



Environmental Risks of Property Transfers

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Agenda

- **Foreclosures and Tax “Gifts”**
- **Temptations of preserving open space or redevelopment**
- **Look before you leap – What is “Due Diligence”?**
- **Case Study**
- **Lessons Learned**
- **Costs for Lessons NOT Learned**



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FORECLOSURES AND TAX “GIFTS”

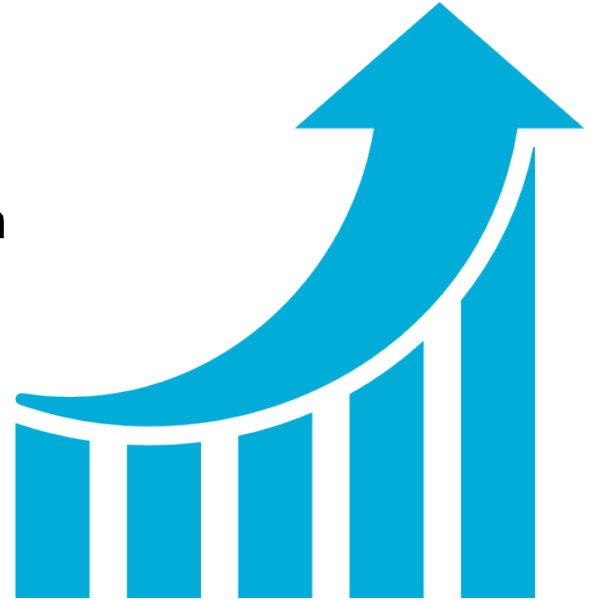
Foreclosures and Tax “Gifts”

- Looking at the tax roll – outstanding taxes due
 - Need to collect taxes to pay the bills
 - Desire to put this property back on the ratable list
- What to do?
 - Negotiate with the property owner, or
 - Foreclose



Foreclosures and Tax “Gifts”

- Now what? – Several possible outcomes
 - Property owner pays back taxes – life goes on
 - Property owner walks away, property is abandoned
 - Property owner negotiates – perhaps “donates” the property in lieu of taxes due
 - Municipality forecloses on the property



OPEN SPACE AND REDEVELOPMENT

Open Space and Redevelopment

Every municipality is looking to improve

- **More open space –**

- ❑ More parks and recreation?
- ❑ Space for a new DPW, Library or Senior Center?
- ❑ Ease flooding or protect wildlife?

- **Or redevelop –**

- ❑ Bring more business to the business district
- ❑ Add to the commercial tax roll
- ❑ Add jobs to the community



Open Space and Redevelopment

But are you getting this:



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Open Space and Redevelopment

this:



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Or this:



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Environmental Due Diligence

What is “Environmental Due Diligence”?

A process that assesses real estate for potential risk of environmental contamination

- Soil contamination
- Groundwater contamination
- Storage tanks (underground and aboveground)
- Asbestos
- Lead paint



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Environmental Due Diligence

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) establishes a process to determine who is liable for hazardous substances.

- Regulators authorized to hold property owners responsible for contamination
- EVEN IF THEY DID NOT CAUSE IT!!!
- Can be very expensive



Environmental Due Diligence

States can also have their own regulations

New Jersey – Industrial Site Remediation Act (ISRA) Regulators authorized to hold property owners responsible for contamination

- “requires owners of facilities with specific industrial classifications to investigate and remediate prior to property transfers when the business ceases operations or is sold”



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Environmental Due Diligence

Innocent Landowner Defense (CERCLA)

The criteria for satisfying the innocent landowner defense are set forth in 42 U.S.C. §§ 9607(b)(3) and 9601(35). To be eligible for the innocent landowner defense, a landowner must show that:

- The landowner acquired property after all hazardous substances were disposed of at the facility,
- On or before the acquisition date, the landowner conducted all appropriate inquiries, as described below, into the previous ownership and uses of the facility consistent with good commercial or customary standards and practices;
- The landowner did not know, and had no reason to know, of the hazardous substance contamination at the time of purchase;

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Environmental Due Diligence

- The landowner exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;
- The landowner complied with all continuing obligations after acquiring the property, as described below; and
- The landowner took adequate precautions, meaning it took affirmative acts, against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

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Environmental Due Diligence

Levels of Environmental Due Diligence – Common Terms

- **Property Transaction Screen** – lowest form of due diligence – best used for a quick “don’t touch this” property decision. Does NOT meet requirements for Innocent Landowner Defense.
- **ASTM E1527 Phase 1 Environmental Assessment** – *“intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations on CERCLA liability (hereinafter, the “landowner liability protections,” or “LLPs”): that is, the practice that constitutes all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial and customary practice as defined at 42 U.S.C. §9601(35)(B).”*
- **Phase 1 Investigations** normally do NOT take samples, but identify liabilities or “Areas of Concern” (AOC).

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Environmental Due Diligence

Levels of Environmental Due Diligence – Common Terms

- **ASTM E1903 – 11 - Phase 2 Environmental Assessment-** covers a process for conducting a Phase 2 environmental site assessment (ESA) of a parcel of property with respect to the presence or the likely presence of substances including but not limited to those within the scope of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

In New Jersey -

- **NJDEP Site Investigation**
- **NJDEP Site Assessment**
- **NJDEP Remedial Investigation**

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CASE STUDY – FORMER PRINT SHOP & MECHANICS GARAGE

Case Study – Former Print Shop



- What is ISRA?
- What sites are applicable?
- Required Investigation BEFORE Sale
Property liens

Why we ask about surrounding properties
on the Transaction Screen Checklist....



Case Study – Former Print Shop

Signs of potential industrial activity



Case Study – Mechanics Garage



- Unknown Spills
- Solid Waste
- Haz Waste
- Vacant Sites
- Vandalism

Case Study – Mechanics Garage



Heating Oil
Fill Port



Junk Vehicles
Leaking?



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CASE STUDY – FORMER DRUM RECYCLING FACILITY

Case Study – Drum Recycling

One particular NJ Municipality has a problem

- Short on tax revenue
- Increases in spending
- How to increase revenue?
- Tax lists – who owes and is not paying?
- One commercial property owes \$150,000+ in back taxes –
- Foreclose, and sell the property!!
 - ❖ Gain sale value
 - ❖ Restore to the tax roles with a new business



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Case Study – Drum Recycling



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Case Study – Drum Recycling



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Case Study – Drum Recycling



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Case Study – Drum Recycling



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LESSONS LEARNED

Lessons Learned

- Not doing an ESA in order to save money can be short sighted. The expense of addressing an environmental problem on a site can easily exceed the cost of an ESA.
- Follow-up with the owner to ensure they are in compliance with applicable environmental regulations. Don't forget to document.
- Make sure your environmental due diligence weighs the potential risks versus the benefits.
- Don't assume that a "new" facility has no problems.

Lessons Learned

- Don't let the pressure of a deal influence your decision to perform an ESA
- Environmental problems may be the reason the property is available at such a bargain!
- Failure to correctly perform due diligence before the deal may destroy your legal protections – even if problems are discovered years later

COSTS FOR LESSONS NOT LEARNED

Costs For Lessons Not Learned

- ❖ EPA to Remove Over Two Thousand Drums and Containers of Hazardous Materials
- ❖ Hazardous site was being foreclosed says mayor
- ❖ EPA investigators obtained a federal warrant with the aid of New Jersey U.S. Attorney to investigate the site and declared it an official New Jersey Superfund site.
- ❖ Part of the property includes federal wetlands. Given all the rain and condition of the leaking barrels it is a big concern that chemicals have spread off the property and run off into the watershed and surrounding properties.
- ❖ Costs – well over 1 million dollars, and growing fast

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QUESTIONS?



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