SELLER BEWARE: COORDINATING BROWNFIELDS REDEVELOPMENT WITH REMEDIATION

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Redevelopers in New Jersey have become increasingly comfortable with the idea of buying environmentally compromised properties, particularly with a growing demand for warehouse properties to support the e-commerce economy. There are, however, complexities that both buyers and sellers should be mindful of before entering into such a transaction.

Because buyers tend to be single-purpose entities formed solely for the acquisition and development of the subject property while the seller obviously already owns the property and has the primary obligation to remediate it, the burden of greater care arguably falls upon the latter. In a nutshell, the seller of contaminated property is essentially taking a leap of faith that the buyer will complete the remaining remediation tasks in a timely fashion in the best case, and that it will not create a greater mess that becomes seller's regulatory obligation to address in the worst case.

The guidepost a seller must always keep in view is that regardless of how remediation responsibilities are allocated between buyer and seller in a contract of sale, the seller is the primary obligor with respect to the New Jersey Department of Environmental Projection (NJDEP). Thus, because the seller is on the hook until the remediation is complete, conveying contaminated property before that point in time must be undertaken with extreme care, particularly with respect to the post-closing mechanics and timeline.

From the buyer's perspective, its project must be designed around any engineering controls required for a remedy that entails leaving contaminants on the property at levels above the applicable cleanup standards. For industrial properties, remedies of this nature are more the norm than the exception. This is typically a cap consisting of clean soil, asphalt, and building foundations. In some instances, particular contaminants such as PCBs might even require restrictions on hours of occupancy of any structure constructed on the property. Both the seller and buyer can benefit if the acquisition terms are negotiated simultaneously with the remediation plan so that engineering controls can be integrated into the redevelopment project.

Engineering controls are required to be memorialized in a recorded deed notice that owners (including successors in title) and occupiers of the property (including tenants) must comply with. Similarly, if contaminated groundwater remains beneath the property, a Classification Exception Area/Well Restriction Area will be established by NJDEP preventing its consumption or use. Because both are matters of record and required by the NJDEP to be paramount, the buyer's lender must be willing to accept them in light of the subordinate position its mortgage lien will take.

Often a buyer will not purchase contaminated property without a “clean bill of health” in the form of a Response Action Outcome (RAO) - the equivalent of what was formerly known as a “No Further Action Letter.” The RAO

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confirms that the property has been remediated to applicable standards, whether by removal of hazardous substances, the use of engineering controls, or more commonly for industrial properties, a combination of the two. However, some (arguably more savvy) buyers are willing to work with the seller to complete the remediation by proceeding with acquisition before the RAO issues so that its redevelopment can serve as the final capping engineering control. This can be very beneficial to both parties. It affords the buyer a voice in decisions that will affect its development, such as the grading and elevation plan, as well as the positioning of other constructs such as drainage swales and facilities. This will often result in substantial savings to the buyer in terms of construction costs, and to the seller in terms of the role being played by the buyer in implementing the last step of the remediation plan. Presumably, the latter could also be reflected in a lower purchase price for the buyer.

In such cases, the buyer should insist on a contract provision requiring a certification at closing from the seller's Licensed Site Remediation Professional (LSRP) that all remediation is complete but for installation of the final cap. This ensures that the buyer is in a position to commence construction immediately after closing rather than being tripped up by remaining clean-up activities (or worse, additional investigation and testing) that could easily set the project timeline back by months, if not years.

The seller should ensure that the contract carefully outlines the sequence and other specifics of how buyer's post-closing redevelopment activities will be coordinated with the seller's obligations to comply with remediation deadlines established under the under the 2009 Site Remediation Reform Act (SRRA). Sellers should also consider requiring the buyer to assume existing Remediation Funding Source obligations (typically cash, a bond, or a letter of credit posted with the NJDEP) as this not only shifts the cost to the party most in control of timing at that point, but also provides a financial incentive to the buyer to proceed expeditiously. Lastly, sellers should also require prompt remedial measures for damage to any existing engineering controls that may result from buyer's redevelopment activities.

The foregoing leads to a more difficult issue for a seller to negotiate, namely an outside indemnity or similar financial protection for penalties, fines or other damages that may be visited upon it due to the actions or inactions of the buyer. As noted above, the buyer is almost always a single-purpose entity and the sole asset it owns - the property - will likely be substantially encumbered by its financing. This renders direct recourse against the buyer as a largely illusory remedy. Potential exposure to the seller includes penalties for the failure to meet regulatory timeframes and direct oversight by the NJDEP, meaning that both the seller and buyer will have lost the ability to control the remediation process; instead, they must answer directly to an assigned NJDEP regulator rather than their selected LSRP.

Whether the closing occurs prior to or after issuance of the RAO, the buyer will become a statutory permittee under any Remedial Action Permits (RAP) issued by NJDEP for the property. Although the seller, as the Person Responsible for Conducting Remediation will ordinarily be the primary permittee on a RAP, the SRRA imposes secondary liability on the buyer for compliance with the conditions of the RAP. Furthermore, sellers ordinarily transfer the obligations for permit compliance to the buyer, since the buyer will be in the better position to ensure compliance once it takes possession of the property. These obligations typically include periodic inspections, maintenance of any engineering controls for a Soils RAP, certifications to be filed by a LSRP, and the posting of financial assurance in amount deemed sufficient by the NJDEP to secure the foregoing (as well as its own fees).

Once issued, the RAO remains subject to a three-year statutory audit period, during which NJDEP can reopen it and may even require additional remediation. The liability for reinstating or revising a RAO should also be

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addressed during negotiations. Although a buyer will typically seek to limit its liability to revisions attributable to its redevelopment activities, the seller will also often seek to transfer to the buyer the regulatory risk of more stringent remediation standards being adopted post-closing. This is a significant concern given NJDEP's recent focus on emerging contaminants, such as PFAs and other “forever chemicals”, and the substantial revisions to NJDEP's remediation standards published on April 6, 2020. To the extent that a RAO obtained by the seller is not site-wide but only addresses limited areas of concern, the buyer will also assume risk of unknown environmental conditions. This risk can be mitigated through indemnities or procurement of pollution legal liability insurance.

When the RAO does not issue until after closing (as it must when the buyer's development is integrated into the remedy), and when a seller retains ongoing liability for groundwater contamination, post-closing access rights must be reserved (including for the NJDEP). If groundwater wells are involved, the seller will also want adequate assurances that any wells that are damaged by development activities will be promptly repaired or replaced.

Similarly, if it is anticipated that other environmental permits will be required for the redevelopment project, it is preferable to address them during contract negotiations. The seller's concern is that such permits may require modification of its existing remediation permits, thereby elongating and complicating the process - both of which could substantially increase its cleanup costs. The buyer's concern is the flipside of that very same coin, i.e., that without the seller's willingness to cooperate with such modifications, the construction timeline for the redevelopment project could become elongated and complicated, also resulting in substantially increased costs. Thus, identifying those permits and allocating responsibilities for obtaining and complying with them is a critical step that should not be overlooked.

Lastly, it is becoming increasingly relevant for parties to consider addressing climate change risks in contract negotiations, particularly if a contaminated property is or may likely in future be located in an area at risk of flooding, hurricanes or other climate related damage. Whether this is a regulatory risk for which insurance can be secured is presently very much an open question, as the insurance industry's response remains unsettled.

With careful consideration of existing and potential environmental impacts on a proposed redevelopment, environmentally compromised properties can readily be returned to productive use. Incorporation of appropriate terms into contract documents will lessen the risk of misunderstanding and possible post-closing litigation.

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