



Attorneys and
Counselors at Law

200 FORUM BUILDING
777 High Street
Eugene, OR 97401-2782

PHONE: 541/686-9160
FAX: 541/343-8693

James K. Coons
John G. Cox
Douglas M. DuPriest
Frank C. Gibson
Stephen A. Hutchinson
E. Bradley Litchfield
Zack P. Mittge
Thomas M. Orr
William H. Sherlock
Patrick L. Stevens
Mark M. Williams

**LIMITING PROPERTY OWNER AND MANAGER LIABILITY
FOR LAND USE AND ENVIRONMENTAL PROBLEMS.**

LEARNING THE LAW™ Seminar
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Presented by
WILLIAM H. SHERLOCK, ATTORNEY

I. WHEN TO LOOK FOR LAND USE AND ENVIRONMENTAL PROBLEMS ASSOCIATED WITH REAL PROPERTY OWNERSHIP OR MANAGEMENT.

- A. Three major time periods that should always make you examine land use and environmental issues before you sign a contract. When you:
1. Purchase, lease or agree to manage real property.
 2. Plan for expensive development of that property.
 3. Sell the property.
- B. The property owner or manager must protect against land use and environmental risks associated with:
1. Contracting parties: those with whom the owner will have a contract (buyers, sellers, landlords and tenants) affecting real property.
 2. Third parties who come on the land or who supply goods that benefit the land: (customers, friends, trespassers, material and labor suppliers).
 3. Governmental agencies: (city or county planning and zoning authorities; state and federal environmental law and workers' safety organizations; etc.).

II. MINIMIZING RISKS AND MAXIMIZING BENEFITS THROUGH WRITTEN CONTRACTS.

- A. General points to remember.
1. With almost all land use and environmental issues, the two opposite parties to a transaction (buyer/seller or landlord/tenant) will have opposite goals when it comes to acceptable language to deal with these issues. So knowledge and effective negotiation and document preparation is the most important key to protecting your particular position in the transaction.

2. A pre-negotiation land use and environmental issue evaluation checklist should be prepared and reviewed to make certain that you both identify the land use and environmental law issues that must be faced in the transaction and the position that you will put forward for resolving them. Examples:
 - 2.1 What are the necessary land use permits and who will be responsible for paying for them?
 - 2.2 Who will obtain and pay for an environmental audit and who will be entitled to its results; what will be the effect on the transaction if chemical contamination is discovered?
 - 2.3 What representations and warranties will the seller be asked to make as to the condition of the property, etc.
- B. If you as the owner wish to sell your property.
1. The general rule is to make as few as possible in the way of specific representations or warranties as to status or condition of the land. If negotiations require that the written contract contain certain representations and warranties, make them as specific as possible. Do not represent anything that you are not substantially certain of. Example: It is much safer to state, "To the best of seller's knowledge and belief, there are no levels of toxic or hazardous chemical residues on the property requiring cleanup, removal or other remediation under applicable law," then it is to state, "There are no toxic or hazardous chemical residues on the property."
 2. Sellers and managers should always remember to use representations based on "the best of their knowledge and belief" rather than complete representations.
 3. Always include a paragraph in the contract stating that that particular written agreement is a complete incorporation of the contract, there are no unstated promises or representations relied on in connection with the purchase and sale and that the agreement can only be modified by a signed, written agreement.
 4. Consequences of failure to disclose as opposed to misrepresentation:
 - 4.1. Latent and hidden defects known to the seller. For example, unstable subsurface geology, termite damage or soil or groundwater contaminated by chemical residues. Compare inconsequential defects and substantial defects that should be obvious to any owner.
 - 4.2. General rule: If the defective condition adversely affects or might adversely affect the buyer's use of the property, or the price the buyer may be willing to pay, in any substantial way, or you know the buyer is interested in the presence or absence of such a condition, disclose the condition fairly in the written documents, and, then include a statement that the buyer assumes responsibility for the condition as is. Reason: It is better to have to reduce the purchase price than it is to have to pay damages and attorney fees later on.
 5. The nontransferable, seemingly unending liability for environmental conditions and how to deal with it. Example: Property containing underground storage tanks or residues of toxic or hazardous chemicals.

6. Seller's required land use statement in a deed or land sale contract. See ORS 93.040, "This statement will not allow use of the property described in this instrument in violation of applicable land use laws and regulations. Before signing or accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses." This is not a bar to seller's liability for environmental problems and even for some land use law-based matters.
7. If there will be an unpaid purchase price for some period of time after the sale, the Seller (as well as in the case of a lease, the manager) should try to obtain an indemnification promise from the buyer (or tenant indemnifying the seller (manager) from any claim or loss stemming from the buyer's (tenant's) use of the real property.
8. Cleanup Liability to the State. Even if you obtain a written indemnity agreement from a buyer or a tenant, you have not removed your Environmental liability from liability to the state for cleanup or removal costs associated with hazardous conditions or residues that existed at the time you bought the property (unless you can qualify as an "innocent purchaser") or that occurred while you owned it, even if the problem was caused by criminal activity on the property that you were unaware of. Example: a meth lab secretly maintained by a tenant causes contamination.

C. If you are a buyer of property rather than a seller.

1. The general rule is to try and get as specific a representation as possible as to the particular status or condition of the land, especially where that status or condition is critical to the price you are willing to pay to purchase or lease it. Example: A purchaser of a rock quarry would like the sale document to include the following provisions:

"Seller represents and warrants that the real property that is the subject of this transaction:

- 1.1. Is zoned and planned so as to allow rock quarrying and rock processing operations as an outright permitted use;
- 1.2. Is not the subject of any pending enforcement, compliance, cleanup, removal, permit termination or modification or damage action by any local, state or federal governmental agency or entity or any investigation that could lead to the same;
- 1.3. Is subject to an existing operational permit and reclamation plan issued and approved by the Oregon State Department of Geology and Mineral Industries which can and will be transferred to the buyer as a condition of closing;
- 1.4. Possesses all other local, state and federal permits required for quarry operation, which are valid and in effect; and
- 1.5. Does not contain any residues of toxic or hazardous wastes or chemicals as defined by state or federal law, and that seller has not been notified of any reason why such status will not continue after the sale."

2. A buyer should always make a careful pre-purchase examination of the land. Depending upon the magnitude of the investment and the past and anticipated future use of the property, an independent environmental audit should also be required, with results acceptable to the buyer, as a condition to closing. Whether or not the buyer requires an environmental audit, the buyer should require that the seller indemnify and hold the buyer harmless from any claim, loss or damage resulting from the presence at the time of the closing of any toxic or hazardous chemical contamination of the property or any undisclosed and unremoved underground storage tanks.
 3. Include in the introductory recitals to the instrument a statement of the conditions of the real property that is assumed to be present by the buyer.
 4. Condition the closing of the sale on the obtaining of any necessary land use or environmental permits that will be necessary to carry out the anticipated operation on the property. Examples: Rezoning or conditional use permits; water availability and quality; obtaining or maintaining farm use deferral, etc.
 5. Make certain that adequate liability insurance will be available to protect you as a buyer for your anticipated activity on the property.
- D. If you are a manager of someone else's property.
1. In your management contract with the owner, disclaim all responsibility for consequences of criminal activities or violations of statutes, regulations or ordinances by tenants.
 2. Insert a provision in your management contract requiring the owner to indemnify you from any claim or loss resulting from any action by any governmental entity stemming from use of the property in violation of federal, state or local laws or ordinances. Make clear that the burden for maintaining compliance with governmental statutes, regulations and ordinances rests on owner and tenant not you as manager.
 3. Attach to any rental management agreement a copy of the rental application form you will use and do not state or suggest that you will investigate prospective tenants beyond the information provide on the form. Also state in your rental management agreement that, unless a particular reference checked proves negative, there is not obligation on your part to check all references listed. Retain right to amend rental application form at any time during the term of the management agreement.
 4. Either affirmatively state and limit your property inspection obligation after a lease is signed, or if you market and take pride in your "full-service" responsibility to the owner, make certain:
 - 4.1 Periodic inspections are made and logged by you or your employees, and
 - 4.2 Prompt written reports of suspicious activities are made to the owner.

5. Check with your insurance agent to make certain—and receive confirmation in writing—that your liability insurance coverage provides you the broadest available protection from the consequences of criminal activity by tenants and from the claims of owners who you represent in connection with tenants.
- E. If you are a buyer, seller or manager of real property: have an attorney assist you with final contract language before you sign any real property contract or deed.