nerej
CELEBRATING 55 YEARS

Question of the Month: Are environmental issues the death knell for development deals? Answer: absolutely not!

January 26, 2012 - Retail

Several weeks ago, I received a call from a client of mine who is relatively new to the development game raving about the potential of a parcel he recently discovered. It sounded like a dream...3 acre corner parcel, solid traffic patterns, easy access to two major highways, existing curb cuts, heavy prospective tenant action, etc. After about two weeks, I decided to follow up on this exciting new project only to find out that my client pulled himself out of the running for the deal. When I asked him why, he simply said "too many environmental issues, and I hear it is a Transfer Act site." I have heard similar statements by prospective purchasers of real estate on countless occasions and, while I understand the hesitation of some, it really doesn't have to be this way.

Indeed, those of us who practice in Connecticut know that, assuming a property meets the statutory definition of an "establishment", the transfer of ownership interest in that property is subject to the requirements of the Connecticut Transfer Act (CGS Â§Â§ 22a-134 et seq). Within 10 days of the transfer, a filing must be made with the DEP consisting of one of four possible forms: Form I, Form II, Form III, or Form IV. Which form must be used is determined by making a preliminary assessment of the environmental status of the property. Therefore, along with the appropriate form, an Environmental Condition Assessment Form ("ECAF") prepared by a Connecticut Licensed Environmental Professional ("LEP") must be filed. Prior to the transfer, a LEP will perform a Phase I Environmental Assessment to support the ECAF and determine which form should be filed. While some Phase I assessments may include limited sampling, the primary purpose is to assess which areas or activities on the property pose potential environmental concerns (areas of concern or "AOCs") that must be evaluated and addressed, and to identify the appropriate steps to investigate those AOCs. In most cases the parties proceed with a Phase II assessment prior to transfer. A Phase II involves investigation of each of the AOCs identified in the Phase I and the LEP will, in the Phase II report, make recommendations for appropriate remediation or monitoring as necessary for each AOC. For certain form filings (Form III and Form IV) one party to the transaction, referred to as the certifying party, must take responsibility for completing investigation and remediation recommended by the LEP. The "completion" of the investigation and remediation is often a fairly lengthy, non-linear process which requires strict adherence to the standards set forth in the statutes and the DEP has the discretion to determine whether the site will be administered as a "LEP Lead Site" or "DEP Lead Site." Regardless of whether a site is a LEP or DEP Lead Site, however, it is the DEP that has the ultimate authority when it comes to the review and approval of the investigation and remediation.

The foregoing is an oversimplification of the Transfer Act process but it illustrates some of the complexities that often drive potential developers away from a property since, as you may have guessed, compliance involves time and money. In addition, whether a property is subject to the

Transfer Act is just one of a myriad of potential environmental issues one may encounter at any given site. All this is indeed quite daunting, but these deals can, and do, get made on a regular basis. The key is for the prospective purchaser to adopt a mindset that allows him/her to view these issues like any other due diligence issue and work to adjust the business deal accordingly. To adopt this mindset, however, the purchaser must avail him/herself of the opportunity to conduct an exhaustive investigation of the property during an inspection period afforded by the sales agreement. As purchaser's counsel, I typically insist on a period of time during which my client can conduct investigations and walk away for any reason or no reason without risking the loss of a deposit. These investigations can sometimes come at a significant cost but individuals interested in these types of properties must realize that these are short dollars and money very well spent in the scheme of things. Armed with sufficient information, the cost and risk of compliance with the Transfer Act (or any other applicable environmental regulation or statute) can be allocated between the parties through careful drafting by the practitioner; moreover, risk can be further hedged through the use of escrows and holdbacks. The point is that, while many of these issues are seen by many as non-starters, a persistent and informed developer with an appetite for this aspect of the real estate game can often take advantage of significant discounts on sites and do something productive with a site that perhaps has long been forgotten.

James Joseph is a partner at Levy and Droney, Farmington, Conn.