



Don't ignore the dangers of leasing to industrial and commercial tenants

January 12, 2009 - Shopping Centers

Landlords and property managers, how well do you know your commercial/industrial tenants? You may have tenants that you've had for years, but do you know much about what they're doing on your property? Are they handling toxic material or hazardous waste on your property? Are they a large corporation with deep pockets that can absorb an environmental disaster or a small business cutting corners just to scrap by? These are questions you should be asking yourself now more than ever given the uncertainty in today's economy. Why? Because property owners can be held liable for an expensive site clean up, even though they weren't directly responsible for causing it.

When tenants vacate a property, they can leave you to face unexpected environmental problems. Some tenants use poor or sloppy business practices that can result in costly soil and/or ground water contamination beneath the surface of a site. Often these problems are not immediately evident and might not become apparent until years later. These problems may come up at the most inopportune time like when you want to lease to a new tenant or to sell the property. Or worse, the problem may manifest itself into a third-party lawsuit against you because of contamination migrating from your property. Knowing your tenants' activities and planning ahead will help you avoid or quickly react to environmental issues and reduce your future liability. Conversely, turning a blind eye now could cost you millions of dollars down the road.

What can you do? Here are a few considerations:

- * Certain activities, features or processes your tenant might use as part of their business should raise a red flag when it comes to environmental liability concerns. Industrial and commercial facilities that handle and store raw chemicals, generate wastewater or produce hazardous waste are particularly susceptible to costly environmental problems. Likely sources of contamination at these types of facilities include: chemical drum storage, hazardous waste generation, underground or above ground storage tanks, vehicle maintenance, spills or non-permitted discharges to dry wells/catch basins, boiler/compressor blowdown, degreasing pits, wastewater discharge to on-site lagoons or septic leach fields, floor drains and painting booths.

Using lease agreements proactively, including negotiating terms with your tenant upfront, will help you understand how your property will be used and who will be responsible for any clean-up costs. To protect yourself from costly litigation or unexpected out-of-pocket expenses, document environmental responsibilities in the lease.

Commonly, tenants are required to put up a security deposit, an insurance policy or other financial assurance against damage to a property that might occur during their lease. But do these damages include environmental contamination? If so, would there be enough to cover a significant issue such as poisoning the neighbor's supply well? Are there exceptions in their insurance policy? Also, is a security deposit immediately refundable once the tenant leaves or is there a grace period for the

landlord to perform due diligence? A review of your security deposit practices and the content of your current contracts/agreements is a prudent measure to ensure that you have the necessary contingencies in place.

Assess the environmental condition of your property before the tenant moves in; thereby heading off claims that contamination was caused by a previous owner/tenant. Making your tenant aware of the assessment might actually trigger them to better police themselves and to implement more prudent housekeeping practices during their lease.

Evaluate the risk your tenants pose by reviewing their chemical use, waste handling and storage practices. Identify risky operations and have the tenant address them. Include a deadline for complying.

Are your tenants breaking the law? They may be required to maintain certain environmental monitoring measures in place, for instance leak detection for underground storage tanks, permitted discharge of wastewater and judicious removal of hazardous waste. These requirements are designed to provide early detection of discharges, spill or releases in high risk areas. Insist on the right to routine monitoring and periodic inspections of tenant spaces. Also, require your tenants to provide you with copies of any environmental data, as well as correspondence to or from government agencies, in a timely manner.

Prior to expiration of a lease, inspect the property to identify environmental concerns and suggest a remedial plan. Tenants still occupying the site may be more inclined to address environmental issues than tenants who have already left.

Performing due diligence on tenants is a sensitive subject, but one that's worthwhile if it's potentially going to save you millions of dollars and some bad public relations. The key is to maintain open communication with your tenants and to be proactive when it comes to environmental concerns. Your tenants may even thank you.

Jeff Day is the environmental department manager at Terracon, Rocky Hill, Conn.

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