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ENVIRONMENTAL ISSUES IN REAL ESTATE TRANSACTIONS

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Summary

This memorandum highlights the environmental laws most frequently at issue in real estate transactions. It is in summary form and is not intended to be exhaustive. The statutory and regulatory provisions are often very complex and involve related governmental policies.

1. Introduction

Depending on the location and use of property, a number of different laws may impose regulatory requirements or liability on owners, operators and others associated with real property. Here the environmental laws most frequently at issue in real estate transactions are highlighted. It is in summary form and is not intended to be exhaustive. The statutory and regulatory provisions are often very complex and involve related governmental policies.

2. Principal Federal Laws

2.1 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

The most significant federal statute imposing liability for cleaning up contamination in soil and groundwater is the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") (42 U.S.C. §§ 9601 *et seq.*), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Under CERCLA the US Environmental Protection Agency ("EPA") may undertake or require response actions when there may be an imminent and substantial endangerment to the public health of welfare or the environment because of a release or threat of a release of any hazardous substance from a facility. Response actions include removal and/or remediation of the contamination.

Under CERCLA persons who owned or operated a facility when any hazardous substance was disposed, or who are present owners or operators of such a facility, may be liable for the cost of response actions with respect to such

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contamination. Defenses to such liability are limited to the following: 1) an act of God (i.e. Mother Nature), 2) an act of war, and 3) an act or omission of a third party other than an employee or agent of the defendant or than a person in a direct or indirect contractual relationship with the defendant, if the defendant establishes that he exercised due care and took all reasonable precautions against foreseeable acts of the third party. *§ 107 of CERCLA.*

SARA, which was signed into law by the President on October 17, 1986, provides that a deed or other instrument transferring property is a "contract". Thus, contamination of property by predecessors in title can make the "act or omission of a third party" defense unavailable to the present owner. However, SARA also provides a "safe harbor" in that the present owner will not be held liable under CERCLA if at the time he acquired the property he did not have knowledge or any reason to know that the property was contaminated. In order to be said not to have reason to know, an owner of property must have undertaken "appropriate inquiry" and "appropriate investigation" with respect to possible contamination at the time the property was acquired. Moreover, if after the purchase of the property the owner discovers that the property is contaminated, he may not transfer the property without notifying the purchaser of the contamination. Failure to provide such notification causes the seller to continue to be liable under CERCLA, even though he no longer owns the property and did not contaminate it. *§ 101(f)(35) of SARA.*

Courts have generally interpreted the liability under CERCLA to be strict and joint and several among those who are responsible parties under the law. Only in those cases where the contamination caused by each responsible party is divisible would joint and several liability not apply. Moreover, where joint and several liability is imposed, those found jointly and severally liable may have claims for contribution and indemnity among themselves or others.

Officers, employees, directors and shareholders of a corporation may be personally liable under CERCLA if they control or become actively involved in the conduct of the affairs of the corporation. Attached is a memorandum by Courtney M. Price, former EPA Assistant Administrator for Enforcement and Compliance Monitoring, which discusses liability under CERCLA of corporate shareholders and successor corporations for contaminated property.

2.2 Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act of 1976 ("RCRA") (42 U.S.C. §§ 6901 *et seq.*), as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), authorizes actions against persons contributing to an imminent and substantial endangerment resulting from the handling, storage, treatment, transportation or disposal of any solid or hazardous waste, to compel them to abate the danger. *§ 7003 of RCRA.* The HSWA also authorizes EPA to issue "corrective action orders" to hazardous waste management facilities

authorized to operate under RCRA, requiring clean up when there has been a release of hazardous waste into the environment. *§ 3004(u) of RCRA.*

RCRA also imposes a regulatory scheme on generation, transport, treatment, storage and disposal of hazardous waste. Companies that engage in treatment, storage or disposal of hazardous waste are required to have permits and utilize a manifest system to track the waste from generation to disposal. Generators and transporters must also participate in the manifest system. Permits under RCRA impose stringent closure requirements on hazardous waste treatment, storage or disposal facilities, including long-term post closure care and assurance of financial responsibility. *§§ 3002-3005 of RCRA.*

RCRA also regulates underground storage tanks used to store hazardous substances or petroleum materials. It requires the registration of all tanks used after 1984 or abandoned since 1974 but still in the ground. Owners of such tanks are required to notify designated state or local agencies. RCRA also requires monitoring and corrective action with respect to leaking tanks in operation. An "underground tank" is defined as any tank and associated piping, ten percent or more of the volume of which is underground. *§§ 9001 et seq. of RCRA.*

2.3 Clean Water Act

The Clean Water Act ("CWA") (33 U.S.C. §§ 1251 *et seq.*) imposes a number of requirements that can affect the owner of real property. Every discharge from a "point source" (e.g. any pipe, ditch, channel, tunnel, conduit, well or discrete fissure) of a "pollutant" (e.g., dredged spoil, solid waste, sewage, garbage, chemicals, biological matter, industrial, municipal or agricultural waste) to waters of the United States (including intermittent streams, ponds, navigable waters and groundwaters) requires a permit which specifies the amount and contents that may be in the discharges. Permits must be obtained for stormwater discharges through discrete channels or conveyances if they are located in urbanized commercial or industrial areas. *§ 402 of CWA.*

Because of water quality requirements and areawide plans required under CWA, restrictions on the uses to which property may be put can occur. For example, where prior users or users of neighboring property have permitted discharges that create a border-line compliance situation with water quality standards, a new user may have to incur extra expense to undertake treatment of its potential discharge.

Moreover, CWA requires a permit from the Corps of Engineers for any construction activity in any waters of the United States or any wetlands area. *§ 404 of CWA.* Obtaining a § 404 permit in a wetlands area may require that other wetlands property be purchased and preserved in "mitigation" of the development of the wetlands area.

Section 311 of CWA imposes strict liability for spills of hazardous substances and oil products.

2.4 Clean Air Act

The Clean Air Act ("CAA") (42 U.S.C §§ 7401 *et seq.*) imposes requirements for attainment and maintenance of air quality standards. CAA contains a permit program for specific sources of air emissions. Generally, only a certain level of emissions of certain pollutants is allowed in a specific area. A developer of property must consider whether he will be able to obtain the necessary air permits to allow the contemplated development in view of the levels allowed in that area.

New major sources of air pollution and major source modifications must employ stringent emission control techniques and must demonstrate that they will not adversely impact air quality. Air emission studies are required which sometimes can entail collection of data for as long as a year prior to obtaining a permit, depending upon the source. With respect to an existing source, transfer of air permits is often an important economic item, especially if the area has not attained air quality standards.

2.5 Occupational Safety and Health Act

The Occupational Safety and Health Act ("OSHA") (29 U.S.C. §§ 651 *et seq.*) regulates exposure in the workplace to environmental contaminants. Rules under OSHA require notice of any "construction activity" which could involve exposure to asbestos. The term "construction activity" is broadly defined to include, for example, installation of a telephone system.

2.6 National Environmental Policy Act

The National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4321 *et seq.*) requires an analysis of the environmental impact of any major federal action. In appropriate circumstances, major federal action may include issuance of a permit under the Clean Water Act or other federal permitting actions. In those cases where an environmental impact statement is required, the impact of the activity on the environment must be thoroughly investigated and any impacts must be mitigated. Mitigation can be accomplished by restrictions on use of the property, or in some cases, by acquisition of other environmentally sensitive property which will be preserved.

2.7 Toxic Substances Control Act

The Toxic Substances Control Act ("TSCA") (15 U.S.C. §§ 2601 *et seq.*) regulates polychlorinated biphenyls ("PCB's"). The regulations under TSCA impose strict requirements on the use, storage and disposal of PCB's. PCB's are no longer manufactured, but are still in use in electrical equipment, such as transformers and capacitors. PCB's are of primary concern in real estate transactions, because past practices with electrical equipment may have left significant PCB contamination in soil and buildings. Moreover, acquisition of property without knowledge of PCB-containing transformers, capacitors or

other equipment, can lead to violations of the storage and disposal requirements when the electrical equipment is dismantled and disposed.

2.8 Rivers and Harbors Appropriations Act

The Rivers and Harbors Appropriations Act ("RHAA") (33 U.S.C. §§ 401–413) requires that any structures which will impede or impact on a navigable waterway must receive a permit from the Corps of Engineers. The definition of "navigable waterway" is very broad and any impact of development of property on surface waters should be evaluated to determine whether a permit under RHAA should be obtained.

2.9 National Historic Preservation Act

The National Historic Preservation Act ("NHPA") (16 U.S.C. § 470) requires that federal agencies consider the impact of their decisions on cultural and historic resources. Under the NHPA, a company may be required to undertake an investigation of property which may contain valuable artifacts or other historic items prior to construction, mining or other activities on the property. Restrictions in this regard can be incorporated into federal permits, such as those issued under the CWA.

3. Principal state and local laws

3.1 Introduction

Many state environmental laws parallel the federal environmental statutes. Under such laws, a state may be authorized to carry out its state legislation in lieu of the federal program. States may impose other types of requirements in addition to those imposed by federal law. These include the following:

3.1.1 Site assessment requirements

New Jersey has a property transfer law which requires that sellers of industrial sites perform an environmental audit of the site prior to sale and submit a plan to remediate any contamination to the state and the purchaser. Failure to satisfy these requirements is grounds for rescission. Many other states are currently debating enactment of similar laws.

3.1.2 Deed notice requirements

Pennsylvania and Massachusetts laws, among others, require sellers to provide notice in the deed if they have knowledge that hazardous wastes were disposed of on the site.

3.1.3 Superliens

Superlien provisions enacted in Massachusetts, New Hampshire, New Jersey, Connecticut and other states authorize state officials to impose a first-

priority lien on the property of a party responsible for or owning a contaminated site when the state has expended public funds to clean up such site. Often the priority lien is not limited to the property at which the clean up funds were expended, but applies to all property of such parties within the state.

3.1.4 Negative declaration requirements

States such as Connecticut require that the seller certify to the state and the purchaser of property at which hazardous waste has been generated or managed that there has been no release of any hazardous waste on the property or if such release has occurred, that it has been cleaned up under a state-approved plan. This type of certification is often difficult to make because of the difficulty in ascertaining the causes of contamination, particularly groundwater contamination. If neither certification can be made, the seller *or purchaser* of the property must commit to the state to undertake any necessary clean up of contamination at the property.

3.2 Local laws

Local laws regulating zoning, sewage and water connections, building construction and maintenance standards and other aspects of land use are also relevant to real estate transactions and their impact must be identified and quantified in each particular transaction.

3.3 Common law

Owners of property can be liable under common law for adverse effects of their property on others. The principal theories of liability are nuisance, strict liability, negligence and trespass.

Under the law of nuisance an owner of property is responsible for allowing its use to interfere unreasonably with the use or enjoyment of the property of others. Trespass is the physical invasion of another's property by, for example, environmental contaminants. Negligence is the lack of due care in the use of the property that can result in liability to anyone damaged. Presence or use of hazardous substances in some states is an "ultrahazardous activity". In such a case, resulting damage, regardless of negligence, creates strict liability.