

Environmental Attorneys: Why and When They are Important In Real Estate Transactions

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Buyers and sellers of real estate know the importance of obtaining proper legal representation. But what does “proper” mean? As of 2012, according to the New Jersey Courts web site (<https://www.judiciary.state.nj.us/pressrel/2012/pr120403a.htm>), there were more than 80,000 attorneys licensed to practice in the state of New Jersey. And according to www.avvo.com (a web site that helps one find attorneys across the country), New Jersey has no less than 3,523 real estate attorneys from which to choose.

Because of the increased awareness of residential environmental issues, residential closings are no longer perfunctory. Environmental issues often complicate closings; just ask your realtor. Therefore, if you are closing on a simple residential home sale for an older home, the choice of attorney may be critical. And if you are involved in a commercial or industrial deal--where environmental issues can become far more complicated--your attorney selection becomes even more important.

ESA does not suggest that we know who the best real estate attorneys are. From our vantage point we have observed that some real estate attorneys simply do not understand environmental matters. And that is not a problem as long as they recognize this as well. Problems can arise when these attorneys fail to properly advise their clients regarding environmental issues. Often the simple addition of an environmental co-counsel is all that is required.

Background

I am not an attorney, yet I am asked legal questions every single week. Sometimes I know the answer, and sometimes I don't. When I know the answer, I provide it along with the following caveat: “I am not an environmental attorney, nor am I allowed to dispense legal advice. You cannot rely upon what I just said. Therefore what I just told you should be discussed and confirmed with an environmental attorney of your own choosing.” This caveat also permeates my e-newsletters.

This is the 29th e-newsletter I have written since beginning my continuing series on February 2012. Almost every article contains a caveat similar to this: “Be sure to consult an environmental attorney to determine how this advice applies to your situation.” Many people are

reluctant to increase their financial legal outlay. But environmental costs and other costs can skyrocket if an issue is discovered. Read on.

A Real-World Example

In a recent situation, a property owner retained a land use attorney with no environmental savvy to help with a real estate deal. The client had inherited several commercial properties, and he wanted to sell them. Several environmental issues were at play. One of his tenants had triggered the Industrial Site Recovery Act (ISRA), a New Jersey law that mandates an environmental investigation when certain businesses cease operations or sell. It was determined that very minor but actionable levels of groundwater impacts were found in a potable well. And there were other environmental issues also. And on top of this, the buyer hired his own environmental consultant who performed a very comprehensive Phase I report.

Our client was not getting proper environmental advice from his attorney, and the buyer eventually walked. His commercial realtor then advised him to get an environmental attorney. The seller dismissed his original attorney and retained an experienced environmental attorney. Immediately, the new attorney began a collaborative process with ESA to get the project back on track. And now, armed with the proper legal advice, ESA's client has been able to make new and better decisions regarding the management and ultimate disposition of his property.

What Kind of Attorney Should People Retain?

Although most real estate transactions are not encumbered by environmental issues, there are always environmental questions. And to a lesser degree, some deals are in fact encumbered by environmental issues that require professional environmental consulting services. Knowing this, how should you proceed regarding legal representation?

Before You Get Deeply Involved In Any Real Estate Deal

If you already have a solid relationship with a real estate attorney you like and trust, by all means continue to use them. But if you don't have a preferred real estate attorney, we highly recommend you select one. When interviewing attorneys you need to determine their depth and breadth of experience closing real estate deals similar to the one you are contemplating. When you are satisfied that they are legal real estate pros, you need to expand your questions to address environmental issues. See the sample questions below.

To what degree do you understand environmental law?

How do you stay on top of changes in the environmental regulations?

Have you or your firm had to address environmental issues on prior deals? What were the issues and what were the outcomes?

In hindsight, would you handle those issues differently today? If so, why?

Do you have environmental legal expertise in-house upon which you can draw, or do would you retain an outside co-counsel?

Have you ever used outside counsel? When and why? How did that deal turn out?

Ultimately, when you are in the throes of negotiation you want to know that your attorney is going to say and do all that is necessary to facilitate your deal, and that means being able to draw upon a reservoir of environmental expertise as needed.

Conclusion

Real estate deals involve a lot of money, sometimes multi-millions of dollars. The actual amount really isn't relevant because when it's your money, it's always important! That being the case, do not leave anything to chance. Real estate deals often involve protracted negotiations. And when those negotiations involve environmental issues, be certain that your attorney is equipped to handle all aspects of the negotiations with consummate skill. After all, it's YOUR money that's at stake!

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