

Strategies to Manage Environmental Risks

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All properties are different. There is a diverse bundle of characteristics for each property and a different set of circumstances for each transaction. Due to these variations, a specific strategy to manage environmental risks should be prepared for each property and real estate transaction. Just as each investor needs a financial plan, each owner or manager of real estate should develop and employ environmental plans.

There are approximately 30,000 properties in Florida that have reported contamination to the FDEP. There are approximately 52,000 registered fuel storage tanks in Florida. There are tens of thousands of generators of hazardous waste, including dry cleaners, automotive facilities, manufacturing plants, industrial properties, agricultural facilities, golf course maintenance facilities; these are the usual suspects. There are many other businesses that also must deal with this issue on a smaller scale such as, print shops, photo labs, dental offices, medical facilities and other small quantity generators of hazardous materials.

Our society is dependant on the use of chemicals. Inappropriate management of chemicals has killed people. You may occasionally come across a person who thinks the process of environmental assessment is a waste of time and money on some properties; an unnecessary task just to satisfy the underwriters in a large financial institution. But, when buried drums are discovered on a remote former agricultural property planned for development of single family homes that will have numerous lakes for water retention and irrigation wells (both of which could create exposure to the contamination if undetected), the value of environmental assessments becomes evident and makes believers of the few who don't understand why we do what we do.

Developers have to manage every penny or their project can quickly spin out of control. The family business who has owned and operated their facility on the same property for decades and is finally selling to obtain their retirement funds must strive to obtain the maximum purchase price (which means minimizing closing costs) to protect their life savings. Real estate brokers need to prevent environmental problems from killing the transaction that they've invested thousands of dollars of their own money to advertise and hundreds of hours of their own time in brokerage activities. They must obtain their commission, reimburse their advertising expenses, and compensate themselves for their time.

Commercial lending has become increasingly competitive. Environmental assessments are not always required. Low cost assessments may miss critical evidence. Improper diligence may ultimately lead to foreclosures if the borrower can't pay for contamination that may exist on the property. Lenders are rarely concerned about liability due to the Asset Conservation Act of 1996, but the security on their loan is always at risk if the borrower cannot afford to pay remedial

expenses. Foreclosures occur in such cases and the bank is left with an impacted property that will rarely cover the balance on the loan.

Environmental insurance emerged to protect lenders, in these circumstances. Insurance has its benefits to lenders, but it also has other risks and concerns connected to it. When a lender does not require a Phase I because they have environmental insurance to back them up, borrowers typically don't feel the need to perform the due diligence necessary to satisfy the innocent land owner defense (a.k.a. innocent purchaser status). An innocent land owner defense is important for defending liability for the borrower/investor but the more important issue is the potential health impact that exists when human beings are unknowingly exposed to toxic chemicals because an environmental assessment was not considered necessary due to the financial concerns of a competitive market place.

The issue here is balance between economic development and environmental protection. This has always been the issue surrounding environmental concerns. It costs money to properly dispose of waste. It costs money to properly manage environmental risks. In a competitive society that is prone to occasional economic recession, the pressure to cut corners and costs can be strong enough to prevent appropriate environmental risk management strategies.

There must be a balance. While painting the conservative environmental picture described above, the reader might get an impression that these are my dominant attitudes, but I am a believer in cost efficiency and a reasonable approach to investigating environmental risk. Most properties and most transactions can be managed using a phased approach, screening techniques, and appropriate research focusing on legitimate potential environmental concerns for the subject property. For example, extensive regulatory research for an agricultural parcel located five miles from any other developed property is a waste of time and money, in my opinion. Extensive historical research on a property that has clearly been undeveloped forever is a waste of time and money. As stated above, each property and each transaction is different and a risk management strategy should be developed to focus on the specific potential risks that may exist at each site.

There are other risk management considerations that do not involve health impacts, that are purely economical decisions. Like fixing up an old house for resale, buy-cleanup-sell opportunities exist throughout Florida. There are many property owners with expensive liabilities (some with no idea of the worst case scenario cost), for whom selling the property and the liability may be their only economical option. They may not have the cash to comply, so they must sell or face FDEP enforcement. There are numerous investment groups ready to relieve them of liability.

The conditions and variables associated with each property/transaction are price objectives, risk tolerance, extent of contamination, third party liability, potential for government funding, potential for contaminant migration, site geochemistry, and potential for natural attenuation, to name a few. The Florida Petroleum Cleanup Program, environmental insurance, the Florida Dry Cleaning Solvent Contamination Cleanup Program, the Brownfields Redevelopment Act of 1997, the Asset Conservation Act of 1996, precedent setting third party liability lawsuits, innovative remediation technologies, pay for performance contracting, and creative remedial strategies are tools on the environmental/real estate/mortgage workbench.

Specific details will follow in subsequent articles, but some general strategies for managing environmental risks (in no particular order) are:

1. risk based corrective action
2. pollution prevention
3. conditional no further action
4. indemnification
5. sell as is
6. minimize third party liability
7. sampling/site characterization
8. seller funded assessments
9. impaired property tax reduction
10. pre-approved advanced cleanup
11. tank closure
12. compliance auditing
13. pay for performance contracting
14. monitoring of natural attenuation
15. brownfield designation
16. bioremediation
17. land farming
18. creative financing
19. environmental insurance
20. innocent purchaser status

Strategize plan, communicate and win. Maximize the benefit, minimize the impact. The environmental issue is not new to commercial real estate, but the strategies to manage the risks have evolved over the last ten years allowing transactions that previously faded away to now remain vibrant until closing.

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