



[THE ENVIRONMENTAL ELEMENT]

By: ALISON STEELE MANDADI, P.G.
Senior Environmental Consultant
SSCI

With: HELEN I. HODGES
President
SSCI

When the "innocent landowner" must pay

Most small business owners are now aware that the "innocent landowner" defense provides a shield against certain types of environmental liability, providing that standards of due diligence are met prior to real estate purchase.

However, many of those owners are not aware that being "innocent" does not guarantee that they will remain "financially unaffected." In fact, environmental costs can be incurred even if due diligence requirements are met. Two characteristics of small-business property acquisition can conspire to create a situation in which environmental costs grow to represent a high percentage of total investment value. First, the properties acquired by small business owners are often small, with relatively low sale prices. Second, small business owners may not be clear regarding the ways in which nearby properties can impact real estate values, and regarding the magnitude of costs that environmental documentation can require.

In the example provided with this article, a purchaser signed a low-bid contract for a Phase I Environmental Site Assessment (ESA) to be completed

according to the standards established by the American Society of Testing and Materials (ASTM-E1527). The acquisition property was a vacant (but previously utilized) tract of land within an industrial area of Houston. The Phase I ESA did reveal historical disposal issues associated with an adjacent manufacturing property, but the report identified no potential sources of contamination originating with the acquisition property itself. Confident that he could not be held financially accountable if contamination were discovered in the area, the purchaser acquired the property.

A short time later, the adjacent manufacturing property was evaluated by a third party, and its waste pits were found to be leaking. Groundwater contamination was found to extend beneath the acquisition property.

The acquisition property purchaser sought relief under the Innocent Owner/Operator Program (IOP) established by the Texas Commission on Environmental Quality. However, given the complicated industrial history of the area, the costs of acquiring an Innocent

Owner Certificate (IOC) were estimated to total almost 50 percent of the original purchase price of the property. Furthermore, the purchaser was dismayed to learn that, unlike a Voluntary Cleanup Program Certificate of Completion (VCP COC), an IOC would not be transferable if the tract were sold in the future.

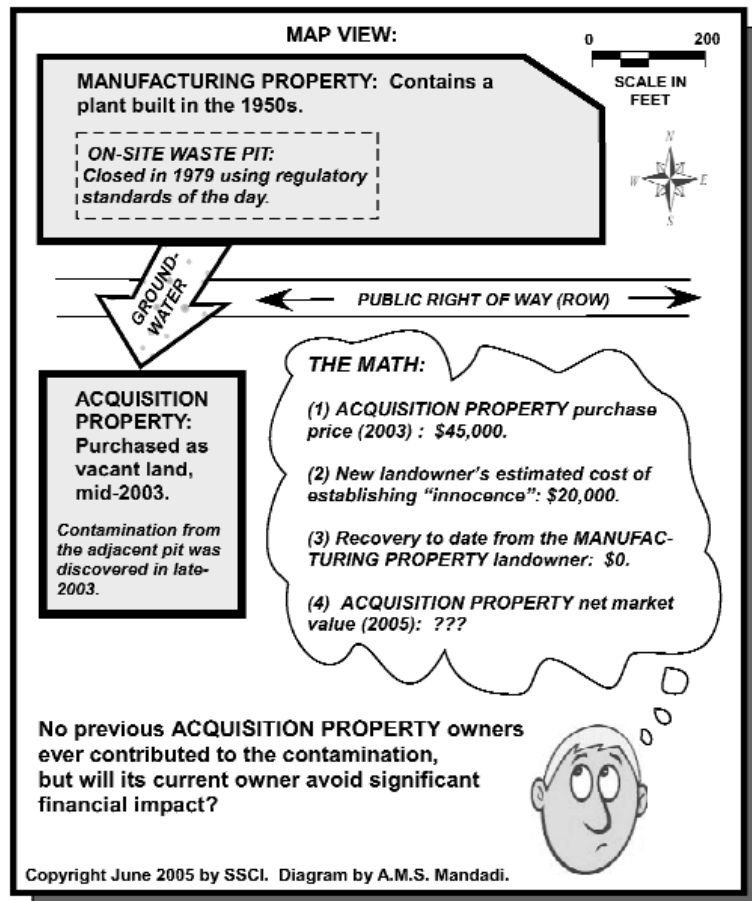
The purchaser found no easy recourse to this situation. There was no guarantee that, with further investment of money and time, restitution of damages could be acquired from the manufacturing property landowner, nor did a break-even re-sale of the acquisition property seem possible.

This scenario is potentially avoidable if a reputable and service-oriented professional provides comprehensive consultation on environmental issues that pertain to real estate transactions, above and beyond the production of Phase I ESA reports. In recent years, a maturing Phase I ESA market has favored independent consultants who often operate home-based businesses.

In order to minimize liability and to realize acceptable income in a price-depressed market, those independents often treat Phase I ESA contracts solely as commodities. That strategy best serves the independent consultant and works well for the purchasers only if they are aware of the limitations of stand-alone reports. The adage, "penny wise, pound foolish" applies. Saving a few hundred dollars on a Phase I ESA will not benefit a real estate purchaser if the eventual result is thousands of dollars in direct costs and/or effective lost property value.

Alison Steele Mandadi, P.G., specializes in multimedia environmental, health and safety compliance as it relates to small-business market strategy.

For more information, please contact Alison Steele Mandadi (astele@sscienvironmental.com) at (281) 300-2174 or Helen I. Hodges (hhodges@sscienvironmental.com) at (800) 324-7724 or visit www.sscienvironmental.com. □



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May 2004	Practical summary of Texas PST program under TRRP	Doug Jackson, CEP, CAPM
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