

Environmental Hazards in Purchasing Real Estate

Recently, the *Dallas Morning News* contained an interesting story of a small business owner's real estate troubles. The story highlights the case of Lucille's Florist in Cockrell Hill. The small town florist's shop recently burned to the ground after nearly 50 years in the same location. 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 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, 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 and continue to conduct business.

This type of problem is all too common with commercial real estate. An innocent purchaser comes onto a property without fully investigating environmental conditions on the property. In this case, a former gas station is definitely a suspect property for environmental liabilities. In addition to the underground tanks, there may be contaminated soil and/or groundwater from other automotive service activities such as used oil storage, old and new battery storage (with lead and sulfuric acid contained within), antifreeze disposal, and the presence of used tires, and brake linings.

Most people could easily recognize a potential problem with a property formerly connected with an obviously environmentally sensitive use such as a gas station. Sites used for lead smelters, dumps, or chemical manufacturing are obviously "dirty" business uses. But what a lot of people do not realize is that some sites that seem to be clean may still contain environmental issues.

In my practice, I have come across situations where a property is currently being used for construction materials and equipment storage, and had no obvious problems from a visual inspection of the surface. However, since it was in an industrial area, an environmental investigation was performed. The investigation discovered from the state environmental records that a large underground storage tank was present on the property and had contaminated surrounding soils. Purchasing this property was not out of the question, however, the costs of fixing this problem had to be considered when negotiating the purchase.

Buying property with a building on it or buying the building alone 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 of a building should investigate the possible presence of asbestos containing materials. The presence of asbestos 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 responsibility of the remodeling party under environmental regulations. For land-based issues, such as contaminated soils, if the lessee is going to improve the property, then these liabilities can also become the lessee's responsibility. Additionally, if a lessee conducts a business using similar hazardous materials to those present before purchase, then it may become a situation where a lessee must prove he did not contribute or aggravate the contamination in order to escape liability. This often equates to expensive environmental investigation and testing.

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 a title insurance policy will probably exempt environmental issues not discovered at the time of issuance, they should due a preliminary investigation and may come across questionable activities.
2. If a questionable owner or use existed in the past, have an environmental investigation performed. A "Phase I" investigation conducted by an environmental services firm consists of a site inspection and records check on the property. They will look at national and state environmental records and will be able to identify most environmental issues from these reports. If the Phase I identifies questionable uses of the property and a history of contamination a Phase II investigation may be recommended which will conduct soil and groundwater testing to verify the presence or absence of hazardous materials.
3. At a minimum, walk the property and look for telltale signs such as bare patches of ground, containers on the property (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). Be especially mindful of potential illegal dumping by someone other than the owner of the property. If it is a commercial property which has not been used recently or not developed at all, then the owner may not be aware of dumping activities on 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. Some types of hazardous materials seep through the soil and groundwater to migrate to neighboring tracks.

While cleanup costs are probably going to be the responsibility of the polluter, proving the source of the pollution after a purchase can be expensive and time consuming.

5. Remember, even undeveloped property may have environmental issues due to illegal dumping.

This information is intended as general legal advice and may not apply to your particular situation. If you have any legal questions you would like answered in this column or ideas, please forward them to me at erbarrett@justice.com, fax number (214) 722-0025 or by mail at the Law Office of Edward R. Barrett, 4451 FM 2181, Ste. 100, PMB 125, Corinth, Texas 76210.