

# **ENVIRONMENTAL CONCERNS IN COMMERCIAL REAL ESTATE TRANSACTIONS: WHAT COULD GO WRONG?**

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**Real Estate Spring Update 2015: Anatomy of a  
Commercial Real Estate Transaction  
Denver, Colorado**



KAPLAN KIRSCH ROCKWELL

# Presentation Objective

- **Outline the legal framework affecting environmental liability**
- **Provide a menu of options and mechanisms to meet the developer's objectives:**
  - **Minimizing environmental liability risk**
  - **Assuring costs associated with environmental conditions are known and accounted for**
- **Assumes some level of environmental contamination is present**

# The Legal Framework: Sources of Liability

- **CERCLA**
- **Other federal statutes**
  - RCRA
  - Clean Water Act
  - TSCA
- **State statutes**
  - Hazardous Waste
  - Solid Waste
- **State common law**
  - Non-disclosure
  - Tort claims

# The Legal Framework: Federal Liability Protections

- **CERCLA and the BFPP defense**
- **Establishing the defense**
  - **Phase I ESA**
  - **Comply with reporting requirements**
  - **No affiliation with the PRP**
- **Not available to “operators” or lessees unless the lessor and owner maintain the defense or has sufficient “indicia of ownership”**

# The Legal Framework: State Programs

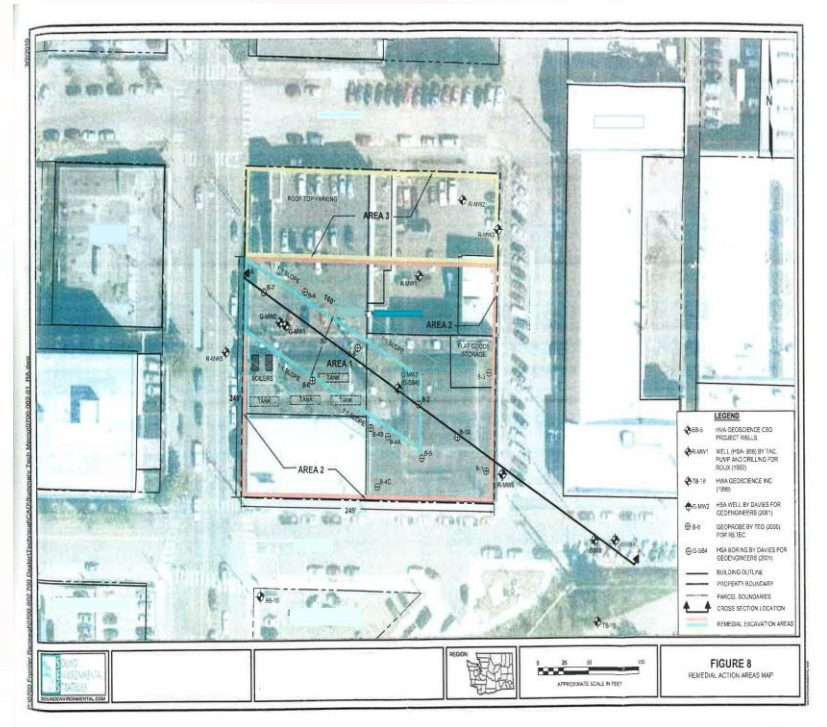
- **Colorado Voluntary cleanup programs**
  - **Voluntary Cleanup and Redevelopment Act**
  - **Voluntary cleanup under other state programs**

# The Legal Framework: Funding and Tax Benefits

- **Federal Brownfields grants and related funding**
- **Federal and state tax benefits**
  - **Colorado Brownfields Tax Credit (up to \$525,000)**
- **Public financing, e.g.,**
  - **Tax increment financing**
  - **Special districts**

# Tools to Protect the Buyer and Seller

- Buyer Protections
  - Pre-closing
  - Post-closing
- Seller Protections



# Buyer Protections and Tools

- **Seller disclosure**
- **Phase I and Phase II environmental site assessment**
  - **What will you learn?**
  - **Is a reliance letter sufficient?**
  - **Timing?**



# Buyer Protections and Tools

- **Integrate state law liability protections and requirements as necessary into transaction structure**
- **Establish cleanup requirements by contract**
  - Existing plan or order in place? Is it sufficient? Who will be responsible for amendments/transfers?
  - What standards apply?
  - Who performs the remediation?
  - When is cleanup done? Before or after closing? On what schedule?
  - Who verifies that the cleanup meets standards?
  - What assurances are necessary to make sure cleanup will be completed?

# Buyer Protections and Tools

- **Environmental insurance (PLL Policy)**
- **Federal sites**
  - **Covenants**
  - **Indemnities**
- **Seller indemnities**
  - **Claims accruing prior to purchase**
  - **Pre-existing environmental conditions**
  - **Assignable to subsequent purchasers?**

# Buyer Protections and Tools

- **Environmental cost recovery claims**
  - **Claims for cleanup costs — who will own them?**
  - **Insurance claims — assign them?**
  - **Are there other contractual rights and indemnities that run to seller? Can they be assigned?**
  - **Include obligations for the party transferring or assigning claims to cooperate in the pursuit of those claims**
- **Funding sources and tax benefits**

# Buyer Protections and Tools: Post-Closing

- **Monitor any seller remediation activities**
- **Maintain defenses to liability post-closing**
- **During development, implement a “materials management plan” to identify and avoid exacerbation of existing contaminants**
- **Assure that contractors carry environmental insurance**

# Buyer Protections and Tools: Post Closing

- **Make sure any cleanup costs are “consistent with the National Contingency Plan” for cost recovery**
- **Maintain good records**
- **Make sure contractors are carrying adequate insurance**
- **Monitor the statute of limitations for cost recovery and indemnity claims**
- **Work creatively with subsequent buyers/lessors:**
  - **To minimize cleanup costs, coordinate a purchaser’s vertical development with cleanup**
  - **Elect to minimize cleanup with use restrictions and covenants**

# Seller Protections and Tools— or, the Shoe is on the Other Foot

- Disclosure
- As-Is/Where Is provisions
- Buyer releases of claims
- Buyer indemnification
  - Exacerbation of existing contamination
  - Failure to remediate
  - Complete risk transfer?

# Seller Protections and Tools

- Covenants to remediate
  - Cleanup standards
  - Milestones for completion
  - VCUP program or assume existing orders
- Buyer financial disclosures/financial assurances
  - PLL Policy
  - Escrow
  - Others

# Seller Protections and Tools

- Buyback provisions
- Use restrictions or covenants
  - CDPHE standard forms
  - Others enforceable under VCRA



# Questions?

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