille’s Florist in Cockrell Hill. The small town florist recently had the shop they operated out of since 1951 burn to the ground. Unfortunately, they did not have insurance and were forced to find new quarters quickly to maintain the business and family income. So, they moved across the street to a former gas station. The new shop is small, and Lucille’s wants to expand the building and remove the gas pumps still in place out front. The problem is that the original underground fuel storage tanks are still in place and must be removed before the city will issue a permanent occupancy certificate or allow major changes to the property. With an estimated price tag of \$15,000 to remove the tanks and remediate the soil, it’s an expense the small shop can’t bear at this time. Fortunately, the town has granted a one year extension for Lucille’s to develop a plan to remove the tanks.

This type of problem is common with commercial real estate. An innocent purchaser comes onto a property without fully investigating the conditions present. In this case, a former gas station is definitely a suspect property for the underground tanks as well as contaminated soil from used oil containers and any leaking which may have occurred from the tanks. Further, if the groundwater has been contaminated by the underground tanks, then the costs of removing contaminants (called “remediation”) could be greatly increased beyond the \$15,000 already estimated.

Often the property in question contains problems which are not as apparent as a former gas station. In my practice, I have come across situations where a property is currently being used for construction materials and equipment storage, which had no obvious problems from a visual inspection of the surface. However, since it was in an industrial area, a Phase I survey was performed which discovered from the state environmental

records that a large underground storage tank was present on the property, had not been removed and had leaked in the past to contaminate surrounding soils. Purchasing this property was not out of the question, however, the costs of fixing these problems needed to be considered when negotiating the purchase.

Additionally, buying a property with a building on it or buying the building itself can present environmental issues as well. Asbestos was commonly used as fireproofing, wallboard, tile and cove base throughout buildings until the 1980s. Any anticipated purchaser should investigate the possibility of asbestos being present. The presence is of concern not only for employee safety reasons, but also for proper disposal in the case of remodeling of the property. Also, some old water coolers contain lead piping that has to be disposed of properly, transformers on the property may contain PCB containing oils, and lead based paint may be present on surfaces.

Even businesses and individuals contemplating leasing real estate should also be concerned. For building issues, such as asbestos or lead based paint, if the lessee is going to remodel a building, these environmental liabilities become the lessee's under environmental regulations. For land based issues, such as contaminated soils, if the lessee is going to improve the property, then these liabilities are also become the lessee's responsibility.

While environmental issues are a concern for the real estate purchaser or lessee, they can be properly handled. Of course the best time to discover these issues is prior to purchase or lease and incorporate the costs and liabilities into negotiations.

How to spot potential problems:

1. Conduct a title search or obtain title insurance to determine previous owners and uses of the property. Although they will probably exempt environmental issues not discovered at the time of issuance, they should due a preliminary investigation.
2. If a questionable owner or use existed in the past, have an environmental investigation performed. Either a Phase I report.
3. At a minimum, walk the property and look for telltale signs such as bare patches of ground, containers on the property (55 gallon barrels or other containers present on the property), oily residue on any low spots on the property, abandoned equipment on the property, signs of dirtwork on the property (new excavations unassociated with a previous use of the property).
4. Look at neighboring properties as well to determine if they have environmentally sensitive uses or if they have witnessed some kind of environmental dumping on the property.
5. Even undeveloped property may have environmental issues due to illegal dumping.
- 6.