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EPA answers a prospective purchaser's top 10 questions

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"Superfund" properties are labeled by the U.S. Environmental Protection Agency (EPA) after achieving a sufficiently high hazardous ranking score. However, the EPA's May 8, 2008 answers to a prospective purchaser's "Top Ten Questions" when buying a Superfund site seem to tout such sites as sound real estate investments. Not so fast - since an owner may become obligated to take immediate response actions or investigate contamination to protect occupants or neighboring properties, buyers should plan for additional expenses that include maintenance, inspection and initial remediation for potential new contamination.

Liability Surprises

Let's start by reviewing a few possible "cons" to buying a Superfund site. Despite legislation offering greater buyer protections, a prospective owner could be held liable for increased levels of contamination. Additionally, despite protections for bona fide prospective purchasers (BFPP), there is potential to inadvertently trigger liability for contamination. Therefore, prospective purchasers should retain environmental counsel from the beginning to navigate risks and ensure proper recordkeeping. Keep in mind that the EPA does not provide formal certification that a prospective purchaser has achieved BFPP status, so a comprehensive due diligence program in accordance with the EPA's "All Appropriate Inquiry Rule" is a must.

As part of a potential purchaser's due diligence, it is imperative to touch base with both the regional and state environmental agency offices – never assume that these entities speak with one voice. Be certain to determine local opinions regarding a site and its future redevelopment since even perceived environmental issues are often ammunition to block unpopular projects. Plans for redevelopment usually need to be adapted based on land-use restrictions. Non-compliant use of the land could result in the loss of liability protections, so carefully research land records for notice of deed restrictions. Legal counsel can provide advice on the process for lifting or modifying deed restrictions. Also, reputational stigma might hinder a site's value - few families want children living or playing on a Superfund site regardless of how much reassurance anyone provides.

Sound Investment

A prospective owner's profit dreams could be derailed if a Superfund lien is placed on the land records. These so called "super liens" take precedence over other recorded interests and are used by the EPA or state environmental agency to recover its costs upon property transfer. The EPA, along with the current owner and prospective purchaser, may be able to negotiate a lien release, waiver or settlement based on a reduced sale price, cash consideration or work performance. Keep in mind that in today's very tight credit market, financing is only more difficult. Unfortunately, environmental insurance for lenders has become largely unavailable.

Despite cautionary warnings, Superfund sites present potentially good investment and redevelopment opportunities for savvy buyers. While the EPA does not provide assurances that substitute for a buyer's independent consultation with legal and environmental professionals, often a partnership with a municipality or other public agency or entity makes an ideal purchaser/developer match.

Tricia Foley is a partner in the real estate and environmental practice of Day Pitney LLP based in Hartford, Conn.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540