

INSIDER'S VIEW

Owners should disclose property contamination

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In the news: In late July, Kiddie Kollege, a day-care facility in Franklin Township, voluntarily closed down after two years of operation when high levels of mercury contamination were discovered on the property, which formerly housed a thermometer factory.

Q. Was the Kiddie Kollege case an anomaly or do potentially contaminated sites often fall through the cracks?

It's really not that frequent an occurrence, quite frankly. Especially when you are dealing with historic, industrial establishments, when you know what the activities were and you know what the contamination would have been in the past.

In this case, there just seemed to be quite a bit of confusion, for lack of a better description, over the years as to what was done or not done about the contamination.

Q. What steps should a property owner take to vet a property?

When you are buying a piece of property, considerations come into play other than just getting building permits or having the zoning board allow you to do what you want to do. New Jersey has a set of standards that will take effect on Nov. 1 related to an environmental investigation protocol that would allow you, as a purchaser, to do a preliminary site assessment of a certain magnitude. If it is done properly, you have the ability to invoke certain innocent landowner or innocent purchaser defenses.

As I understand it, [Sullivan] acquired a tax sale certificate and he was looking to foreclose on



a tax sale certificate. He ultimately took title without the typical protections that you would put into a contract as a buyer of property in a normal business sense.

Q. What about the Kiddie Kollege business owners, Steve and Becky Baughman? What are their responsibilities?

What probably happened is that nobody went after the original company or individuals who caused the contamination. Then time elapsed and you got to where you are today.

The DEP or the EPA might look to [them] or to the titleholder of the property first and put the burden on them to demonstrate it was not their responsibility.

Q. What can a property owner do to protect himself when buying former industrial land?

Had this been a normal business transaction and had there been a lender involved, a lender would require the appropriate environmental investigation. The purchaser, properly advised by legal council, would undertake the appropriate environmental investigation.

You would want the landowner to be making representations and warranties that there

have been no reports of environmental contamination. And you would want to hold that seller responsible based upon the representations and warranties that are in that contract that, to the best of their knowledge, they are not aware of anything. Then if it turns out there is something there, and the seller was aware of it, then they are in breach of a contractual obligation and there may be certain liabilities.

Q: What if you're the seller?

You typically would want to disclose it and say you want to sell the property in "as is" condition, to put the buyer contractually responsible for any inspections, tests or investigations that might be necessary.

Q. Does the property owner have to disclose such information when leasing the space?

If a property owner is aware of a defect in the property, then the property owner would have a legal obligation to disclose that defect if it is one that is not readily discernible.

If someone does something to knowingly hide the condition of the property, then they could be responsible for general legal principles for failure to disclose, or it could rise to the level of a fraudulent nature.

Q. How long will it take for this to be settled?

There are two different avenues here. As far as the property cleanup is concerned, if someone is willing to take the responsibility to do the remediation to the property — and the last thing I saw was that [the owner] was willing to do that — then the DEP will oversee that and put in certain requirements as part of a remedial action work plan.

That is a separate front from any investigation as to whether there was any wrongdoing in the process, which I understand the attorney general's office may be pursuing.

Q. Does remediation correlate to guilt?

Not necessarily. The objective of the environmental laws is to get rid of the problem, clean up the property, get the property to the point that it can be a functional space down the line, to address any situations that might have an adverse impact.

— G.W. Miller III