



> Failure to perform proper due diligence can lead to scary discoveries when it is too late.

One of my favorite movies as a kid was "Poltergeist." For those who have not seen the movie, the plot is essentially as follows: A suburban family lives in a home that, unbeknownst to them, is built on top of an old cemetery where the bodies were never exhumed and the house is haunted. Ghosts kidnap five-year-old Carol Anne Freeling via static on the television, and the rest of the film involves the family's efforts to rescue her. Eventually they do, but the spirits go on a rampage.

"Poltergeist" is a due diligence nightmare. Assuming the developer unwittingly constructed the home and failed to exhume bodies in accordance with law, this could create quite a bit of liability both with the state and local government, as well as future homeowners. Yet this morass could have been avoided, or at least accounted for in the cost of project, with a bit of historical sleuthing.

The "Poltergeist" story is not complete fiction. In one example in Pennsylvania, in the late 1930s, a developer constructed a multifamily apartment building on top of a former cemetery. The structure stood for 30 years until it was demolished in the 1970s, at

which point it remained fallow for nearly 30 years. Recently, the same developer elected to redevelop the property on the previously existing footprint. Upon entry of the first shovel into the ground, it was found that over 30 tombstones and corpses had not been exhumed as part of construction of the prior development.

What lessons may be learned here? First, never assume that a prior owner – or even the same owner – properly performed due diligence. Second, using the same footprint does not guarantee proper soil conditions or a lack of geotechnical issues. Third, a review of title, specifically with respect to the owners before the present owner, may



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provide clues as to the potential existence of any serious issues.

The fact that the prior owner was a cemetery should have given the developer pause to determine whether all state and city cemetery closure laws had been followed. Though there are other issues, a close review of title for hints as to the historical use of the property may have ameliorated post-commencement of construction angst. No one wants to find skeletons in their closet, literally.

Other examples abound as to how a simple title search may save significant time and money. Oftentimes, the original owners of a property have passed away and left - by will, intestacy or otherwise property to their heirs. Many times these transfers are not properly recorded by confirmatory deed, are incorrectly recorded or are only partially revealing. Title gives the basic information as to who should currently own the property but not necessary who in fact owns the property. A search of each individual may reveal whether such person is divorced (in which event, proper documentation as to the distribution of property is a must prior to closing), married but the spouse does not hold an interest in the property (in which event, a spousal waiver may be required), and whether any spousal support is due.

Purchasing a former gas station is another good example as to how the chain of title can assist the buyer in ascertaining and potentially avoiding post-closing problems. The fact that a property was a gas station should not scare off a developer and certainly developers are becoming more acquainted with the myriad of products (e.g., environmental insurance) and programs (e.g. Pennsylvania's Act II compliance program) to mitigate, shift or even eliminate environmental liability whether developing brownfields, Superfund sites or even former and current landfills (e.g., Virginia's Mt. Trashmore). But mitigation, shifting and even limitation of liability do not necessarily address the underlying physical problem of tanks located on the site.

Looking at the title and determining that the owner you are purchasing from is a gas station does not take full advantage of what title has to offer. If you request that the title company run a chain of title search back several decades, it is not uncommon to find two, three or more prior gas station owners. Each of those gas stations may have placed underground storage tanks on the property in different locations. Unlike the stringent statutes and regulations that have been enacted and promulgated over the past several years, for many years, the tank registration laws would best be described as lax. This meant, among other matters, that when one gas station closed, it may not have removed the tank nor left any paper trail as to where those tanks were located.

In one extreme example in Virginia, the research of the local records as well as the environmental engineer preparing the phase one environmental site assessment disclosed the existence of six underground storage tanks. But once construction and soil removal began, over 19 tanks were ultimately unearthed. With a circumspect inspection of title, the buyers could have verified, or at least known, what they did not know - namely that all tanks may not have been accounted for in connection with the initial inspection of the property because there were multiple past operators located at the site.

Similarly, former tanneries, soap makers, glue manufacturers and similar operations that are now banned or severely restricted may similarly have created soil contamination issues that, at the very least, should be looked into before purchasing the property to learn whether there is a problem, and if so, how much it will cost to remediate. Who owns the home (e.g., felon or a trust) could be a key to what the property was used for and any problems it may engender, or be buried.

Back in Time

How far back should developers look? They should look beyond the written page. Depending on the location, going back 100 or 150, or at least to the time when the land was farmland, makes sense. On the East Coast, you may need to go farther. It is not unusual to pick up the paper in Philadelphia, New York or Boston and find that some building hit an ancient Indian burial ground or servants quarters.

On larger projects, it may be necessary to employ a historian. If there is an old manor house, chances are there are stables and living quarters nearby for the servants that may have been leveled or constructed without a permit. It is important to extrapolate from what is around the area to be developed as to what can possibly be buried underground.

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