

“The Developer’s Environmental Checklist”

By: Joseph E. Quandt

Developers frequently find themselves the unwitting targets of environmental lawsuits and agency enforcement initiatives while attempting to bring a project to fruition. If some prior attention had been given to environmental due diligence issues in the beginning of the project, painful and costly lessons would not have to be learned. Thus, although the following is not an exhaustive list of all of the environmental issues which may be confronted as part of a new development project, it is certainly a good template from which to work.

First, from a transactional perspective, you should be sure to leave yourself plenty of time to do your environmental homework. An inspection period of 60 to 90 days should be sufficient to complete your environmental due diligence. Certainly, the purchase agreement should give you the flexibility to decide whether or not to escape a transaction or modify the terms of the transaction to accommodate any environmental concern which may arise.

Second, after the property is secured up in a purchase agreement, thoroughly investigate the history of the property. At a minimum, a title search should be completed to determine whether or not the property was used in a way which may environmentally compromise the property. Even for large tracts of open space, you should give the property a thorough walk over inspection with an environmental professional who may be able to identify regulated features of the property such as wetlands, streams, lakes, etc. Another natural feature which may be of importance is the topography or slope of the land. Many developments have failed as a result to properly calculate the cost of infrastructure and earth moving sufficient to stabilize erosion areas.

Properly evaluating these natural feature issues and their attendant costs is critical to a successful project as regulated areas such as wetlands, inland lakes and streams, etc. may significantly reduce useable development area thereby impairing the economic value or at least altering the proposed economic density of the project.

Once you have determined what regulatory limitations may apply to your project and their economic impact, you must now determine whether or not there are other environmental limitations related to the property. Frequently, if the property has any type of commercial or industrial history, a graduated or “phased” evaluation process must be utilized in determining whether or not there may be environmental contamination risks associated with the property. Once again, proper research into the history and use of the property is crucial.

The first phase of this evaluation process if the commercial history of the property is limited is to perform a transaction screen. A transaction screen involves a limited historical evaluation of the property to determine whether or not there was a use of the property which may have involved hazardous substances. If hazardous substance use is deemed likely as a result of the transaction screen, additional investigation will become necessary. It is

important to note that a transaction screen is normally appropriate only in circumstances where a property has a very limited commercial or industrial history. For properties where the commercial history of the site is more significant, a Phase I Environmental Site Assessment (ESA) must be completed. Much like the transaction screen, a Phase I ESA evaluates the prior use and history of the property. However, the Phase I ESA generally requires a great deal more scrutiny and also involves an evaluation of the history and use of surrounding properties. If the Phase I ESA (or the transaction screen) indicates that there is no likely history of the use of hazardous substances associated with the property, then your environmental due diligence process is complete. If the Phase I ESA indicates that there are recognized environmental conditions related to the property, a Phase II Environmental Site Assessment must be completed.

The Phase II Environmental Site Assessment includes sufficient testing of soil, groundwater or other environmental media as determined necessary to properly evaluate recognized environmental conditions noted in the Phase I Environmental Site Assessment. If the results from soil or groundwater tests disclose that the site is contaminated, then a Baseline Environmental Assessment (BEA) must be performed in order to purchase the property without legal liability for the contamination clean up.

A Baseline Environmental Assessment is defined under Michigan law as an evaluation of existing contamination sufficient to distinguish pre-existing contamination from any contamination which may be caused as a result of the developed use in the future. Once the BEA is completed, it must be disclosed to the Michigan Department of Environmental Quality so that the MDEQ can determine whether or not the property's condition justifies the use of state financial resources to clean up the property. Regardless of whether or not the state decides to expend resources to address the contamination, you must also exercise "due care" in your ownership and operation of the property. Due care as defined under Michigan law means that you will own and operate the property in a way which does not unreasonably expose the public to unacceptable concentrations of hazardous substances.

Exercising due care may mean something as simple as providing notice of the contamination to owners of adjacent property and anyone who may come in contact with the hazardous substances. However, due care responsibilities are sometimes more invasive and require actual restrictive covenants on the property and may require some form of contamination treatment to prevent "unacceptable exposures." Unacceptable exposures are defined under Michigan law as any exposure to contamination which exceeds the residential criteria (contamination standards for residential use).

Assuming that you have completed an acceptable Baseline Environmental Assessment for any property which is contaminated and the MDEQ has accepted your Due Care Plan (your plan for demonstrating how you will prevent unacceptable exposures to the contamination), you can then close on the property with a high degree of confidence that your environmental responsibilities related to the property have been resolved.

As you can see, there can be a long and winding environmental road towards the goal of performing appropriate environmental due diligence. Remember to do careful research into your project prior to making a commitment which may be extraordinarily costly in the long run.

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