



Attorneys and
Counselors at Law

200 FORUM BUILDING
PO Box 10886
777 High Street
Eugene, OR 97440

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

James K. Coons
Frank C. Gibson
E. Bradley Litchfield
Janice L. Mackey
Thomas M. Orr
William H. Sherlock
Patrick L. Stevens

Paul R. Allen
Zack P. Mittge
Samuel L. Roberts

Retired
John G. Cox
Douglas M. DuPriest
Stephen A. Hutchinson

Buying Property - - Is It Clean?

William (Liam) Sherlock

The author of this article is a principal in the Eugene law firm of Hutchinson, Cox, Coons, Orr & Sherlock, P.C. Liam's law practice includes assisting property owners with issues relating to environmental contamination, land use, and real estate transactions.

What you don't know about buying real property can hurt you, especially your pocketbook. This axiom rings especially true if there has been a release of toxic or hazardous chemicals. In some cases, cleanup costs can even exceed a property's value.

Owners and property tenants can be liable for cleanup costs they create or even if the contamination occurred before the owner or tenant came onto the property.

While environmental audits are becoming routine for commercial and industrial property purchases, care should to be taken when buying residential property too. Consider the following example: A family buys a spacious new house, built in the 1950's, located in a good neighborhood. It's just what they had been looking for. The house is heated by a forced air, oil furnace. In the backyard, a small capped pipe, the fill pipe for the buried oil tank that supplies the furnace, sticks up out of the ground.

Could the family be buying an expensive problem? Possibly.

After less than a year, the family realizes that they need to re-order fuel for the furnace sooner than they had anticipated. They mention this to the oil dealer and, upon inspection, the old tank turns out to have a leak. This means that both the tank and surrounding contaminated soil need to be removed at considerable expense. The family is not pleased because they have to spend their savings on the cleanup rather than going on their planned summer vacation to Disney World.

Who pays for the cleanup? While there are a number of factors that can affect the answer, the family is likely to bear at least the initial burden of dealing with this unwanted problem and expense. The Oregon Department of Environmental Quality (DEQ) generally looks to the current owner to cleanup releases.

The family understandably feels they should not be entirely responsible since they are relatively new to the property. They contact the seller, inform him of the situation and ask for assistance. The seller refuses to help.

The seller explains that not only did he disclose that the house had an oil furnace, but the fill spout was visible in the yard. He says the buyers should have known the tank was buried, since no tank was visible above ground.

Also, the seller claims he had no knowledge of any leak and the furnace was working when he sold the property. He says the leak must have occurred after he left.

An attorney could assist the family in evaluating whether it would be worthwhile to file a contribution claim against the seller. The strength of that claim will depend, in part, on what the sale documents said and what the seller and his real estate broker said or did not say prior to sale.

In any event, unless a new owner can establish that it made diligent inquiry before buying and qualifies as an "innocent purchaser", DEQ will require the new owner to conduct the cleanup. Since the family failed to investigate the condition of the oil tank before purchasing, the family here likely would not qualify as being "innocent purchasers".

DEQ also knows that current owners are much more motivated to deal with this problem rather than former owners who may have moved from the area. Since liability for cleanup is "joint and several", DEQ can choose which potentially responsible party it wishes to pursue.

How could the family have protected itself from getting into this difficult situation? Prospective purchasers need to be alert to a wide range of potential problems. Today, it is not enough simply to inquire about the age of the roof or to get a termite and dry rot report when buying real property.

Property buyers should be alert to current or past signs of heating oil use or other hazardous materials. For example, if the home is older, a careful purchaser would inquire if it contains any asbestos.

If a buyer learns a problem might be present, they should investigate further. To qualify as an "innocent purchaser", and to try to obtain protection from liability for clean up costs, a buyer must exercise due diligence in investigating conditions before closing the purchase. This requires that all appropriate inquiry be made that might reveal possible contamination.

Consider another example, this time in a commercial setting. A business desires a larger, more visible location. They locate a suitable site and lease it. The business takes comfort in the fact that an old fuel tank has recently been removed and DEQ has issued a letter stating that no further action is required regarding the tank.

Can the tenant rely on DEQ's letter to protect it fully? Unfortunately, no. The DEQ letter only covers the tank removal and cleanup. It does not address or affect any other condition that may be present on the property.

The best protection for a potential tenant is to obtain an environmental site assessment, sometimes referred to as an ESA. An ESA is a report prepared by a licensed environmental consultant for a real estate holding. The report identifies potential or existing environmental contamination using a phased process. The ESA

typically addresses both the underlying land as well as any physical improvements to the property. If the landlord does not provide such a report, the prospective tenant can obtain one and, in some cases, deduct the cost from the purchase price.

If the property had been leased to similar businesses in the past, and contamination is later discovered, it is often quite difficult to prove which business caused the release. This is another reason it can be important to obtain an ESA before buying or leasing.

Because the cost of investigation and cleanup can be high, it is important to make reasonable inquiry about past activities and uses that might have resulted in a release, before buying or occupying a property. It is generally far better to know what you are dealing with in advance than to discover a larger problem after you bought or leased the property.

Keep in mind that while a thorough environmental analysis can protect a buyer from liability for cleanup of past contamination, it does not guarantee the property is clean. In one case, a property had a DEQ "No Further Action" letter for a recent tank removal and an environmental audit. Nevertheless, when excavation was done for the foundation of a new building, unexpected contamination was discovered. However, because the buyer had fortunately undertaken reasonable care in trying to assess the property, they qualified as "innocent purchasers" and did not have to pay for the secondary contamination.

It can be difficult to be certain that a property does not have some contamination. Prospective purchasers should exercise due diligence to minimize risks. Qualified professionals should be consulted about what level of inquiry is appropriate in a given circumstance in order for purchasers to protect themselves from liability as best they can.