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Property Biz Canada

June 25th, 2014

Phase 1, 2 and 3 Environmental Site Assessments ("ESA") – A Very Basic Primer

As a real estate lawyer whose practice is predominantly commercial leasing, I still need to be aware of "red flags" for potential environmental issues and then seek assistance from an environmental law specialist where contamination is possible, suspected or known.¹

Owners, lenders, tenants, occupiers, managers and others who have or had "control" over a contaminated property, and those who caused or contributed to contamination of a property, can be liable for the clean-up and compliance of the property as well as civil and regulatory liability (including fines and imprisonment) for breaching environmental laws. So, it is important to be aware of when an ESA is reasonable or required or you could find yourself liable under environmental laws.

There are a plethora of federal, provincial and municipal laws and regulations (primarily the *Environmental Protection Act*, R.S.O. 1990, and the *Ontario Water Resources Act*, R.S.O. 1990) that govern the environment and operations that can affect the environment. ESA's help identify the risks of contamination (from such contaminants as

petroleum, heavy metals, pesticides/herbicides and volatile organic compounds), the scope of contamination, compliance or non-compliance with applicable laws and methods for dealing with identified contamination going forward.

Often, deciding to have an ESA is an easy determination based upon a current use of the property or a known past use that is potentially hazardous to the environment, such as a plating business, a gas station, a tire storage facility, a Laundromat, scrap yard, or if an underground storage tank is associated with the site. This is true with "Brownfield properties" (vacant or underutilized places where past industrial or commercial activities may have left contamination (chemical pollution) behind, including: factories, gas stations and some waterfront properties like port lands, formerly used for industrial or commercial activities) that are intended to be redeveloped.

Phase 1 ESA: A Phase 1 ESA report is carried out by an accredited environmental consultant ("**Consultant**") and is intended to identify potential contamination visiting the property to identify visual evidence of actual or potential contamination (for example, a UST, or asbestos pipe insulation), reviewing background documents (to collect data on past activities on the site and neighbouring properties); interviews with site personnel, government officials and third parties, and through certain clearance letter searches with governmental authorities. The

¹ I do not specialize in environmental law so this article is a very basic introduction to environmental site assessment options available to help minimize the risk of finding out that a property is contaminated.

information is then reviewed and the findings and conclusions reported upon by the Consultant. In a Phase 1 ESA, no laboratory testing, sample gathering, intrusive investigation, or physical analysis is required. The Phase 1 ESA is used to reduce but does not necessarily eliminate the risk of contamination and resultant liabilities for contamination.

A Phase 1 ESA is commonly done on:

- Real estate due diligence for a buyer
- Assisting a vendor in expediting a sale
- Property Insurance renewals
- Financing and Re-financing
- Commencement of a lease to establish a baseline condition
- Lease termination to assess if contamination has arisen/increased during the lease.

Phase 2 ESA: A Phase 1 ESA that raises the possibility of contamination is usually the trigger for a Phase 2 ESA. The Phase 2 ESA requires on-site drilling to sample soil and groundwater and to ascertain if contamination exists and to what extent. The process includes gathering of lands and buildings, physical analysis and laboratory testing of the samples for contaminants (such as asbestos). As in a Phase 1 ESA, the results of the Phase 2 ESA are reviewed and reported on by the Consultant.

The reasons for performing a Phase 2 ESA include those for a Phase 1 ESA as well as to address concern(s) identified by a Phase 1 ESA. In addition, it can be required pursuant to an order from a governmental authority or where contamination is already known to exist, as a step in designing a remediation action plan to address the contamination.

The Phase 2 ESA provides a better understanding of the condition of the land, ground water (if any) and structures, in, on and upon the property at a point in time, but in no circumstance is it a "guarantee" of the environmental state of the property. At best, it can reduce the risk of contamination being present but much depends on the nature, extent and locations of the investigations made and samples taken, the qualifications and experience of the Consultant, and the analysis of the resulting information obtained.

Phase 3 ESA: The term is often used to identify the report of a Consultant that identifies the best available alternatives, costs and strategy for remediation and environmental risk management. It will set out the steps required to perform site remediation and follow-up monitoring for residual contamination including monitoring wells if needed.

The Lessons:

1. Understanding the role of Phase 1, 2 and 3 ESAs and when you should obtain them is a vital exercise on commercial (and even some residential) transactions. ESAs can be costly in terms of dollars spent (\$3,000-\$5,000 to \$30,000 and even more) but can be of great value by reducing (but not eliminating) the risk of contamination. ESAs can cause a deal to die but can also help negotiate a purchase price that factors in the risk and remediation costs.
2. ESAs should be carried out before a deal is firm and early in the due diligence stage. Especially where the property (e.g. landfill site) or present or past uses (e.g. a scrap yard, gas station, auto repair garage or dry-cleaner) raises red flags.
3. Adjoining lands and water sources and uses need to be considered as part of the ESA.
4. Use an accredited experienced and experienced Consultant.

5. Ask counsel whether the retainer with the Consultant should be through legal counsel for solicitor/client privilege.

6. Given the technology, testing methods and remediation options that are available today and the potential civil and regulatory liability for contamination, it borders on "Russian roulette" for a person to purchase/lend/invest in property in the absence of type of ESA.

Disclaimer: This article is for general information purposes only and not intended as or to be relied upon for legal advice. Consult with a lawyer for your unique situation.

[*If there is a general real estate or leasing related question you would like to see addressed in a future article in "The Legal Corner", please contact me directly by e-mail at dgold@robapp.com with your suggestion. Not all requests can be accommodated.]

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