



Hazardous-Waste Laws and the Developer

by Jeffrey G. Gilmore & Karen E. Harrison

In assessing a potential building site, developers should be aware that even undeveloped land may have been a dumping ground, either legal or illegal, for hazardous waste. Furthermore, these sites needn't be the work of big industry; many small businesses have created hazardous-waste sites. Thousands, for example, have been created by gas stations that are now closed. Many of these sites occupy prime commercial land.

Prospective developers should consider several risks. First, exposing employees to hazardous waste on the job site creates tort liability for any illnesses that result. Second, the developer, if also an owner, is liable to the federal government for the cost of site cleanup—even after the land has been sold.

Tort Liability to Employees

A general contractor or developer must provide reasonably safe working conditions. Employees who are unknowingly exposed to hazardous waste can sue the employer for negligence. Developers or contractors will be liable for the employee's illness or injury if they failed to use a reasonable degree of care.

Most contractors obtain insurance to cover these situations. However, most policies now exclude hazardous-waste liability from the coverage.

Developers or contractors who knowingly permit employees on a site that contains or even is suspected to contain hazardous waste can be found liable for an intentional tort—or criminal charges. Insurance policies

caused by the waste.

The owner does have several narrow legal defenses. Recent amendments to Superfund—Superfund Amendments and Reauthorization Act (SARA)—exempt private-land owners from liability if they acquired the land without knowledge of—and without any reason to know of—the hazardous waste, and if they adequately investigated the previous ownership and use. Such an investigation by the purchaser could prove costly. However, the cost of an investigation usually pales next to the cost of site cleanup, which can run into millions of dollars.

The original defenses to Superfund are so narrow as to usually preclude their use. The owner is not liable if the release of hazardous waste—or the damage—is caused solely by an act of God, an act of war, or an act or omission of a third party that occurs despite the owner's exercise of due care.

Liability of a Past Owner

Federal courts have interpreted the Superfund statute to hold past owners liable for waste that was on the site during their period of ownership. Thus, liability does not end when the owner sells the land. This is logical, since Superfund's purpose is to hold all persons associated with hazardous waste liable for its cleanup. The defenses that were discussed above apply to past as well as current owners.

Protection for Contractors and Owners

Potentially liable parties can protect themselves by taking one of two steps prior to buying land.

First, a prospective purchaser can ask the current owner to have the property inspected for hazardous waste. Obviously, if hazardous waste is found, the prospective purchaser should either not purchase the property or should require full site cleanup. The latter might qualify the purchaser for the Superfund exemption if further waste is found. Alternately, the buyer could hire a consultant to undertake such an investigation.

Second, the prospective purchaser can include an indemnification clause in the sales agreement. A typical clause could admit the existence of hazardous waste, arrange for its removal, and provide for full compensation for any injury, damage, or loss that results from the waste. Or the clause might provide that, in the event that hazardous waste is found, the seller will compensate the purchaser for any injury, damage, or loss, including economic loss.

These agreements would not relieve the owner of liability to the federal or state government for cleanup costs, but would provide a means for reimbursement, assuming the seller has assets to be collected against. Enforcing the agreement could, of course, require litigation, which is

time-consuming and expensive.

Another option for owners of a hazardous site is a lawsuit against prior owners or generators of the waste. This lawsuit can be brought in the absence of an indemnification agreement, and courts have held that the Superfund statute permits these actions. However, these lawsuits are generally allowed only after some cleanup costs have been incurred. The initial cost of cleanup—and the cost of litigation—could easily be too high for a small developer, and would simply make a project uneconomical.

The proliferation of toxic waste has changed the construction industry forever. Hazardous-waste sites exist throughout the country. The broad liability and the high cost of cleanup should make developers, owners, and contractors seriously examine their potential liability and take steps to protect themselves. ■

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Liability as an Owner Under Superfund

Superfund—technically, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)—imposes broad liability on those associated with property that contains hazardous waste. The federal statute states that the owner and operator of a facility are liable for (1) all costs of removal or remedial action incurred by the federal or state government; (2) any costs incurred by anyone else who cleans up the site; and (3) damages for injury to, destruction of, or loss of natural resources.

Thus, by assuming ownership of a site, a developer assumes liability for all cleanup costs and for damage