



Understanding Vapor Intrusion and its role of due diligence when buying property

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The term Vapor Intrusion or VI has become a new aspect of due diligence when buying property. What exactly is Vapor Intrusion? Where does it come from? When did it first begin? The background of VI involves the breakdown of contaminants in the soil/groundwater that migrate downwards as gravity and the soil composition permit. As these contaminants break down they can volatilize into gaseous form which in turn begin to migrate upwards (in a gaseous state) and accumulate within a building. Enough of these compounds can become trapped within a building and cause adverse health effects to the occupants. Many states have already introduced some form of a VI policy/guidance.

The source of the VI can be from the subject site as well as adjacent properties. This would include gas stations, drycleaners, industrial sites as well as state hazardous waste sites and Brownfield sites. In addition, sites that formerly had contamination and issued a No Further Action (NFA) letter are not exempt. In fact many of these sites are the culprits of VI. Long Island has more than its share of properties that fall within one of these categories. In many cases, not all of the contamination is removed as a condition to receiving a NFA letter. In New York for instance, each site is evaluated individually and in many cases a decision to leave minimal amounts of contamination behind is within the judgment of the case manager. This has been standard operating procedure with the NYSDEC since the mid 1980s. New York State has been plagued with hundreds of sites that were closed and issued the NFA.

Evidence now suggests that these remaining contaminants have impacted the indoor air quality of a building. The NYSDEC has already re-opened many of these closed files to determine if such a condition exists. This can be difficult for environmental consultants evaluating a property with a spill event previously closed by the NYSDEC. With the exception of asking for the supporting documentation for the closure of the spill many consultants would list the event in the Historical Recognized Environmental Condition (HREC) section of the phase 1 report. Although still considered a non-scope issue to the phase 1, more and more consultants are addressing the VI issue. An important question is raised as to whom the report is being prepared. A potential purchaser has more to be concerned about than the lending institution commissioning a phase 1 report to insure no red flags or Recognized Environmental Conditions (RECs) exist. The onus will always be more on the purchaser than the lending institution.

The American Society of Testing Materials (ASTM) set up a task force which spent two years looking into the VI issue and in the spring of 2008 released the ASTM E-2600 standard on how to approach VI. A four tiered guideline outlines the steps recommended to determine if a VI issue exists. The first 2 tiers are referred to as the screening stage, followed by tier 3 which outlines investigation and finally tier 4 is the mitigation stage. As in most tiered scenarios, the cost and

complexity of determining a VI issue increases as each tier is required. Many sites can be eliminated as a threat from the first 2 tiers being conducted. Some sites will require the more advanced tiers to eliminate a VI threat. The advent of the VI standard should aid purchasers in determining if such a condition exists at property prior to becoming the landlord.

Oftentimes potential purchases balk at the thought of the phase II or further evaluation as recommended by their consultant. Cost, time constraints, seller's objections to intrusive testing, time of the essences clauses, etc... may play a role in the decision to move forward with the recommendations or accept the property as is. Of course a purchaser can always decide not to purchase as well. However, in a buyer beware state such as New York, the more information that can be obtained in a due diligence period the better. Upon closing on a real estate transaction that is later discovered to have an environmental impact/issue, the NYSDEC as well as local environmental agencies (health departments) will first turn to the current owner of the property to conduct the appropriate remediation. The new VI standard can be utilized as another tool in determining the environmental impact a site may be experiencing.

Chuck Merritt is the director of environmental operations for
Merritt Engineering, Bayside, N.Y.

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