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Should I completely bypass the phase one of the Environmental Site Assessment (ESA)? - by Chuck Merritt

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Chuck Merritt,
Merritt Environmental

Many times, when purchasers are looking to acquire a piece of commercial real estate that is “environmentally suspect” they ask if it’s possible to skip the phase one Environmental Site Assessment (ESA) and move directly to the testing stage which is generically known as the “phase 2.” This is a more comprehensive evaluation of a property and typically consists of advancing borings to collect soil and groundwater samples. In addition, vapor testing inside of a structure may be an important part of understanding all the potential impacts before buying the property.

Although the thinking is logical in many instances such as when the asset is a former gas station or abandoned industrial site, there are many benefits to starting with the ESA or phase one. The main reason for conducting the phase one is that it acts as the road map for what the scope of work should include in the phase 2. For instance, historical maps on the property may indicate the location of buried tanks. This is critical information when deciding where to advance borings to collect data on the quality of the soil and groundwater. Information about the location of potential buried tanks can also help if ground penetrating radar (GPR) is needed to zero in on where this sonar technology should be deployed to find where buried tanks may be present.

Another benefit the phase one may produce is whether past regulatory interaction has occurred on a property. This can outline what steps may have been taken in the past by local, state, and federal regulators with regards to contamination that may have occurred. Additional records can then typically be obtained through the Freedom of Information Laws (FOIL) when available. This forensic analysis may produce data that was not previously disclosed to the buyer. An environmental impact that has not yet been resolved from the governing regulatory agency may be enough for a buyer to decide to cancel the contract. This would in turn save them any money they may have been willing to spend on the phase 2. The ESA report also includes a site visit in which a trained person can uncover issues that would need to be addressed in further investigation on a property. Talking to local business owners and neighbors that have worked or lived near a now abandoned property can be of great value. Jumping to the phase 2 investigation would not reap the benefits of this site reconnaissance.

The cost of the phase one ESA is inexpensive when you consider the cost of commercial real estate. Ranging from \$1,800-\$3,000, a phase one can generally be prepared within 2-3 weeks. There are always the outliers when it comes to pricing, such as low bid providers doing phase one reports below that threshold and large consulting firms which may charge more for their expertise. But for 95% of the commercial assets being inspected, the price range outlined above can be relied upon.

Since phase 2 investigations are more expensive, a properly conducted phase one ESA can help in minimizing the cost. The items outlined above can target past issues and provide a better scope of what steps should be taken next. Without it, consultants will tend to be more cautious in their recommendations. This may lead to a more expensive phase 2. Many times, a phase one ESA can be expedited by a consultant when they know a client is considering the phase 2 to save time. A draft of a report noting the concerns a consultant may have can be completed and submitted to the client so decisions and scheduling the next phase can commence quickly.

When considering skipping the phase one, remember that most commercial real estate is financed by banks, insurance companies, credit unions and private lending groups. Those institutions generally require a phase one ESA as part of the internal risk analysis. So, bypassing the phase one as a buyer will not alleviate the need for one altogether. Lenders have their own “approved” consultants whose obligation is their client (the lender). So, when that consultant shows up at a property to inspect, they represent the lender’s interest, not the buyer.

When a purchaser hires a consultant as part of their due diligence of a property, it is a more direct relationship. That consultant is now the advocate for the buyer and can work with the lender and their consultant to explain why a certain strategy was chosen conducting the phase 2. This will lead to better communication with the lender and hopefully a quicker path to closing. So when deciding whether or not to bypass the phase one altogether, purchasers should evaluate the benefits provided and decide accordingly.

Chuck Merritt, LEED AP, is the president of Merritt Environmental Consulting Corp., Hauppauge, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540