

Sussman Shank LLP  
— attorneys —

**Changing Building and Property Uses**  
**What Could Possibly Go Wrong!**  
**2018 Oregon Brownfields Conference**  
**Patrick G. Rowe**

# Changing from Industrial to Commercial/Recreational.

## Case Study – Former Battery Manufacturing Facility

### Facts:

#### § 1945- 2001:

§ Property used for battery manufacturing

#### § Early 1990's:

§ DEQ became aware of lead contamination in soils at the property.

#### § November 1999:

§ DEQ issues NFA for the property, subject to Easement & Equitable Servitude – **Industrial use only** unless otherwise authorized by DEQ in writing.

# Changing from Industrial to Commercial/Recreational.

§ April 2002:

§ Battery Co. files for Ch. 11 bankruptcy.



# Changing from Industrial to Commercial/Recreational.

§ June 2002:

§ Battery Co. sells property.

§ 2002 – 2011:

§ Approx. 3 different owners; use property for commercial and recreational purposes (e.g., catering co. offices, batting cages).

# Changing from Industrial to Commercial/Recreational.

§ Fall 2011:

§ Good guys consider buying property.

§ Late 2011:

§ DEQ, in writing, informs good guys the property could be used for commercial purposes as long as done within a building and there is no contact with the soil.

§ Later 2011:

§ Good guys buy the property w/o doing sampling (Phase I but no Phase II). Insurance does not cover pre-existing environmental conditions. Good guys continue leasing for commercial and recreational purposes.

# Changing from Industrial to Commercial/Recreational.

§ June 2013:

§ Battery Co. again files for Ch. 11 bankruptcy.



Battery Co. provides constructive notice of bankruptcy in local newspaper; does not provide actual notice to good guys.

Good guys don't file a claim in the bankruptcy.

# Changing from Industrial to Commercial/Recreational.

§ Late 2016:

§ Good guys still leasing for commercial and recreational use (Crossfit, batting cage, brewpub about to move in).

§ Want to refinance & expand; need to have the E&ES removed.

§ Feb. 2017:

§ DEQ informs good guys in order to completely remove E&ES, must investigate inside building.

# Changing from Industrial to Commercial/Recreational.

§ Late Feb. 2017:

§ Investigation - dust samples from inside building contain high levels of lead.



§ DEQ, OHA and OR OSHA request and good guys agree to evacuate tenants from the building until remediation completed.



# Changing from Industrial to Commercial/Recreational.

§ Spring 2017:

§ People that had used the building provided free blood testing – all come back negative.



# Changing from Industrial to Commercial/Recreational.

§ Feb 2017 –

§ Late 2017:

§ Good guys spend approx. \$1.5 million investigating, remediating lead and compensating tenants for time displaced from building.



§ Ongoing: Seeking to recover costs from battery company. Bankruptcies may prevent any recovery.

# LESSONS LEARNED

- § Redeveloped industrial sites can pose problems long after their original owners/operators have vacated.
- § It is the building owner's responsibility to make sure the inside of building is clean and safe for occupancy.
- § Do your own investigation and analysis!!!
- § Understand the scope and limits of agency expertise!!
- § Get good insurance!
- § If you learn that prior owner/operator has declared bankruptcy – consult an attorney promptly.

# Case Study – Former Dry Cleaners

§ Client inherited dry cleaners.



§ Yaaay, we're in **\$\$\$\$\$\$\$\$\$\$** **!!!!!!!!!!!!!!!**

# Case Study – Former Dry Cleaners

- § Significant soil contamination; buildings needed asbestos abatement.
- § Client originally intended to conduct enough remediation to re-sell as a commercial property.
- § Real estate broker opined that selling for a purely commercial development would depress the price significantly – no market need.
- § May be marketable with commercial on ground floor and hotel, condos or apts. above.

# Case Study – Former Dry Cleaners

- § Analyzed costs to conduct asbestos abatement and remediate contamination to point where it could be used for mixed use development – cost prohibitive.
- § Client ended up selling at low cost and “As Is” to developer.

# LESSONS LEARNED

- § Identify most likely / practical future use of a property before purchasing, positioning for sale or commencing remediation.
- § If don't have handle on marketable future uses, could end up wasting money – *e.g.*, conducting remediation that doesn't need to be done or not doing enough, such that potential Buyers/developers see little to no value in what you've done.

# FREQUENT MISTAKES

## § Sellers

§ Rely on boilerplate “AS IS” provision.

§ Standard as-is clause does not reallocate environmental liability – the buyer can still bring claims against the seller under environmental laws.

§ Courts consistently hold that to allocate environmental liability, that intention must be expressly stated

## § Lesson:

§ If you want a “walk-away”:

§ Negotiate as is and release provisions that explicitly address known environmental conditions and cover unknown environmental conditions.

§ Consider purchasing environmental insurance.



# FREQUENT MISTAKES

## § Buyers

- § Buyer doesn't conduct its own environmental due diligence; relies on old Phase I or II Seller's environmental documents or fact that there's an NFA.
- § Due diligence not thorough
  - § Post-purchase discover contamination at concentrations higher than expected or locations not previously identified.

## § Lessons:

- § Build in sufficient time to conduct your own due diligence.
- § Make it thorough.
- § If not confident you have a complete picture, negotiate a hold back on purchase price and a strong seller indemnification.

# FREQUENT MISTAKES

## § Buyers/Redevelopers

- § Lack of care in asbestos abatement.
- § Don't thoroughly inform contractors of nature of site conditions.

## § Lessons

- § Make sure:
  - § To understand site conditions.
  - § To hire personnel qualified in light of the conditions.
  - § All contractors have a comprehensive understanding of the site conditions.

Sussman Shank <sup>llp</sup>  
— attorneys —

**Questions?**

**Thank you for your time!**  
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