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LOOKING BEYOND THE TITLE SEARCH: ATTORNEYS MUST CONSIDER ENVIRONMENTAL REGULATIONS

JOEL STROUD

INTRODUCTION

Attorneys who only occasionally assist clients in buying, selling, or leasing real estate for either commercial or residential uses may inadvertently neglect environmental issues relating to real estate transactions. Moreover, they may consider environmental issues as being ancillary and collateral elements of these transactions. They may decide that discussing environmental issues with their clients is not necessary. Although this is a frequent topic of continuing legal education classes, attorneys who rarely have real estate clients may not attend real estate/environmental classes.

Under these circumstances, attorneys assisting clients with even the most basic real estate transactions may face increased exposure to malpractice claims. Moreover, assisting clients in this manner could be the catalyst that sparks the much-predicted rise in the number of environmentally-based lawsuits filed directly against attorneys.¹

If attorneys determine that they are not able to provide the client with diligent assistance in real estate transactions, they should refer clients to a real estate attorney who can provide adequate diligence. Environmental issues and regulations represent some of the most complex issues that affect and complicate real estate transfers. Federal and state environmental regulations impose liability on almost every party involved in the property transfer.

Federal and state environmental regulations correct and prevent damage to our environment. While the focus of this paper is on federal and state environmental regulations, local municipal and county regulations also have environmental components affecting real estate transactions. These regulations require attorneys to redefine and expand the narrowly focused perspective commonly used in pre-environmental real estate transactions. For example, one environmental issue that is becoming more common is the problem of illegal drug

1. J. B. Ruhl, *Malpractice and Environmental Law: Should Environmental Law Specialists Be Worried?*, 33 Hous. L. Rev., 173, 179 (1996).

manufacturing laboratories in residential neighborhoods.² The illegal dumping and storing of the hazardous chemicals may contaminate the property.³ The Drug Enforcement Agency had to clean 4,500 illegal laboratories in 2000.⁴ The cost of cleanup ranges from 3,000 to more than 40,000 dollars per structure.⁵ Explosions and fires caused by the chemicals used in making the drugs occurred at over 114 drug laboratory sites nationwide in 2000.⁶ Attorneys need to check with local law enforcement to determine whether the property may be at risk for this type of environmental contamination. Attorneys need to be aware that insurance policies may exclude pollution costs.⁷ Thus, it is now advisable to consider the possibility of illegal drug and chemical contamination in a property environmental assessment and title search.

Traditional real estate attorneys performed title searches for identifying limitations on the alienation and marketability of particular tracts of land. Disclosure rules imposed on the seller, and to a lesser extent on the realtor, supplemented these title searches. Caveat emptor, imposed on the buyer, generally provided impetus for the buyer and her attorney to conduct a site inspection of sufficient due diligence to discover any obvious site limitations or defects. This tripartite approach provided a framework that usually protected the interests of all of the parties.

Attorneys conducting title searches in the pre-environmental law context generally needed to look at only a few other files and records, such as the tax and the lis pendens records. They rarely needed to apply other legal disciplines, other than property, contract, and tort law, to most real estate transactions. In addition, attorneys rarely needed to develop community and county contacts with agencies, businesses, and professionals or consultants that extended beyond those connected with buying and selling real estate.

LOOKING BEYOND THE TRADITIONAL TITLE SEARCH

The tripartite approach, when used in the current environmental setting, still provides a framework that usually protects the interests of all parties but only if attorneys incorporate an environmental compo-

2. AIR/ WATER POLLUTION REPORT'S ENVIRONMENTAL WEEK, November 25, 1996.

3. Paula Lavigne Sullivan, *Unwitting Landlords Can be Victims Too*, SCRIPPS HOWARD NEWS SERVICE, January 23, 2001.

4. Mitzi Perdue, *Clan Labs Can Kill You*, SCRIPPS HOWARD NEWS SERVICE, March 19, 2001.

5. *Id.*

6. Gene Fadness, *Boise City Council Will Vote on Plan to Reduce Meth Labs*, THE IDAHO STATESMAN, November 21, 2000, at 01.

7. Carl A. Salisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357 (1991).

ment when performing title searches. Attorneys must discuss environmental issues with clients. Both must be prepared to address environmental issues with lenders, appraisers, and government officials. Environmental disclosure laws may require that attorneys and clients discuss environmental issues with potential buyers, sellers, and renters. These discussions will facilitate property transactions and make it more likely that property transfers comply with applicable environmental regulations.

In preparing for these discussions, attorneys must apply environmental law to real estate transactions. Attorneys should have sufficient working knowledge of environmental law to understand its terminology and concepts. Acquiring this working knowledge is necessary regardless of how often attorneys provide real estate assistance to clients. Diligent assistance has the same standards whether attorneys have one client or a hundred clients. Attorneys need to stay informed and current on environmental regulations in order to provide diligent client assistance. The Federal Register contains changes in federal laws. The North Carolina Bar Association offers seminars on environmental law and its effects on real estate transactions.

Every parcel of land is subject to federal and state environmental regulations. Moreover, attorneys should initially presume that a specific parcel has an environmental issue, which could be subject to these regulations.⁸ A Phase I Environmental Site Assessment, conducted by a competent environmental consultant, may be needed to rebut this presumption. This is especially true if the property transfer is a commercial transaction.⁹ Phase I Assessments are becoming more common in residential transactions, because lenders are becoming more risk conscious, and risk adverse.¹⁰ Environmental liabilities may so impair a transferor's ability to discharge debts that the transaction may be void as a violation of the Uniform Fraudulent Conveyance Act.¹¹

The Uniform Residential Appraisal Report (URAR) does not require a Phase I Assessment but does require the appraiser to comment on "adverse environmental conditions . . . present in the improvements, on the site, or in the immediate vicinity of the subject property."¹²

8. Ruhl, *supra* note 1, at 191.

9. Janet M. Johnson, *A Practical Guide To Identifying and Managing Potential Environmental Hazards and Conditions Affecting Commercial Real Estate*, 32 REAL PROP. PROB. & TR. J. 619, 635 (1998).

10. Robert Colangelo & Ronald Miller, *Environmental Site Assessments and Their Impact on Property Value: The Appraiser's Role*, 1995 APPRAISAL INST. 03.

11. Johnine J. Brown, *Superfunds and Superliens: Super Problems For Secured Lenders*, 1998 PRACTICING L. INST. 445, 457.

12. Colangelo, *supra* note 11, at 11.

A Phase I Assessment is the first minimum environmental critique of the property and is a “snapshot view” of a site’s environmental condition at any given time.¹³ It is “[a]n investigation to assess the environmental integrity of real property including historical research, government environmental records, and a site observation.”¹⁴

Some environmental regulations, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (CERCLA), provide some protection from liability for innocent landowners. An innocent landowner, under CERCLA, is “one who did not release or dispose of hazardous substances on the property, and who did not know or have reason to know of the presence of hazardous substances on the property at the time of acquisition.”¹⁵ Before clients acquire property, attorneys must arrange for due diligence site inspections in order for clients to have this liability protection. There is no “bright line” standard to determine the extent and nature of this pre-acquisition inspection.¹⁶ A Phase I Assessment, however, is strong evidence that a due diligence pre-acquisition site inspection occurred before acquisition of the site by the current owner.¹⁷

The property’s prior use and its physical traits provide a general starting point for assessing potential environmental issues.¹⁸ Examples of previous businesses that tend to cause environmental harm include dry cleaners, agricultural chemical distributors, metal electroplating facilities, hunting clubs, gas stations, landfills, industrial plants, and retail offices that may have either lead paint or asbestos.¹⁹

Attorneys must discuss environmental issues, regulations, and liabilities with clients to gauge the extent of and the types of site environmental assessments that best meet the clients’ needs. These discussions help in determining the financial consequences and liabilities the transaction represents to the parties, based on the extent of the assessment and the scope of the environmental site investigation. While not every property transfer requires a Phase I Assessment, it is imperative that attorneys provide sufficient environmental information to clients. Informed and deliberate decisions are more likely when clients have information regarding environmental issues that affect property transactions. Attorneys should document that these discussions occurred. Recommending that clients consider this expanded

13. *Id.* at 7.

14. *Id.* at 219.

15. Johnson, *supra* note 10, at 642.

16. *Id.* at 635.

17. *Id.*

18. *Id.* at 628.

19. *Id.* at 629.

scope of diligence, as related to the environmental impacts on real estate transactions, reduces risks for malpractice lawsuits against attorneys.²⁰

ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Four distinct considerations shape the environmental law perspective of the expanded scope of diligence as related to the buying, selling, and leasing of real estate.²¹ Understanding the applicable environmental laws is the first consideration. Second, attorneys must understand the types of disclosures that the seller must make regarding known and hidden environmental hazardous substances, contaminants, and pollutants that may be present on the property. Third, attorneys must consider laws affecting the particular contemplated use of the property. Attorneys must consider how an environmental contaminant located on an adjacent or adjoining property would affect the contemplated use of the property that is the subject of the land transfer. For example, North Carolina General Statute § 130A-310.8 requires public disclosure if the property was a hazardous substance disposal site.²² The property deeds of adjoining and adjacent properties may contain a statement identifying the parcel as an inactive hazardous waste disposal site. Thus, a diligent investigation includes title searches of the adjoining and adjacent properties. The fourth consideration is that attorneys must understand that provisions in the environmental liability laws can make a bona fide purchaser liable, although some of the environmental regulations grant exclusion and safe harbor provisions for innocent buyers.

Failing to incorporate these considerations into the due diligence required in performing and rendering assistance in the selling, buying, and leasing of property can have far-reaching ramifications. For example, consider the ramifications if attorneys fail to conduct title searches on adjacent or adjoining properties and fail to consider the environmental histories of the adjacent or adjoining properties.

Leaching of the hazardous waste to adjoining or adjacent property could have occurred if the property served as a hazardous waste disposal site. Leaching could also have occurred if the previous business or user of the site was especially prone to causing environmental contamination or damage. Thus, all of the property in the area may have

20. *Id.* at 635.

21. Michael L. Rodburg, *General Environmental Law Considerations Affecting Business Transactions*, 1986 PRACTICING L. INST., 37, 39 (1986).

22. N.C. GEN. STAT. § 130A-310.8 (2000).

significant environmental problems that could affect the quality of the ground water and soil.

These consequences are harmful to the client's interests, as well as to lenders and other third parties. The attorney's failure to consider the environmental issues/regulations may result in multiple lawsuits filed against the attorney. Even if the lawsuits are unsuccessful, the effects on the attorney's reputation may be severe and long lasting.

The United States Environmental Protection Agency (EPA) administers most of the environmental regulations. However, the Fish and Wildlife Service of the Department of the Interior and the National Marine Fisheries Service of the Department of Commerce administer the Endangered Species Act.²³ The EPA shares administration of wetlands environmental regulations with the Army Corps of Engineers, the Department of the Interior, and the Department of Agriculture.

OVERVIEW OF SPECIFIC ENVIRONMENTAL REGULATIONS AFFECTING REAL ESTATE

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 et seq., as amended, and the Superfund Amendments and Reauthorization Act of 1986, as amended, (CERCLA/SARA) and the Resource Conservation and Recovery Act, (RCRA), create the greatest liability risks for all participants in the property transaction.²⁴ The scope of liability is so sweeping that "ownership or operation rather than culpability or responsibility triggers liability."²⁵ Liability also extends forward and backward in time with respect to past and current owners and operators.²⁶

CERCLA was a response to the widely publicized environmental disaster that occurred at Love Canal, in Niagara Falls, New York.²⁷ Clean up of such sites is one of the primary functions of CERCLA and SARA. The law provides a federally funded response and uniform standards of "remedial actions" for problems caused by the re-

23. JASON F. SHOGREN, PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT 27 (1998).

24. Ruhl, *supra* note 1, at 184.

25. Cyndy Day-Wilson, *Federal Environmental Issues in Commercial Leasing Transactions: A Practitioner's Guide*, ENVTL. L. 597, 603 (1996).

26. *Id.* at 607.

27. Johnson, *supra* note 10, at 619.

lease of hazardous substances.²⁸ The regulations promulgated under CERCLA take effect upon either the actual release or the threat of a release of a “hazardous substance or pollutant or contaminant” into the environment.²⁹

Under CERCLA, a hazardous substance is any substance requiring special consideration due to its toxic nature as determined by the EPA under the Clean Air Act, the Clean Water Act, or the Toxic Substances Control Act (TSCA).³⁰ Hazardous wastes, as defined under the RCRA, are also hazardous substances.³¹ The EPA, in the Federal Register, provides lists of hazardous substances. However, Congress allows for broad regulatory discretion in defining and regulating pollutants. Thus, the EPA, under CERCLA, provides that a pollutant or contaminant can be a substance not presently listed. If it is determined that the substance “will or may reasonably be anticipated to cause any adverse effect in organisms and/or their offspring”, it will be considered a pollutant or contaminant.³² CERCLA does not classify petroleum as a hazardous substance. However, the Oil Pollution Act of 1980 regulates surface waters or shorelines contaminated by petroleum discharges.³³ Petroleum is also subject to the regulations that govern underground storage tanks.³⁴

To address the issue of funding the cleanup of sites contaminated by hazardous substances, the EPA uses the “Superfund.”³⁵ If the EPA cleans a contaminated site, the government, under the provisions of CERCLA/SARA can recover these costs from “responsible parties.”³⁶ A responsible party is any person who is liable. Under some circumstances, CERCLA provides for cost recovery by third party private persons.³⁷ CERCLA defines four classes of responsible parties.³⁸

1. The present owner or operator
2. The owner or operator of the site at the time of the release of the hazardous substance
3. Generators of the hazardous substance who arranged for disposal or treatment and

28. WILLKIE, FARR AND GALLAGHER, ENVIRONMENTAL LAWS AND REAL ESTATE HANDBOOK II-1 (3d ed.1992).

29. SOMENDU MAJUMDAR, REGULATORY REQUIREMENTS FOR HAZARDOUS MATERIALS 21 (1993).

30. *Id.* at 21.

31. *Id.*

32. *Id.*

33. FARR, *supra* note 29, at 30.

34. Richard Fahey, *Underground Storage Tanks: A Primer on the Federal Regulatory Program*, AMERICAN BAR ASSOCIATION 03 (2d ed. 1995).

35. *Id.* at 1.

36. Colangelo, *supra* note 11, at 3.

37. *Id.*

38. *Id.*

4. Transporters of the hazardous substances

The government or a private third party can recover costs only if the cleanup activities are in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan.³⁹

CERCLA imposes strict, joint and several, and retroactive liability on any or all of the responsible parties.⁴⁰ Moreover, the reach of CERCLA's liability is so broad that it can affect real estate purchasers, landlords, lessees, lenders, debtors who have not yet filed for bankruptcy, and corporations.

The Resource Conservation and Recovery Act (RCRA)

The Resource Conservation and Recovery Act (RCRA) regulates the generation, handling, transport, treatment, storage and disposal of hazardous wastes.⁴¹ The EPA has defined hazardous wastes as those "solid wastes that pose a danger to human health or the environment, and must be managed accordingly."⁴² Managed is defined as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous waste."⁴³ EPA's definition of solid waste includes "any discarded material" and can include "abandoned materials, recycled materials, and inherently wastelike materials."⁴⁴ Hazardous wastes exhibit one of four traits: "ignitability, corrosivity, reactivity, or toxicity."⁴⁵ The EPA has developed lists that identify the hazardous wastes that cause health and environmental problems. The Code of Federal Regulations contains a list of identified and known hazardous wastes. The RCRA's mandate is to regulate all aspects of hazardous waste management. Enforcement provisions include injunctive relief. Moreover, CERCLA remedies apply to hazardous wastes because these wastes, by definition, are hazardous substances.

The RCRA provisions also regulate underground storage tanks. These tanks represent one of the major and most frequent environmental issues affecting the buying and selling of property. Environmental problems result when these tanks leak "regulated substances" into the ground.⁴⁶ The RCRA defines a UST as:

39. SOMENDU, *supra* note 30, at 202.

40. Day-Wilson, *supra* note 26, at 603.

41. RIDGEWAY M. HALL, JR. ET. AL., RCRA HAZARDOUS WASTES HANDBOOK, § 2-1 (Government Institutes, Inc. 10th ed. 1993).

42. *Id.*

43. *Id.*

44. SOMENDU, *supra* note 30, at 129.

45. *Id.* at 131.

46. Fahey, *supra* note 35 at 1.

Any one or combination of tanks (including underground pipes connected thereto) which are used to contain an accumulation of regulated substances and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.⁴⁷

Regulated substances are those substances defined as hazardous under CERCLA and any form or class of petroleum.⁴⁸ The statute assigns liability to owners, lessees, and operators of property containing "tanks in service and out of operation tanks."⁴⁹ In some situations, the liability follows the seller if the seller did not remove the tank and it was out of service. The current owner may still be liable for environmental damages caused by past discharges of a UST regardless of the original owner's availability.⁵⁰

The issue that is most relevant to land transfers is determining whether a UST is located on the property. The next concern is whether the contamination makes the property subject to an environmental cleanup. Thus, attorneys must consider underground storage tanks when assisting clients with real estate transactions.

The Endangered Species Protection Act

Every parcel of property is unique, and environmental issues can vary within the geographical areas that comprise the county or region. This is especially true regarding the Endangered Species Act (ESA).⁵¹ Consultation with the local agricultural extension service can provide specific information about the locations and types of endangered species that exist in the county and region. Agencies that track both the species and the types of habitats that support the species can provide maps of the properties that may be subject to ESA protection.

The agencies administering the ESA recognize that there must be a balancing of private property rights and protection of endangered species.⁵² The ESA's guiding principle is to enable species to recover and become self-sustaining.⁵³ ESA provides a framework for conservation and management of species that are in danger of becoming extinct.⁵⁴ The Federal Register contains a list detailing the species that the ESA protects. The ESA covers both plants and animals⁵⁵ on public and

47. SOMENDU, *supra* note 35 at 157.

48. *Id.* at 157.

49. Fahey, *supra* note 35 at 3.

50. *Id.* at 4.

51. RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION 16 (1992).

52. *Id.* at 5.

53. *Id.* at 29.

54. *Id.* at 15.

55. *Id.* at 9.

private property.⁵⁶ If a private person harms, removes, or destroys a listed species on public or private property, the ESA provides for fines and imprisonment. Similar charges apply for private landowners.⁵⁷ Thus, attorneys must stay abreast of the listed endangered species. An example illustrates the effects of the Endangered Species Act (ESA) on a real estate transaction.

North Carolina protects Red-cockaded Woodpeckers and their habitats.⁵⁸ Attorneys assisting clients who are purchasing property need to include in the option to purchase clause rescission language that addresses this issue. Property assessments and site investigations are required in order to determine whether these woodpeckers and the longleaf pine trees that comprise their habitat are present on the property. The ESA restricts the property's development potential if either the woodpecker or the long-leaf pines are on the site. Owners and persons leasing property so restricted, must develop, use, and manage it such that these activities do not "take" the protected species.⁵⁹ The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct."⁶⁰

Development options include restricted uses of the property to only passive benign activities, or pursuant to ESA Section 10, submittal of an application for an "incidental take permit."⁶¹ An "incidental take permit" authorizes a taking "incidental to otherwise lawful economic activities" and requires development of a plan that details how the species will be affected and provides the measures taken to mitigate the affects.⁶²

Instead of either voiding the sale, or developing an individual plan, it may be possible to collaborate with an existing plan. The North Carolina Sandhills Habitat Conservation Plan is one example of an existing plan.⁶³ The landowner agrees to manage intensively a portion of the property for the woodpeckers in exchange for an incidental taking exemption permit to cut down only those trees absolutely required to clear space to build the house.

56. *Id.* at 16.

57. SSHOGREN, *supra* note 24, at 19.

58. *Id.* at 5.

59. *Id.* at 101.

60. *Id.* at 4.

61. *Id.*

62. *Id.*

63. *Id.* at 101.

Other Federal Environmental Regulations

The Clean Water Act (CWA)

The CWA makes it unlawful to discharge pollutants from a point source into the waters of the United States, except pursuant to a permit under the National Pollutant Discharge Elimination System (NPDES) Program.⁶⁴ Attorneys negotiating a lease need to consider whether the tenant's business would require an NPDES permit. This is because the EPA, under the provisions of the CWA, can sue the landlord, as well as the tenant, if the tenant fails to comply with the CWA permit requirements. Liability under the environmental regulations applies to both owners and operators, thus making the landlord or lender potentially subject to liability.⁶⁵ The District Court of Rhode Island has held that the landlord or the lender can also be subject to charges of aiding and abetting, if the state proves the landlord or lender had "influence and control" over the polluters.⁶⁶

Attorneys, in writing lease provisions, must strike a balance between the degree of property and eviction/foreclosure control the landlord or lender retains, versus the amount of unfettered control the tenant retains under the lease provisions. The degree of control retained by the landlord or lender must not be great enough to infer that the landlord or lender is deemed an operator or owner having "influence and control" over the polluters.⁶⁷

The Clean Water Act regulates real estate transactions involving dredging or filling in navigable waters or wetlands adjacent to navigable waters.⁶⁸ Violating the CWA can cause liability for the lender, the landlord, and the tenant, based on the operator or owner environmental liability standards.

Toxic Substances Control Act

The Toxic Substances Control Act regulates the manufacture, distribution, and use of chemicals, especially PCBs.

The Clean Air Act

The Clean Air Act prohibits discharges of air pollutants that exceed the EPA's published emission standards.⁶⁹ The Federal Register con-

64. Amos C. Dawson, II, Et. Al. *Real Property Transactions - Avoiding the Legal and Technical Environmental Pitfalls*. PROFESSIONAL EDUCATION SYSTEMS 27 (1987).

65. Day-Wilson, *supra* note 26, at 613.

66. *Id.* at 613. See also *O'Neil v. Q.L.C.R.I., Inc.*, 750 F. Supp. 551 (D.R.I. 1990).

67. *Id.* at 614.

68. PRACTICAL ENVIRONMENTAL LAW FOR THE BUSINESS AND REAL ESTATE LAWYER, NORTH CAROLINA B. FOUND. CONTINUING LEGAL EDUCATION I-1 (1993).

69. *Id.* at III-2.

tains these standards. Attorneys need to consider this regulation if the real estate transaction involves or may involve property contaminated by asbestos or lead-based paint.

Other federal environmental regulations, such as the Safe Drinking Water Act, Watershed Protection and Flood Prevention Act, and the Federal Insecticide, Fungicide, and Rodenticide Act, affect both the environment and real estate transactions.

State of North Carolina Environmental Regulations

Many of the federal laws have state counterparts that also affect real estate transactions. Other state environmental laws may have no direct federal counterparts, but embrace the central regulatory purpose of protecting and managing the state's environment. Applicable North Carolina regulations include the following:⁷⁰

North Carolina General Statute Chapter 47E: Residential Property Disclosure Act

Section 47E-4 (6), (Required Disclosures), provides that a disclosure statement shall include the presence of lead-based paint, asbestos, radon gas, methane gas, underground storage tank, hazardous material or toxic material (whether buried or covered), and other environmental contamination.

Exposure to radon gas is associated with an increased risk of developing lung cancer. The EPA ranks radon as a more serious health threat than asbestos, lead-based paint, PCBs, and dioxins combined.⁷¹ Section 47E-4 (6) is one of the few regulations that apply to radon gas in residential structures. One of the reasons for this lack of more extensive radon environmental regulation is that radon gas levels vary geographically and from house to house in the same neighborhood.⁷²

However, the EPA has established that a radon level above four picocuries per liter of air is of such a health risk that remediation is warranted.⁷³ The average level of radon in United States dwellings is about 1.3 picocuries per liter of air.⁷⁴ It is estimated that between seven and seventeen per cent of dwellings in North Carolina have radon levels above four picocuries per liter of air.⁷⁵ Additional radon information on the real estate protocols that the EPA has established

70. *Id.*

71. ROBERT LEKER, EXTENSION Radon Specialist, North Carolina Cooperative Extension Service, IN-SITE FOR MANAGING WORK & FAMILY: TESTING YOUR HOUSE FOR RADON (1995).

72. *Id.* at 1.

73. *Id.*

74. *Id.*

75. *Id.*

for radon is available in the EPA Document, "Home Buyer's and Seller's Guide to Radon."⁷⁶

Attorneys should include in the contract for sale a contingency clause stating that the contract is voidable if the property has a radon level above a predetermined level. Remediation can usually bring down the radon level to two picocuries per liter of air.⁷⁷ The cost of remediation can range up to \$1,300 per dwelling.⁷⁸ Attorneys should discuss radon with clients and decide on pre-closing radon testing, remediation protocols, and responsible parties.

North Carolina General Statute Chapter 130A: Public Health

Regulations under this chapter include sections on Solid and Hazardous Waste Management, The Scrap Tire Disposal Act, Lead-Acid Batteries, Inactive Hazardous Sites (130A-310), Superfund Program and the Brownfields Property Reuse Act.

North Carolina General Statute Chapter 113: Conservation and Development

Subchapter IV, Conservation of Marine and Estuarine and Wildlife Resources has regulations affecting real estate transactions.

North Carolina General Statute Chapter 113A: Pollution Control and Environment

This Chapter has numerous regulations that affect real estate transactions. The Chapter supplements many of the federal environmental regulations such as the Endangered Species Act, Clean Water Act, and the Federal Environmental Policy Act.

North Carolina General Statute Chapters 159C, 159G, and 159I

Chapter 159C is the Industrial and Pollution Control Facilities Act. Chapter 159G is the North Carolina Clean Water Revolving Loan and Grant Act of 1987.

Chapter 159I is the North Carolina Solid Waste Management Loan Program.

Attorneys assisting clients with real estate transfers need to be familiar with Chapter 159, because the provisions of Sections C, G, and I may help clients defray some of the costs for complying with environmental regulations.

76. EPA Document 402-R-93-003, HOME BUYER'S AND SELLER'S GUIDE TO RADON.

77. Radon Detection Systems, Inc.: Hazmat Guides, <http://www.radondetectionsystems.com/hazmat.radon.html>

78. *Id.* at 4.

N.C. Gen. Stat. Section 106-701: Nuisance Liability of Agricultural and Forestry Operations

This statute provides that:

[n]o agricultural operation after it has been in operation for one year, can be a public or private nuisance, because of any "changed conditions in or about the locality" when the operation (a) was not a nuisance at the time it began, and (b) does not result from negligent or improper operation.⁷⁹

Attorneys should advise clients that bringing lawsuits against existing agricultural operations for odors and other conditions not rising to the level of damages that would trigger violation of environmental laws is problematic. *Mayes v. Tabor* is an example of how the law is applied.⁸⁰

CONCLUSION

Environmental regulations have a significant effect on real estate transactions. Attorneys must expand the methods they use to assist clients buying, selling, and leasing real estate. If attorneys determine that they are not able to provide the client with diligent assistance in real estate transactions, they should refer clients to a real estate attorney who can provide adequate diligence.

Environmental issues and regulations represent some of the most complex issues that affect and complicate real estate transfers. Federal and state environmental regulations impose liability on almost every party involved in the property transfer. Environmental regulations base liability on a person's status as owner or operator and may impute liability to attorneys, lenders, landlords, and tenants. Liability has few connections with responsibility but is very proportionate to the individual's nexus to the property.

Attorneys must develop a working knowledge of environmental law if they are to provide the level of diligence required for adequately counseling and advising clients. Providing this type of diligence may lessen the risk of environmental malpractice lawsuits against attorneys assisting clients with real estate transactions. Attorneys must discuss environmental issues with clients. Clients and attorneys must be prepared to address environmental issues with the client's lenders, appraisers, and government officials.

Attorneys, in writing lease provisions, must strike a balance between the degree of property and eviction/foreclosure control the

79. CHARLES E. DAY AND MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS 523 (2d Ed. 1999).

80. *Mayes v. Tabor*, 334 S.E. 2d 489 (N.C. App. 1985).

landlord or lender retains, versus the amount of unfettered control the tenant retains under the lease provisions. The degree of control retained by the landlord or lender must not be great enough to infer that the landlord or lender is deemed an operator or owner having “influence and control” over the polluters.

Attorneys assisting clients in purchasing property need to include in the option to purchase clause rescission language that addresses the Endangered Species Act. Assessment of the property is required to determine whether a listed protected species is present on the property. If present, developing the property becomes more burdensome. Attorneys must stay abreast of the listed endangered species. Contacts with local agencies that track both the species and the types of habitats that support the species will help the attorney in developing a location map of the properties that may be subject to ESA restrictions.

The general rule is that every parcel of land is subject to federal and state environmental regulations. The property’s prior use and its physical traits provide a general starting point for assessing potential environmental issues. Examples of previous businesses that tend to cause environmental harm include dry cleaners, agricultural chemical distributors, metal electroplating facilities, hunting clubs, gas stations, landfills, industrial plants, and retail offices that may have either lead paint or asbestos.