CONSIDERATIONS WHEN BUYING CONTAMINATED PROPERTY

October 15, 2018

By: Jeffrey R. Margolis

The availability of large tracts of land on which to build new projects in advantageous locations is shrinking. As a result, there is a growing trend of buyers considering the purchase of properties with unresolved environmental issues that they never would have considered in the past due to, among other things, potential liability, internal risk management protocols, and the inability to obtain financing for property with environmental issues.

There are various properties which may be great development sites which were previously operated as, or are currently operating as a golf course, gas station, or drycleaner. Evaluating and addressing the risks associated with a property that is part of or in the vicinity of a federal or state Superfund site, a former landfill, a former golf course, a former gas station or drycleaner site which has not yet been remediated can be a daunting process. However, buyers and lenders frequently misperceive environmental liability risk in acquisitions and financings. Property with environmental issues may still be a valuable property and worth the extra steps it may take to mitigate the environmental issue.

While each property will have its own unique issues and set of challenges, below is a sampling of the types of risk management and due diligence tools that can be utilized in connection with assessing the viability of such an acquisition.

1. Conduct aggressive due diligence and gain a thorough understanding of the nature of the property and any contamination. This includes a review of environmental documents, as well as retaining a reputable environmental consulting company to perform a thorough review of the property including a Phase I, and possibly a Phase II investigation. Even if the seller of the property has performed or is currently performing its own investigation or remediation of the property, the buyer needs to perform its own due diligence and obtain an independent evaluation as to the environmental status of the property.
2. Use the purchase and sale agreement to mitigate risks. Contractual provisions can be used as a mechanism to allocate environmental liability and/or clean-up costs, including representations and warranties, escrows and hold-backs, releases, and indemnities. Parties may allocate liability for known and specifically identified environmental conditions, but it can be challenging to allocate liability for unknown environmental conditions that may be discovered after closing. In addition, while parties to a real estate transaction can allocate risks and liability, they cannot contractually limit liability to governmental agencies.
3. Purchase an environmental liability insurance policy. In the right situations, an environmental insurance policy can protect against situations that might otherwise have made the deal unprofitable or too risky. These policies have several different types of coverage that might be available in connection with the purchase of a contaminated property including: bodily injury and property damage coverage for pre-existing and new conditions; cleanup cost coverage and environmental cost cap coverage; coverage for off-site transportation and disposal of pollution conditions; defense cost coverage; and business interruption coverage. Coverage may also be available to protect against the possibility that a diligent investigation did not identify contamination that was in fact present. A purchaser should obtain

coverage to help address the specified risks associated with the transaction.

Environmental issues should not immediately discourage a buyer and deter the possible acquisition and development of property. Many environmental issues can be mitigated and overcome. While there are certainly risks associated with purchasing a contaminated property, by utilizing environmental risk management tools such as those described above, a buyer may gain sufficient comfort to move forward with the purchase.

For more information, please contact the author Jeffrey Margolis on our Business, Finance & Tax Team.

Related Team Member(s)

Jeffrey R. Margolis

Topics

Environmental

Real Estate