Barley Snyder

Real Estate and Construction Newsletter, November 2019

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PFAS: The Invisible, Unregulated Money Suck of Brownfield Real Estate Deals

By: Martin R. Siegel
Related Practice Area: Real Estate
Related Industry: Construction

Commercial real estate transactions can be complicated enough without having to worry about potential environmental contamination. Luckily in Pennsylvania, the Land Recycling and Environmental Remediation Standards Act (Act 2) provides a process for liability protection and the removal of some degree of uncertainty from the process.

Unfortunately, as new information is developed related to potential contaminants, uncertainty can be reintroduced.

This is particularly true regarding a ubiquitous class of chemicals of emerging concern - per- and polyfluoroalkyl substances (PFAS). PFAS were commonly used in applications that include surface coating of paper and cardboard packaging products, carpets, non-stick pans, textiles and firefighting foams. These substances have been detected in air, water and soil in and around manufacturing facilities, as well as airports and military bases that used firefighting foams. Studies indicate that various classes of PFAS can cause a wide variety of health problems, and they are highly mobile and persistent in the environment. Contamination has been identified in at least 25 sites in Pennsylvania, and those contaminations are being addressed by state and federal cleanup efforts.

The Act 2 program provides cleanup liability protection to property owners that voluntarily characterize contamination on their property and meet cleanup standards. This liability protection generally protects property owners from paying any additional clean-up costs. The liability protection, however, is limited to substances that the property owner has identified and addressed in the Act 2 process. Since PFAS chemicals are currently unregulated in Pennsylvania, it is unlikely that they have been identified, let alone addressed, at most sites that have Act 2 protections. Therefore, many property owners are not protected from future PFAS-related cleanup costs.

That means owners of PFAS-contaminated properties could face considerable financial risks. The Pennsylvania Department of Environmental Protection is currently considering several regulatory changes that would allow

parties, including the government, to recover costs for addressing PFAS contamination from owners of contaminated properties.

To avoid these potentially crippling costs, prospective purchasers of brownfields properties should work with their environmental consultant to ensure that any Phase 1 environmental study of the property includes an assessment of the potential for PFAS contamination. If the Phase 1 indicates such a possibility, the prospective purchaser should work with their environmental consultant and attorney to consider a sampling for PFAS before finalizing a property sale.

Current owners of brownfields properties that have gone through the Act 2 process likely do not have liability protection for PFAS. These, as well as other brownfield property owners, should consult with the environmental consultants and attorneys prior to putting their property on the market to determine whether steps should be taken to determine whether there is PFAS contamination.

There are many variables that will need to be considered in evaluating alternatives, including potential threats to water supplies and the public in general. In addition, cleaning up a problem now and getting Act 2 liability protection may be less expensive than ignoring the problem and facing future cost recovery costs and litigation. The regulation and remediation of PFAS is evolving and subject to uncertainty. Nonetheless, it is prudent for property owners and prospective purchasers of potentially PFAS-contaminated sites to consider their potential future liabilities and costs, as well as any need to take actions to protect the public.

If you have any questions on PFAS evaluations or the Act 2 process, please reach out to me.

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Catching up with ... Michael Fox

By: Michael W. Fox
Related Practice Area: Real Estate
Related Industry: Construction

In each Barley Snyder Real Estate and Construction Newsletter, we'll feature someone from our firm to help you learn more about them. In this edition, we're catching up with the one of our newest real estate attorneys, Michael Fox.

College: Cornell University

Law school: Temple University Beasley School of Law

From: Lebanon, Pa.

Lives: Myerstown, Pa.

Started at Barley Snyder: August 2019

Work: Michael is an associate in the Real Estate and Business practice groups. His clients include individuals and small to large businesses in a variety of general business matters, residential and commercial real estate transactions, real estate development and financing, land use, entity formation and entity transactions. Michael also has significant experience with real estate title matters, and is one of the two

attorneys in Barley Snyder's new Schuylkill County office.

Did you know?: While working as an AmeriCorps volunteer with the American Red Cross, Mike drove an emergency response vehicle from Philadelphia to several points along the gulf coast between Florida and Texas to assist with relief efforts during Hurricane Gustav and Hurricane Ike. He's also a former Division 1 track and field athlete and still holds his high school stadium's record in the 200-meter dash.

He says: "In my short time at Barley Snyder I am very impressed with the firm's efficiency and competence in all aspects of the legal practice. More than any other firm I've been associated with, Barley has the collective knowledge, experience, manpower capability and staff support in place to handle complex matters with efficiency."

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IRS to Target Fraudulent Conservation Easements

By: David H. Rattigan
Related Practice Area: Real Estate
Related Industry: Construction

Although the IRS recently announced that enforcement actions against fraudulent syndicated conservation easement transactions are a top priority, it shouldn't keep property owners from legally using the environmentally valuable system.

The granting of a qualified conservation easement to an eligible, nonprofit conservation organization is still a valuable way for a landowner to achieve the goal of preserving an important natural habitat of fish, wildlife or plants or similar ecosystems and also obtaining a charitable contribution tax deduction.

Families or fishing and hunting clubs can grant a conservation easement to a qualified organization such as the Nature Conservancy, which restricts the uses and development of the property to preserve the forests and other habitats.

The owners can take a charitable deduction for the difference between the appraised fair market value of the property before and after the conservation easement restrictions are granted.

In addition to the benefits of tax deduction and the preservation of the property, the easement agreement can also allow the owners to continue use of the property for passive recreation such as hunting, fishing and trapping. It can also permit the use of existing buildings and the construction of new buildings and access roads.

Although surface mining activities are typically prohibited, nonsurface disturbance oil and gas extraction can be permitted. The landowner and the conservation organization also have the right to market and share in the revenue from carbon credit sales related to the property.

We have worked with landowners who have granted conservation easements to the Nature Conservancy, a Virginia-based international nonprofit organization that works to protect environmentally important land from future development. In a recent project we worked on, the landowner and the Nature Conservancy worked together to sell carbon credits from a preserved property. That cooperation will produce annual revenues shared by the landowner and the Nature Conservancy.

While the IRS is pursuing abusive syndicated transactions in which the government claims that the value of the conservation easements are greatly inflated, they are not pursuing taxpayers or groups that enter into legitimate conservation easements and follow the technical IRS guidelines.

If you have any questions about conservation easement transactions, please contact me or anyone in the Barley Snyder Real Estate Practice Group.

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Should Your Next Lease Agreement Include a Guaranty?

By: Maria Di Stravolo Elliott
Related Practice Area: Real Estate
Related Industry: Construction

(Editor note: This is Part 2 of a three-part series examining different types of collateral agreements that can be included in commercial leases. You can read Part 1 here, and Part 3 will be coming in our winter newsletter.)

While the Subordination, Non-Disturbance and Attornment agreement is a more complex and layered method for landlord lenders to assure themselves of collecting rent money from a tenant once a landlord defaults under loan documents, the guaranty is a more classic payment assurance that has been part of the commercial and residential leasing world for hundreds of years.

A guaranty is a promise to pay for the debts or defaults of another to the creditor. When it comes to leasing, a guarantor is responsible to pay the debts or defaults of the tenant to the landlord. It requires a separate contract between the guarantor - often a private third-party and not a certified financial institution - and the landlord.

If a guaranty is used, it normally states that in case of a tenant default on any lease payments, the landlord will seek a judgement for the funds from the guarantor first instead of the tenant. Most times, a tenant will seek a guarantor if they aren't creditworthy.

It doesn't mean the tenant isn't financially reliable. But when a tenant has a start-up business with no assets, or it is a young person that doesn't have an established credit history, a third-party could legally and financially vouch for the tenant through a guaranty.

But this guaranty shouldn't just be a handshake deal. Since a guaranty is subject to the statute of frauds, it needs to be in writing. The landlord also should make sure the agreement is executed at the same time as the execution with the lease, not after.

Some terms landlords should consider including in any guaranty:

- Either make it unconditional, or insert a condition that a judgement must be obtained against the tenant first (in the case of a commercial lease, the judgement can be a confession of money judgement).
- Make it unlimited in the amount of funds a landlord can receive, or come up with a mutually agreed upon limit to the amount the guarantor is willing to expend.
- It should be unlimited in time, or establish a mutually agreeable time limit to when the tenant can establish

"creditworthiness" so that the guaranty can then expire. Or, consider a rolling guaranty where the guarantor is limited in liability for a certain time frame throughout the term of the lease on a rolling basis.

- Include a confession of money judgement (for commercial leases only).
- Include a requirement for the guarantor to be made known of any change in the lease between the tenant and the landlord.

Keep in mind that any material changes made to a lease, such as changes in rent or expiration date (beyond any applicable options to renew or extend), should also obtain the consent of the guarantor. The guarantor then cannot argue the guaranty is invalid or enforceable.

If you have any questions about a guaranty or its necessity in a lease agreement, please contact me or any member of the Barley Snyder Real Estate Practice Group.

Part 3 of this series about different types of collateral agreements in commercial real estate leases will concentrate on landlord waivers.

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