

Local Government, AAI Rule and CERCLA Liability

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Common Forms of Local Government Acquisition

- Arms Length Transaction
- Tax Delinquency/Abandonment
- Condemnation/Eminent Domain
- Escheat
- Gift/Bequeaths

Risks Associated With Contaminated Properties

- Risks Associated With Contaminated Property
- Liability
- Financial - Unknown or extra costs
- Time - Unexpected delays
- Business and service interruption
- Use restrictions
- Government Accounting Rules

CERCLA Defenses

- Third Party Defense
 - due care
 - precautions
- Innocent Landowner (ILO), Bona Fide Prospective Purchaser (BFPP), Contiguous Property Owner (CPO)
 - AAI
 - Appropriate Care

CERCLA Third Party Defense

- Release caused “solely” by third party
- No direct or indirect “contractual relationship” (ILO Defense)
- Exercise Due Care
- Precautions Against Foreseeable Acts of Third Parties

Third Party Defense

- Release caused “solely” by third party
- No direct or indirect “contractual relationship”
- Exercised Due Care
- Precautions Against Foreseeable Acts of Third Parties

No Contractual Relationship

- No “contractual relationship” where:
 - Government entity acquiring title through involuntary transfer or acquisition;
 - exercise of eminent domain authority by “*purchase or condemnation*”

Conflicting Case Law

- Acquisition by negotiated purchase falls within 101(20)(D) exemption
- Acquisition without judicial proceeding not within eminent domain exemption of 101(35)(A)(ii).

Confusing Guidance- December 1995 Fact Sheet

- Definition of Involuntary Acquisition
 - government holds interest or title because
 - Actions of non-government party gives rise to government's legal right to control or take title
- Examples:
 - acquisition after abandonment, bankruptcy, tax delinquency, escheat and other circumstances where title thru sovereign function.

1995 Lender Policy

- Categories of “involuntary acquisition”
 - Can be volitional and not purely passive
- Examples:
 - Conservator or receiver thru clear mandate
 - Foreclosure while administering government loan, loan guarantee or insurance program
 - Seizure or forfeiture authority

1995 Regional Memorandum

- Government Entity that involuntarily acquires property thru eminent domain by purchase or condemnation will have third party defense.
- Involuntary Acquisition Can Include Affirmative Conduct and Discretionary Acts: Escheat, Tax Delinquency, Demolition Foreclosure

1986 “aai”

1. specialized knowledge or experience of defendant;
2. relationship of the purchase price to the value of the property if not contaminated;
3. Commonly known or reasonably ascertainable information;
4. obviousness of the presence or likely presence of contamination; and,
5. ability to detect the contamination by appropriate inspection.

“aai” caselaw

- If owner did not find contamination, it did not conduct “aai”
- Recent Examples
 - R.E. Goodson Construction v Int’l Paper
 - AMCAL Multi-Housing Inc v. Pacific Clay Oro Fund
 - U.S. v. Domenic Lombardi Realty

2002 Amendments (“AAI”)

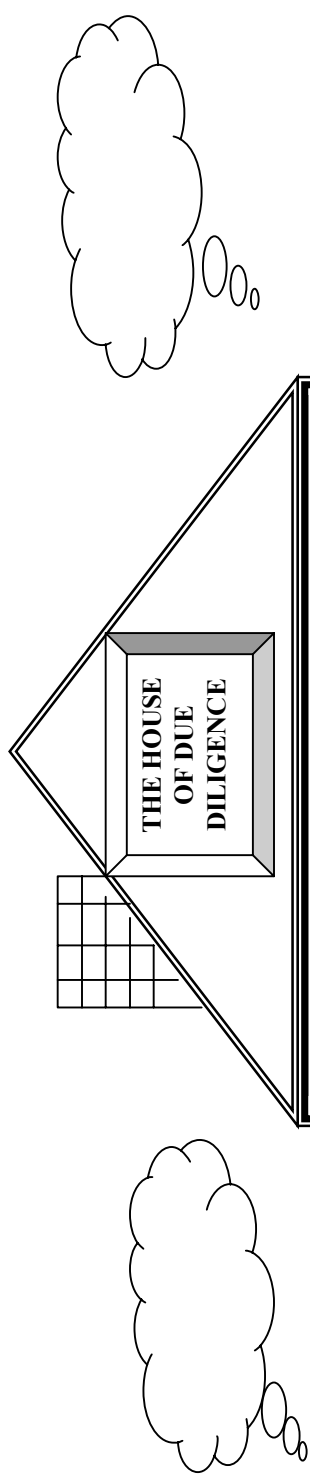
■ “aai” and:

1. inquiry by EP;
2. interviews with past and present owners, operators, and occupants;
3. reviews of mandated historical sources since first developed;
4. searches for recorded environmental cleanup liens;
5. reviews of governmental records (vi) visual inspections of the facility and of adjoining properties;

■ Continuing Obligations

AAI Rule

- AAI completed when release identified
 - No further investigation required
 - Not consistent with preponderance of caselaw
 - Does not overrule caselaw
- Assumes further investigation or remediation to satisfy continuing obligations
- Assumes EP will exercise good professional judgment
- Assumes property owners willing to pay for quality diligence

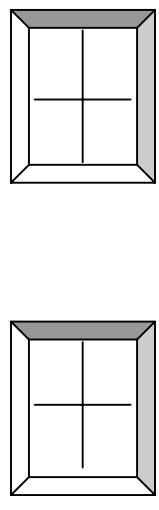


M&A Deals- Compliance/Sampling/RAP

Penthouse

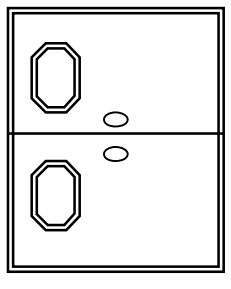
REDEVELOPMENT - Phase 1/2
No Prudent Developer will go below

Suite



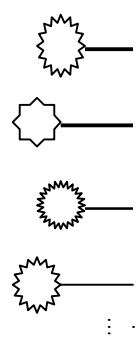
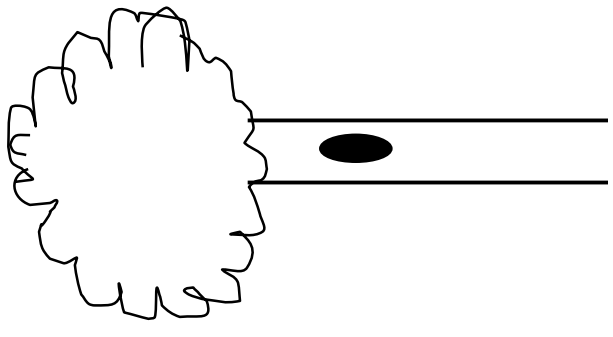
Refinancing/Purchase Residential - AAI
Plus

First Floor



Refinance/Purchase Commercial - AAI

Basement



Appropriate Care/Reasonable Steps

- exercises appropriate care by taking reasonable steps to:
 - stop any continuing release;
 - prevent any threatened future releases; and
 - prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance
- “appropriate care” = “due care”

What Is Due Care?

- “reasonable and prudent person would have taken in light of all relevant facts and circumstances”
- “CERCLA does not sanction willful or negligent blindness”
- “no affirmative acts... to investigate or ameliorate conditions...is no care”
- “deliberate ignorance or avoidance of knowledge of contamination” not part of defense
- “defense not available when defendant took no steps to prevent harm”
- “due care not established when PRP took no affirmative measures to clean site”

Gifts and Bequests

- CERCLA exemption does not eliminate need for AAI
- Local Government should not take the title prior to completion of AAI
- Local Government should not rely on donor reports

Valuation

- New York City v. Mobil-
 - evidence of contamination excluded to prevent potential double recovery
 - minority view
- Majority view -- Evidence of contamination is relevant when determining FMV.

Scope of CERCLA Protection

- Shields from liability for hazardous substances
- Not Petroleum liability

RCRA

- Owner or operators of Treatment, Storage or Disposal Facilities (TDSF)
- Generator sites
- Petroleum USTs
- RCRA obligations run with the land
- Corrective action
- Closure

RCRA Cont'd

- No RCRA cost recovery
- Injunctive relief available under 7002:
 - Any person who has or is contributing to;
 - Past or present handling, storage, treatment, transportation or disposal of;
 - Any solid or hazardous waste which MAY;
 - Present an imminent and substantial endangerment

Summary

- Negotiated purchase-
 - conduct AAI
 - BFPP Agreement
- Condemnation-
 - local government did not cause or contribute to contamination
 - AAI to satisfy Appropriate Care
- Gifts-
- Third Party Defense

