

ENVIRONMENTAL ISSUES IN REAL ESTATE TRANSACTIONS

TEN CRITICAL CONCEPTS AND IMPORTANT TOOLS TO MANAGE RISK



Phase I ESA

The Phase I ESA is a foundational document in commercial real estate transactions that allows a purchaser to obtain CERCLA liability protections. Make sure all technical requirements are met to satisfy AAI.



Phase II Subsurface Investigation

Subsurface data (Phase II) is often necessary to understand the nature and extent of any contamination. This data will inform many other aspects of the project. Sometimes there is sufficient data from an ongoing cleanup to avoid Phase II.



Vapor Intrusion

Vapor intrusion is now a point of regulatory focus in most environmental cleanups. A developer should anticipate that investigation and, where warranted, mitigation of “VI” issues will be required.



Soil Management

When development, excavation and/or land disturbance must occur in areas that are contaminated, it is often advisable to have a Soil Management Plan prepared by and environmental consultant.



ERC

Environmental Restrictive Covenants or “ERCs” are a common remedial tool that restricts future use of land due to residual environmental impacts. The restrictions often impact development.



Offsite Migration

Offsite migration must be investigated and controlled. Offsite liabilities must be managed. Unexpected offsite liabilities can be very disruptive to the redevelopment and future use of a project.



Contractual Risk Allocation

Buyers/developers must be acutely focused on the risk allocation that is put in place between them and the seller. This is especially important when redevelopment is occurring parallel to remedial activities.



Strategic Design

Intended future use can dictate the scope of a cleanup, and vice-versa. One important tool is the ability to “design around” particularly problematic conditions.



Comfort Letters

Indiana’s Comfort Letter program is a tremendous tool for buyers of contaminated properties. It allows buyers to further insulate themselves from historical liabilities, but not required to obtain liability protections, and not appropriate for all sites.



Environmental Insurance

Environmental insurance such as PLL and CPL coverage can be polarizing. Some parties like it; some do not. Regardless, it is a tool to consider and can be effectively deployed in appropriate circumstances.



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