

Environmental Views You Can Use

April 29, 2015

SELLER BEWARE

With the economy continuing to rebound, this is a good time to revisit some lessons learned regarding environmental issues that impact real estate transactions. The focus of this piece is on the deal process as it relates to sellers.

Conditions can change. Even if a seller received a “clean” Phase I when it purchased the property, that does not mean a buyer will not raise potential environmental issues. Site conditions can change in the period after a property is purchased. New site conditions that trigger concerns can arise not only from operations conducted on the property being sold, but also from conditions on neighboring properties. Another concern we have had to deal with for clients involves the presence of fill on the seller’s property, especially when the seller does not have sampling data confirming the fill is clean. If the buyer’s consultant concludes there are Recognized Environmental Conditions (RECs) potentially impacting the seller’s property, seller should expect that those RECs will need to be addressed before the buyer is willing to close on its purchase.

Regulators’ concerns can change. The Texas Commission on Environmental Quality (TCEQ), the State’s environmental regulatory agency, has a tendency to change its approach to regulatory concerns without giving the regulated community a heads-up. Those changes can complicate deals. Of particular note currently is TCEQ’s approach to vapor intrusion/vapor encroachment which may potentially result from volatile organic compounds in soil or groundwater. Although TCEQ has not issued regulatory guidance regarding sites where volatile organic compounds are present, our experience is that TCEQ is, with certain

properties, *de facto* regulating those issues before granting regulatory closure with respect to impacted property. TCEQ's current requirements can include additional investigation, mitigation and restrictive covenants.

Corral the buyer's consultant. Sellers have to live with the consequences of poorly performed investigations by buyers' consultants. Our clients have run into several instances recently where the consultant engaged by the prospective buyer, or the analytical lab hired by the consultant, did such a poor job that it left the seller at a material disadvantage when the prospective buyer decided to walk away from the transaction. Consultants' reports tend to live on far into the future. That happens when a buyer's contract requires the seller to provide all environmental reports it has in its possession regarding the site, or where a seller is concerned about a later claim of failure to disclose if it were to withhold outdated reports from future buyers. There are potential strategic approaches for addressing this concern, but those need to be addressed in the language of the purchase contract.

Control the data. Use a confidentiality clause in the purchase contract to control dissemination of the environmental data developed. Until the transaction is completed, any environmental information developed by a buyer with respect to the seller's site should be subject to strict confidentiality, with the buyer and its advisors as the only persons with access to that information. No third party disclosure should be allowed without the express, advance written agreement of seller. One of our clients was faced recently with a situation where the conclusions of the buyer's consultant were not supportable and the prospective buyer not only dropped the contract, but then spread the erroneous story that the seller's property was contaminated. A confidentiality provision would have provided recourse to a seller in such a situation.

Try to avoid kicking the sleeping dog. A seller needs to think carefully about allowing a buyer to perform subsurface investigation. Any new sampling data regarding environmental conditions at a property can create unanticipated concerns for the seller. If a seller's property already has regulatory closure, additional sampling results may

only muddy the waters since TCEQ will have already determined that the property is deemed clean enough to meet applicable regulatory standards. Also, if a buyer is allowed to sample at the site, issues may arise as to governmental reporting obligations with respect to the data collected. Many sellers condition their agreement to subsurface sampling upon a contractual provision allowing the buyer a walk-away from the deal without providing a reason for exercising their right to walk away and without sharing sampling data with seller.

The foregoing thoughts do not purport to be an exhaustive discussion of environmentally-related concerns of a seller. The noted items are, however, matters that we see on a recurring basis and are matters for which we have developed various approaches in counseling our clients that are selling real property.

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This is one in a series of occasional pieces discussing environmental issues of current interest to clients and friends of the firm. This material is not intended as legal advice. Readers should not act upon information discussed in this material without consulting an attorney.

Guida, Slavich & Flores, P.C. provides legal representation to businesses and individuals in the planning, strategy-setting and execution of their business objectives within the complex maze of environmental laws, including regulatory compliance counseling, structuring and negotiation of contaminated property transactions and litigation.

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