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Environmental Due Diligence in Land Acquisitions

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Let's Talk Legal Topics

LTA's STANDARDS AND PRACTICES

"Ensuring Sound Transactions," Standard 9(c)(1): Environmental Due Diligence

> "For every land and conservation easement transaction, conduct or obtain a preliminary environmental investigation, transaction screen or Phase I assessment to identify whether there are any conditions that pose environmental risks, and take steps to address any significant concerns."

Note: Applies to both fee and CR acquisitions. The appropriate level of inquiry must be determined on a case-by-case basis. Property history? Intended use? Public access?

What is a transaction screen or Phase I?

A transaction screen is limited, may be conducted by anyone, and is especially appropriate for rural, non-industrial or undeveloped properties. Includes a site visit, regulatory records review, key interviews and limited historical research.

A Phase I assessment is more involved, but does not include testing. Must be performed by an environmental professional. Generally intended for commercial properties to identify "recognized environmental conditions"; *i.e.*, presence/potential presence of hazardous materials/petroleum.

If contamination is suspected, testing will be recommended as part of a Phase II. Note that the current landowner might resist analytical testing due to concerns about its own liability if something is found.

WHY IS AN ENVIRONMENTAL ASSESSMENT IMPORTANT?

- Potential strict liability (*i.e.*, without regard to fault) as a hazardous waste site owner under Mass. Gen. Laws c. 21E for cleanup costs and property damages to third parties.
- Potential common law tort liability to any users of the property for personal injuries due to exposure to contaminants on the property.
- Commercial liability policies routinely contain "pollution exclusions" that broadly preclude coverage for these claims.

- Public cleanup funding rarely exists.
- Negative PR for the land trust.
- Drain in land trust time and resources.

CHAPTER 21E LIABILITY AND DEFENSES

Fee-owned properties:

Generally, an owner of contaminated property is strictly liable to conduct a cleanup in accordance with MassDEP regulations. If the property is the source of the release of contaminants, the "site" for which the owner is responsible extends to other impacted lands. Source site owners may be responsible for cleanup costs on nearby properties and any damages to those properties, such as diminution in value.

Very limited liability exemptions or defenses for subsequent owners who did not cause the contamination, so don't count on them!

> No blanket protections for "innocent" landowners under state law.
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> "Eligible persons" who did not cause the contaminant release or own the property at the time of the release and who own a source site that has reached certain regulatory cleanup milestones may be eligible for certain liability protections. M.G.L. c. 21E, § 5C.

CRs:

CR holders will not be considered strictly liable "owners/operators" under c. 21E if they did not cause or contribute to the contaminant release and meet certain other criteria. M.G.L. c. 21E, § 5(l). This is generally good protection.

Pesticides exemption: MassDEP exempts from its hazardous waste site cleanup regulations (the Massachusetts Contingency Plan), implemented under c. 21E, the release of pesticides resulting from their application "in a manner consistent with their labelling." 310 CMR 40.0006 and 40.0317.

> *Note*: Spills of pesticides from drums, for example, are subject to 21E and are not exempt. Soil testing evaluating patterns of distributions of pesticides from historic pesticide use can sometimes identify spills.

TORT LIABILITY FOR PERSONAL INJURIES DUE TO CONTAMINANT EXPOSURE

An owner or CR holder could be liable in tort (*i.e.*, for common law nuisance, negligence or trespass) for "toxic torts" - personal injuries allegedly caused by exposure to contaminants on the land. Personal injury claims do not fall under chapter 21E.

Although these cases are often very difficult to prove since the plaintiffs must demonstrate, among other things, a causal connection between their injuries and their exposure to contaminants at a particular site, a toxic tort lawsuit against a land trust could have significant financial and PR impacts.

There are two potentially applicable statutory defenses to tort claims, noting that these do not apply to 21E claims for cleanup costs and property damage:

Public/Recreational Use Statute, Mass. Gen. Laws c. 21, § 17C

> Owners of an interest in land (fee-held or CRs) that are *open to the public* for recreational, conservation, scientific, education, environmental, ecological, research, religious or charitable purposes, *free of charge*, shall not be liable to members of the public for personal injuries or property damage *absent willful, wanton or reckless conduct* by the landowner/CR holder.
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> *Note:* This statute can be a strong incentive not to charge a fee to enter conservation land.
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> Additionally, although liability protections do not extend to "willful, wanton or reckless conduct" (such as gross negligence), which a plaintiff would have to prove to get around the statute's bar to claims for mere negligence, there is no bright legal line between these two standards. Rather, it is fact dependent and subjective, ultimately left to the discretion of a judge or jury.

Charitable Immunity Statute, Mass. Gen. Laws. c. 231 § 85K

> *Tort liability of charitable organizations, such as most land trusts, is limited to $20,000* if the tort was committed in the course of an activity *directly related to the organization's charitable purposes*, *provided it was not primarily commercial* in nature.
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> *Directors/officers/trustees who are not compensated* for their work shall not be liable due to their roles in the charitable organization for torts, if such person was acting within the scope of their roles and in good faith, *unless the damage or injury was caused by willful or wanton conduct*.
>
> *Note:* This liability carve-out does not apply to paid directors/officers/trustees or employees. Similar to the Public Use Statute, willful or wanton conduct is not protected.
>
> *Issues raised:*
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> - Was the activity committed in the course of an activity directly related to the charitable purpose (*i.e.*, not primarily commercial or for other reasons)?

- Was the *director/officer/trustee who was allegedly* responsible for the tort uncompensated and not acting willfully or wantonly?

Plaintiffs who cannot sue charitable organizations or its directors/officers/trustees will sometimes sue employees directly, to try to circumvent this statute.

The statute tends to be narrowly construed, and there is growing momentum to increase the statutory liability limit. There are no reported Mass. cases involving land trusts. In the context of claims against charitable educational institutions, hospitals/medical centers and religious institutions, there are plenty of cases holding that there is no immunity protection.

Don't count on this statute as a defense!

WHAT IF CONTAMINATION IS FOUND IN DUE DILIGENCE?

Each situation is unique. Before acquiring an interest in land, it is important to understand the nature and extent of any contamination, its source, whether a cleanup is required under Mass. law, and what the potential exposure could be to property users.

If contamination is found:

- Negotiate/Restructure the deal?
- Address the problem?
- Back out of the deal?