

Closing the Deal on Contaminated Sites – Solutions for Real Estate Professionals

Steven D. Urgo, Esq.

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urgos@whiteandwilliams.com

Atlantic City, New Jersey



Presenters

- **Jim Vetter – Marsh Environmental Practice**

- National Environmental Leader
 - Environmental Insurance Solutions
 - Risk Transfer Options

- **Sue Boyle – GEI Consultants**

- Senior Manager/Program Developer
 - Overview of Brownfield Programs
 - Remediation Process

Transfers of Distressed Properties - Overview

I. The Problem –

- Stigma
- Liability
- Valuation

II. The Opportunity

- Location
- Redevelopment



III. Solutions in Transferring Distressed Properties

- Mitigation/Shifting of Risk
- Maximizing Funding/Tax Incentives
- Potential Liability for Real Estate Professionals

Why Bother??

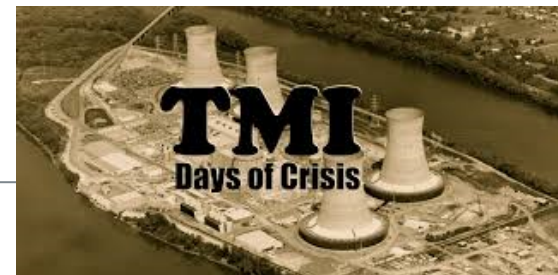


- Recognize potential liability exposures in dealing with contaminated sites;
- Forego sites with issues (difficult to avoid) or capitalize on value added/resource for clients;
- Provides opportunities to capture financial rewards in exchange for acceptance of additional risk;
- If you can control costs you can control risks!

The Problems

Stigma - Based on Perceptions

- *Reduction in value caused by public perceptions relating to onsite or offsite property contamination;*
- *Perspective purchaser's subjective perception to reduce willingness to purchase or diminished value due to negative perception rather than contamination;*
- *diminution in value of real property resulting from the marketplace fear perceived to have been created by contamination*



Types of Stigma - Residential

- Old or leaking fuel oil UST;
- Mold;
- Termites;
- High Tension Power Lines;
- Nearby Landfill;
- Adjacent Gas Station;
- Adjacent Waste Site/Formerly Remediated Site;
- Defective Construction – EFIS;
- Heinous Crime.



Types of Stigma - Commercial



- Former Industrial Uses;
- On and Off Site Storage/Disposal;
- Mold, Asbestos, Lead Based Paint, PCBs;
- Impacted Groundwater;
- Stigmatized industry – Dry Cleaners;
- USTs; ASTs and other industrial equipment.

Valuation



The Uniform Standards of Professional Appraisal Practice (**USPAP**) - standards for the appraisal profession.

Advisory Opinion 9: The Appraisal of Real Property That May Be Impacted by Environmental Contamination (AO-9), 2002.

Unimpaired Value: The market value of a contaminated property developed under the hypothetical condition that the property is not contaminated.

Impaired Value = Unimpaired Value - Cost Effects (Remediation and Related Costs) - Use Effects (Effects on Site Usability) - Risk Effects (Environmental Risk/Stigma).

Diminution = Unimpaired Value – Impaired Value.

Diminution = Cost Effects (Remediation and Related Costs) + Use Effects (Effects on Site Usability) + Risk Effects (Environmental Risk/Stigma).

Effects of Time/Cleanup on Valuation

- Perceived Value/Stigma changes
 - Before investigation/cleanup:
 - Uncertainty about nature and extent of contamination
 - Perceived risks and adverse property impacts at a maximum
 - During cleanup
 - Knowledge increases = risk decreases = value increases
 - After cleanup
 - No further action, regulatory closure
 - Risk declines to near market levels
 - Value increases
 - Unimpaired levels



Time = \$\$



- Increase Valuation – Investigative Phase

- Phase I and Phase II

- Sampling takes time – may not reflect reality

- Environmental Insurance

- Can be placed if Phase I has no RECs or Phase II quantifies contamination

- Contractual Risk Transfer –

- Could be limited due to financial integrity of indemnitor

- Escrow – could be insufficient to cover cleanup

Cleanup – Who Pays?

- Environmental Statutes – Generally = Strict, Joint, Several and Retroactive Liability
 - Strict – Without Fault – Non Negligent Party;
 - Joint – all entities involved in creating contamination;
 - Several – you can be liable for entire cleanup even if other parties were involved;
 - Retroactive – liability today for events that took place prior to inception of law.



CERCLA – Responsible Parties – 4 Categories

1) Current Owners / Operator.

Excludes property acquired through foreclosure or a security interest, but includes current owners even if they made no contribution to the hazardous release. In *NY v. Shore, Shore*, a landowner who had purchased a contaminated site with the intention of cleaning it up and developing it, was held liable for clean up costs as he was aware of the condition of the land when he purchased it (and that dumping was still on-going at time of purchase).

2) Past Owner / Operator at time the pollution occurred.

Prior owners / operators will be held liable for any release of toxic substance that occurred during their possession / control of the land. Note that even a party who does not / did not own a facility may be liable as an "operator" if they had substantial control over the activities that lead to the release of hazardous substances. (See *US v. Bestfoods* (524 U.S. 51, 1998))

CERCLA – Responsible Parties – 4 Categories

3) Arrangers

- Any person who arranged for disposal of a hazardous substance at a site. Under the "Useful products doctrine" if you are not arranging for disposal, then you are out of the system. Thus, a producer of a chemical that is sold for use (not disposed of) is not an arranger.

4) Transporters

- Any person who transported a hazardous substance to the site. Transporter liability is premised on the transporter playing some role in the selection of the site where the hazardous substances are taken. (*Tippins, Inc v. USX Corp.*, 37 F.3d 87 (3d. Cir. 1994). Additionally, if the transporter moves a substance from one contaminated area of a parcel to another, uncontaminated area, they will still be held liable. (*Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.* 976 F.2d 1338 (9th Cir. 1992).

CERCLA Defenses

- Act of God / Act of War
 - Courts have held these defenses do not apply to events that could be anticipated, such as heavy rains, or earthquakes; rather these defenses would be limited to an exceedingly rare and unforeseen set of circumstances.
- Third-party defense
 - This defense will only apply if (1) the PRP can show they exercised due care and (2) there was no contractual relationship with the egregious third party. Thus, this defense will not apply if the dumper was an employee, agent, parent company, subsidiary, or anyone in a contract with the PRP. This defense could apply in the case of a midnight dumper - unbeknownst to you, someone secretly dumps toxic waste on your land, and you had no reason to suspect this might be happening.
- Innocent Landowners
 - In response to criticism, amendments to CERCLA known as SARA include a defense for innocent landowners who "undertook all appropriate inquiries" before purchasing the land, and "had no actual or constructive knowledge" of the hazardous substance.



Resource Conservation and Recovery Act



- What is the purpose?
 - to provide a “cradle to grave” framework for managing solid and hazardous waste from generation to final disposal
- Who must comply?
 - Any party that generates, transports, stores or disposes of solid and hazardous waste – regulates underground storage tanks (USTs).
- Who implements the program?
 - the EPA
 - States: with EPA approval, some states implement and manage solid and hazardous waste management programs in lieu of the federal RCRA program

RCRA - Goals

- Protecting human health and the environment from hazards posed by waste disposal;
- Conserving energy and natural resources through waste recycling and recovery;
- Reducing the amount of waste generated; and
- Ensuring that wastes are managed in an environmentally safe manner.



RCRA Liability



- RCRA § 7002(a)(1)(B)
 - Any person can sue in federal court against any person, "who has *contributed* or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." (emphasis added).
 - A plaintiff must establish:
 - (1) the site may present an imminent and substantial endangerment to health or the environment;
 - (2) the endangerment stems from the handling, storage, treatment, transportation or disposal of any solid or hazardous waste; and
 - (3) the defendant is contributing to or has contributed to such handling, storage, treatment, transportation or disposal.

Clean Water Act



- What is the purpose?
 - The stated objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.
- What is the scope?
 - All point sources that discharge any pollutants into the waters of the United States must first obtain a permit under the Act.
 - 1987 amendments adopted best practices for non-point source pollutants.
- Who implements the program?
 - the EPA
 - With EPA approval, states can issue NPDES permits within the state. The EPA can revoke a state's permitting authority if the program is not as stringent as the federal program.

STATE LAW

- **NJ SPILL ACT**

- Spill Act imposes joint and several liability on any person or entity *in any way responsible for the discharge* of a hazardous substance. See *N.J.S.A. 58:10-23.11g(c)(1)*. No petroleum exclusion

- **PA ACT 2 – Land Recycling Act**

- Voluntary cleanup with multiple cleanup standards

- **ISRA** - Triggered by change in ownership of “industrial facility”

- **New York State Navigation Law, Article 12; Oil Spill Prevention, Control and Compensation**

- Strict liability for discharges of oil



Common Law v. Statutory Law

Common Law

- Rules are created by judges through court decisions.
- Because common law is continuously shaped by court decisions, common law can vary between different jurisdictions.
- Liabilities stem from personal injuries or property damage caused by environmental conditions.

Statutory Law

- Rules are created through legislative procedures.
- Statutes provide uniform, national frameworks for pollution control, e.g. Clean Water Act.
- Liabilities stem from national pollution control policies.



Common Law: Nuisance

- *Definition:* An action brought against somebody for interfering with one's use and enjoyment of property
- *Application in environmental law:* In Florida, a court ruled that an oil company unreasonably interfered with the ability of neighboring land owners to peacefully occupy their land because of noise, vibrations, and emissions from the plant.



Common Law: Trespass



- *Definition:* unauthorized invasion of a person's land
- *Application in environmental law:* a defendant was held liable for trespass when defendant's sludge seeped on to plaintiff's land and yet defendant did nothing to stop it.

Negligence

- Elements in Negligence; each of which must be proven by the Plaintiff (the one suing) with preponderance of evidence:
 1. Duty of Care
 2. Breach of Duty
 3. Proximate cause
 4. Causing Harm



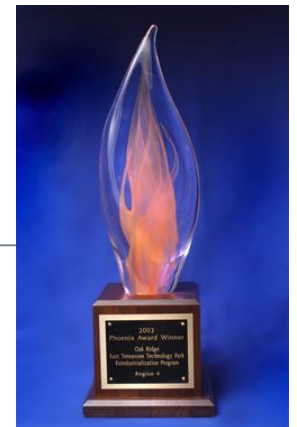
Opportunities Involving Sale of Distressed Properties

- Location, location, location
 - Former sites or planned redevelopment in desirable areas
 - Close to major transport hubs;
 - Major metropolitan areas;
 - Corner properties well suited for current desired uses
 - Franchise/Retail
 - Banks
 - Drugstores



Showcasing Redevelopment

- Phoenix Awards™
 - Created in 1997
 - Honors individuals and groups working in solving critical environmental/social challenges, transforming contaminated areas into new/sustainable projects.
- Big Apple Brownfield Awards
 - Promotes excellence in Brownfield redevelopment projects in NYC
- People's Choice Award for Brownfields - Chicago



Showcasing = Advertising

- Thropp Brothers Machine Shop - East State Street – Trenton
 - Acquired by the city in 1988 in a foreclosure sale.
 - Redeveloped into Greg Grant Park
 - 1.45-acre park with brightly colored playground, basketball court, and picnic pavilion.
 - Dilapidated row homes and old Greg Grant Park across the street were redeveloped into 20 affordable single-family homes known as East Trenton Homes.
 - Park cleanup/redevelopment - \$1.7 million.
 - Home redevelopment - \$4.3 million.

Thropp

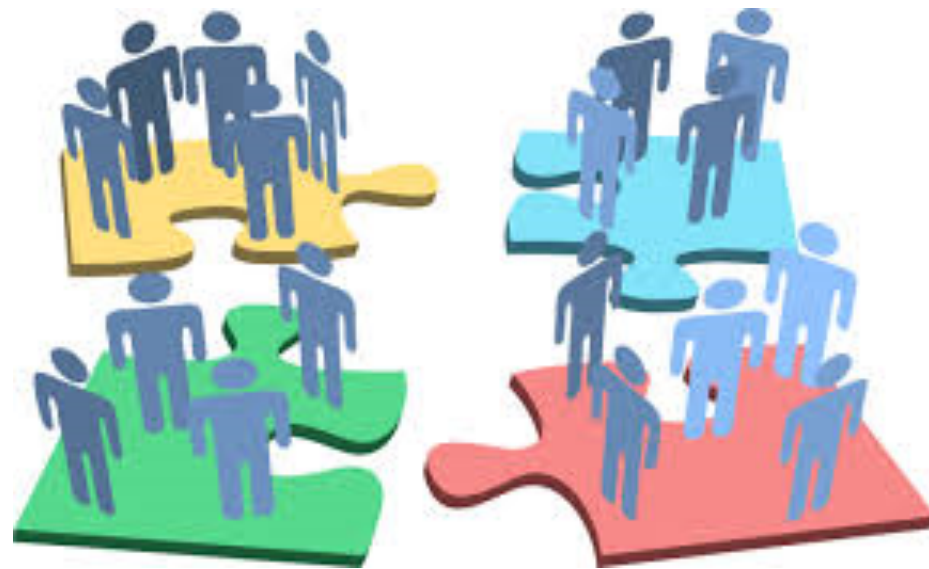
Before

After



Partnering with Stakeholders

- Who are the Stakeholders?
 - Community
 - Government
 - Industry
 - Customers
 - Investors
 - Customers



Financing – show me the \$\$

- **Thropp Bros. Site:**

- **\$1.7 million – Park**

- \$350,000 = state Green Acers Program
 - \$250,000 = County Grant Program
 - \$500,000 = federal Community Block Grants
 - \$301,303 = EPA Grants



- **\$4.3 million – Homes**

- \$3.5 million = Grant Balanced Housing Grant/Loan Program
 - \$85,000 = Regional Contribution Agreement Funds
 - \$712,626 = Better Community Housing of Trenton – “100 Homes”
 - \$260,000 = County

Grant Programs – New Jersey

- New Jersey =
<http://www.nj.gov/dep/srp/brownfields/funding.htm>
 - Hazardous Discharge Site Remediation Fund;
 - NJ Environmental Infrastructure Trust;
 - NJ Economic Development Authority;
 - NJDEP Section 319 (h) Watershed Grants;
 - Brownfield Redevelopers Reimburse Agreement



Grant Programs – New York

- New York =
http://www.dec.ny.gov/docs/remediation_hudson_pdf/bfttoolbox.pdf
 - Dep't of State – Brownfield Opportunity Areas Program;
 - Brownfield Cleanup Program;
 - Environmental Restoration Program;
 - Technical Assistance Grants
 - Clean Water State Revolving Fund



Grants – Pennsylvania



- PA =
 - <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-98042/Brownfield%20Development%20Guide.pdf>
 - PA Dep't of Community & Economic Development;
 - Industrial Sites Reuse Program
 - Business in Our Sites Loans
 - Pennsylvania Infrastructure Investment Authority
 - Brownfield Redevelopment Loans

Grants - Federal

- EPA = www.epa.gov/brownfields/grant_info/index.htm.
- U.S. Department of Agriculture (USDA) Business and Industry Guaranteed Loans
- US Economic Development Administration (EDA) Grants
- U.S. Department of Housing and Urban Development (HUD) Community Development Block Grants
- New Market Tax Credits
 - Provides tax incentives to investors to invest in low income communities
 - Expired in 2014 but is bill introduced to extend

Solutions

- **Environmental Due Diligence**

- All Appropriate Inquiry = Can Support Innocent Landowner Defense
 - Should be requirement on all commercial properties
 - Consideration for residential properties
 - Older property?
 - ASTs or USTs?
 - Adjacent/downgradient from commercial sites?
 - Former agricultural site?
 - Title issues?
 - Wetlands?
 - Urban Fill?



Environmental Due Diligence – Residential

- *State Farm Fire & Cas. Co. v. Shea*, No. A-4124-10T1, 2012 WL 4464297 (N.J. Super. Ct. App. Div. Sept. 28, 2012);
 - Residential Property Owner held liable under Spill Act for fuel oil that migrated from his property onto adjacent site.
 - Prior to closing, purchaser observed vent pipe in backyard but didn't investigate – never used fuel oil.
 - While Spill Act imposes no affirmative duty to inspect site, court suggests that observation of fill pipe created duty to inquire.
 - Shea could have avoided Spill Act Liability had he performed environmental assessment prior to purchase.



Solutions

- Shifting Risk to Insurers

- What is the Risk?
- Is Risk limited in time?
- What is cost of Risk vs. cost of Insurance?
- Is remedial funding source required by regulator?
- Are there sufficient assets to protect against Risk?
- What specific type of insurance is required?
- What Risks may not be covered by Insurance?



Solutions

- Allocating Risk Between Buyer/Seller – Contractual Risk Transfer
 - Establish a baseline;
 - What is the demarcation line?
 - Pre vs. Post Closing
 - Who will pay?
 - What triggers payment?
 - Incurring costs v. obligation to incur?
 - Is Indemnity provision valid and binding??
 - Does Indemnitor have sufficient resources??



Potential Liability Exposure – Distressed Sites

- Fiduciary relationship
 - Broker's duty to seller similar to trustee's duty to beneficiary;
 - Broker required to act with utmost good faith toward seller;
 - Can be creature of common law or statute;
 - Certain jurisdictions may recognize legal duty owed to buyers.

Potential Exposure for Environmental Conditions

- Realtor Mag - Top 10 Legal Issues Facing Brokers
 - **No. 1** = Misrepresentations /omissions re: environmental problems;
 - Generally may rely on seller's statements unless reason exists to doubt truthfulness;
 - Some states, i.e., California, require realtor to inspect and disclose;
 - **No. 7** = Environmental Issues
 - Asbestos, lead-based paint, groundwater contamination – failing to recommend consultant to evaluate

Duty to Disclose Known Conditions

- New Jersey - Strawn v. Canuso, 140 N.J. 43, 62 (1995)
 - Imposed upon residential real estate developers and their agents obligation to disclose to prospective purchasers of new residential construction any adverse, but not readily observable, off-site conditions.
 - Superseded in certain respects by New Residential Construction Off-Site Conditions Disclosure Act, *N. J. S. A. 46:3C-1, et seq.*
 - Realtors not “learned professionals” under CFA – De Pompe v. Weichert Realtors, No. L-1834-08, 2011 WL 2566132 (App. Div. Jun. 30, 2011).



Duty to Disclose – still viable

- *Nobrega v. Edison Glen*, 327 N.J. Super. 414 (App.Div. 2000)
 - Plaintiffs bought condo units 2 miles from Superfund Site
 - Plaintiffs learned of Superfund Site after sale;
 - Re-sales dwindled/40% depreciation
 - Held - sellers of new residential properties can be held liable under the Consumer Fraud Act for failing to inform the buyers of nearby Superfund sites.
 - Disclosure Act does not affect “disclosure requirements for conditions off-site contained in . . . any other statutory provision.”



Potential Exposure to Real Estate Professionals

- SCOPE – Standard of Care Ordinarily Practiced and Exercised
 - NJ – **Specialist** = special degree of skill normally possessed by average realtor licensed in NJ who has devoted special study and experience in the field of real estate sales (*Lentz v. Mason*, 961 F. Supp. 709, 720 (D.N.J. 1997));
 - NY - Duty to exercise that degree of diligence, judgment, care, and, skill **ordinarily used** by persons of common capacity engaged in the same business (*Hiller v. Helen L. Lips Realty, Inc.*, 102 Misc. 2d 367, 369, 423 N.Y.S.2d 406, 407 (Sup. Ct. 1979));
 - PA - Duty of care includes **duty to disclose** presence of known defects, e.g. presence of ureaformaldehyde foam insulation (*Roberts v. Estate of Barbagallo*, 366 Pa. Super. 559, 563, 531 A.2d 1125, 1127 (1987)).

Potential Liability - Failure to Investigate

- *Lentz v. Mason*, 961 F. Supp. 709, 720 (D.N.J. 1997).
 - Owner entered into listing agreement with Fox & Lazo referencing obligation to check credit;
 - Fox & Lazo secured tenant/perspective purchaser
 - Tenant leased site, ultimately evicted, no credit report
 - Tenant allegedly contaminated site
 - Motion to dismiss for CERCLA, Spill Act = successful
 - Motion to dismiss for breach of contract/negligence = unsuccessful
 - Duty to check that buyer is attending to contractual obligations;
 - Duty to communicate with bank to ascertain status of application;
 - Duty beyond mere skills of salesperson



Potential Exposure to Real Estate Professionals

- Failing to Disclose Known Environmental Conditions
- Failing to Investigate Reasonably Observable Environmental Conditions
- Failing to Advise/Counsel Seller/Buyer to Retain Environmental Consultant



Questions??

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