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Environmental Real Estate Newsletter

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ERAS Environmental, Inc. (ERAS) publishes this Newsletter from time to time to discuss developing environmental issues. It is distributed for the benefit of our clients of and other interested persons. It focuses on environmental issues pertaining to due diligence for environmental assessment of commercial real estate. Many of these issues come up regularly during our business interactions with our clients.

IN THIS ISSUE

- [Bank Lending for Property Contaminated from Offsite](#)
- [ASTM Questionnaires for Due Diligence](#)
- [Hazardous Materials Closures and Close of Escrow](#)
- **HAPPY HOLIDAYS**

Bank Lending for Property Contaminated from Offsite

KEY CONCLUSION: Recent requirements make it much more difficult to finance properties contaminated from off-site sources.

There have been recent developments in requirements for financing of properties contaminated from off-site sources. In the past, there have been lending institutions that have financed properties that were known to be contaminated *if it could be conclusively determined the subject property itself did not contribute to the underlying contamination*. SBA loans could be obtained for off-site contamination with an appropriate “comfort letter” from the local regulatory agency. In this case, a Phase 1 report would be submitted to the agency who could then agree in writing *the subject property itself did not contribute to the contamination underlying it*.

In ERAS recent experience, many of the banks and lending institutions are not financing property that is known to be contaminated from any source, even from off-site. There are no significant changes to the requirements for SBA. However, the regulatory agencies are more often *asking for expensive Phase 2 investigations* to demonstrate or verify the Property is contaminated and whether it has contributed to the contamination.

Most likely, the agencies are requesting this because 1) they have no funding and many responsible parties are not investigating their sites due to their own lack of funds and 2) due to budget cuts which does not allow the time to prepare comfort letters. Beside the cost to the owner, there is also potential financial liability if there are “skeletons in the closet” (unknown contamination) associated with the Property itself

ERAS is currently working with several regulatory agencies to provide comfort letters for properties impacted by solvents in groundwater from off-site sources. Some of these sites have the potential to have contributed to the contamination due to past uses. ERAS recently has even been asked to write the comfort letter to be approved by the local regulators. Note that the comfort letter process is extensive but once issued, there is little risk of future liability for the current or previous owners.

ASTM Questionnaires for Due Diligence

KEY CONCLUSION: Questionnaire or interviews are an important and integral part of due diligence projects.

A very important portion of a due diligence project is the completion of an ASTM Questionnaire, often called an interview form. As specified in ASTM E 1527-05, standard practice for Environmental Site Assessments, the objective of the interview is to “obtain information indicating *recognized environmental conditions* in connection with the property.”

The ASTM standard specifies the environmental professional (EP) should interview the key site manager; this could be the owner of the property, an operator of the business or occupants. In some cases, it is considered advisable to interview some or all of these parties and sometimes even previous owners or occupants. It is up to the discretion of the EP about whom to interview and also to decide when to obtain the interview information.

In practice, ERAS usually interviews, or even more commonly, requests the owner of the property to complete the questionnaire, BEFORE the project proceeds significantly. This is so that the information obtained from the owner, usually representing the most recent uses of the Property, can be dovetailed with file review requests and review of other historical information. Receiving timely interview information is even more important for Environmental Transaction Screen (ETS) projects where environmental research is usually much more limited than for Environmental Site Assessment (ESA) projects.

In some cases, the interview information can be used to *greatly expedite* the due diligence process by allowing assessment of what research information is actually required. In extreme cases, answers to an interview form can be used to document whether significant environmental information was withheld from the buyer or financier.

Hazardous Materials Closures and Close of Escrow

KEY CONCLUSION: Hazardous materials closures should be performed prior to close of escrow.

Part of the due diligence process is to identify the presence and location of hazardous waste and materials present on the subject site. For operating businesses, this is to avoid conditions that could lead to future *recognized environmental conditions* that could affect property value.

In cases where a business that is operating and using regulated hazardous materials and waste is vacating the property, a hazardous materials facility closure should be conducted prior to Close of Escrow (COE). The reason for this is that when the facility closure is performed, there are sometime requirements by the inspector to perform a Phase 2 investigation to assess for potential contamination, usually to subsurface soil. In extreme cases, if contamination is found, additional investigation could be required that would lead the property being listed as a leak case.

ERAS has been involved with property sales when hazardous materials facility closure has led to designation of properties as leak cases. This typically not only *delays or cancels* the financing of the property but could result in costs to the owner of tens to hundreds of thousand of dollars. For that reason, ERAS recommends completion of all hazardous materials closure prior to the COE.

***HAPPY
HOLIDAYS
FROM ALL OF US
at
ERAS Environmental, Inc.***

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If you have any questions regarding the information in this newsletter, ERAS services, or if you have a subject you would like to read about in a future newsletter, please call David Siegel at 510.247.9885 (ex. 304) or send us email at info@eras.biz