



## Scrimping on your due diligence may cost you more in the future

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After being burdened by foreclosed properties with environmental concerns financial institutions have been a driving force in requiring that environmental due diligence be performed as a condition of securing financing. In today's difficult economic climate, securing bank financing for real estate purchases is not as easy as it once was. As a result, for those lucky enough to have sufficient financial reserves, cash purchases of property may occur more frequently. With no bank involved, there are no longer requirements to perform environmental due diligence on the property you intend to purchase, however this does not mean that you should skip this important step.

Performing environmental due diligence during a real estate transaction is important, because when you purchase a property, you also buy any environmental issues that accompany the property. Your only defense in such situations is the "innocent landowner defense." In order to claim such defense, you need to be an informed owner and show that you had no reason to know that environmental conditions existed. Claiming ignorance to the sites history is not a valid defense.

So how do you become an informed purchaser of a property? The recommended method is by performing a Phase I Environmental Site Assessment (ESA). The requirements of what is contained in a Phase I is specified by the United States Environmental Protection Agency (USEPA) All Appropriate Inquiries (AAI) rule as well as the American Society for Testing and Materials (ASTM) 1527-05 standard.

A Phase I ESA takes a multi-tasked approach to evaluate the property for current and historic environmental conditions which can require costly remediation, be a liability for offsite damages, and can adversely effect the properties value and as well as its functionality. A Phase I typically includes the following:

- \* A walk through of the property in order to inspect for signs of contamination, such as chemical spills, leaking drums, or unexplained dead vegetation. The inspection also looks for potential contamination sources such as chemical drums, tanks, and evidence of underground ground tanks (such as tank fills and vents).
- \* A review of historic site maps, aerial photos, and city directory listing. The purpose of this step is to determine historic site uses as far back as practical (obtaining records back to the 1880's is not uncommon for New York City). These records are reviewed to look for signs of tanks, as well as site uses which have the potential to adversely effect the site, such as gasoline service stations, dry cleaners, and factories.
- \* An environmental database report will be obtained and reviewed for the property. This report summarizes environmental records from federal, state, and local databases into searchable report so that documented environmental concerns for the subject property as well as surrounding properties can be reviewed to determine if any know environmental concerns are present in the

area.

\* Freedom of Information Act (FOIA) requests are sent to the USEPA, state environmental agencies, local health departments, local fire marshals, and the local building department in order to obtain environmentally relevant site information. Such documents typically include, spill reports, petroleum bulk storage forms, and building plans.

Following the review of this information, the Phase I report is prepared, which will summarize the findings and indicate if any recognized environmental conditions are present. The Phase I will also include recommendations as to whether a Phase II investigation is required. A Phase II is a sampling investigation and depending upon the Phase I findings may include, soil and groundwater sampling, subsurface vapor sampling, tank testing, and a geophysical survey to located buried tanks and drums. If the Phase I findings identify substantial environmental issues at the property, you may choose against purchase of the property at this point with out investigating the issues further.

If you choose to go ahead with investigating the site, The Phase II report will indicate whether any site remediation, such as tank removal, soil removal, or groundwater remediation, will be required. Where as the Phase I / Phase II costs are usually conducted at the expense of the buyer, remedial costs are typically the responsibility of the seller. The seller typical pays for such costs by the following three methods:

1. Site remediation is conducted by the owner prior to the sale of the property, with the owner hiring and paying the remedial contractor;
2. Money is put in escrow to cover the remedial costs following the sale of the property. In this situation, the seller usually retains liability of the environmental issues until they are remediated;
3. The selling price of the property is reduced to reflect the remedial costs. In this situation, the buyer usually accepts the environmental liability of the property.

Deciding which method to choose will be dependant upon the site conditions as well as conversations between yourself, the seller, and your attorney.

The relative cost of performing a Phase I investigation compared to the purchase price of most properties is quite small. However, should you decide to try to save a couple of bucks when you purchase the property and not perform any environmental due diligence, don't be too surprised when you get a call from your you building foreman that they dug up a gasoline tank while excavating the building foundation. Congratulations, you just purchased a former gas station and will have to foot the bill on the cleanup.

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