

ENVIRONMENTAL ISSUES IN SOUTHWEST FLORIDA

By Steve Hilfiker

There are numerous potential environmental concerns that can affect commercial real estate transactions. In southwest Florida that are few heavy industrial or manufacturing businesses so most of the concerns stem from service industries such as dry cleaners, gas stations, print shops, and other commercial and light industrial facilities that utilize hazardous substances.

The purpose of this article is to increase awareness for local commercial investors and help them to resolve potential environmental concerns that may prevent the successful acquisition of real estate in southwest Florida.

We are living in a society that is dependent upon chemicals. The vast majority of environmental issues in this market stem from underground fuel storage tanks, or from chlorinated solvents discharged from dry cleaning facilities. There are also numerous instances of improper waste disposal on vacant properties, chemicals from agricultural and golf course maintenance facilities, and small quantity hazardous waste generators such as any facility that utilizes waste oil, paints, solvents, and similar chemicals in their day to day operations.

Chemicals enter the environment in one of three ways. Chemicals are either improperly stored, improperly handled, or improperly disposed of, leading to contamination of the soil and groundwater resources of the state. There are very strict laws designed to protect such resources and strict, joint and several liabilities are commonly assigned to potentially responsible parties when the Florida Department of Environmental Protection needs to enforce a regulated discharge of chemicals.

The Love Canal and other high profile environmental cases prompted the Congress in 1980 to pass a law commonly known as "Superfund". Amendments to the Superfund Law in 1986 created a defense known as the "innocent purchaser status" (which is also known as the "innocent land owner defense"). This defense is available to owners of property who can demonstrate that "all appropriate inquiry consistent with good commercial practice" (as stated in the law) has been performed on the subject property prior to the party taking title to the property. Appropriate inquiry is a Phase I Environmental Site Assessment, performed diligently in strict accordance with ASTM Standard Operating Procedures (E1527-00 Standard Practice for Phase I Environmental Site Assessments). This is the nationally recognized standard operating procedure for Phase I's. It is important to have a Phase I performed by a stable firm that will be around to defend their work if contamination is ever discovered on a property. The value of a Phase I ESA to an investor is to be able to utilize the report as part of a defense (an innocent purchaser defense) to help fend off enforcement action by a government agency in the future if contamination is later discovered on the subject property.

Phase I ESA's are typically required to obtain financing. The process involves diligent regulatory research, historical investigations, and detailed site observations in an effort to identify evidence of environmental impact. If such evidence is identified in a Phase I, a Phase II is performed to collect soil and groundwater samples and determine if contamination is present

on the property at levels that exceed the government standards. If contamination is confirmed, then more intensive site characterization and remedial planning strategies are performed to try to determine the most cost effective solution. A cleanup is not always necessary; there are many environmental risk management strategies available. Depending on the goal of the investor (which may include a purchase or sale decision, financing, regulatory clearance, property tax reduction, prevention of third party liabilities that may be caused by off site migration, or obtaining insurance) there is a specific strategy to be applied that can usually meet the investor's objectives.

When considering an investment in southwest Florida, prospective purchasers should understand the potential environmental issues that could lead to liability. Evidence of environmental impact is not always apparent, so a comprehensive study of historical, regulatory, and current site activities should be conducted.

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