

# Required Environmental Disclosures in Sales of Nonresidential Real Property: Caveat Emptor No More!

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**In this article, the author discusses the primary disclosure requirements concerning the environmental condition of non-residential property, focusing on California law.**

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Sales of nonresidential real property in California do not carry with them the litany and breadth of disclosures that accompany residential sales, but they are not without their obstacles either. The development of environmental regulations has changed the nature of purchase and sale transactions dramatically for sellers, significantly eroding the time-worn doctrine of “caveat emptor.” Sellers now have significant disclosure obligations and liability exposure under environmental laws. This article discusses the primary disclosure requirements concerning the environmental condition of non-residential property.

## ***Hazardous Substances***

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) imposes liability on owners or operators of properties for the cost of remedial action where there is an actual or threatened release of hazardous substances into the environment.<sup>1</sup> Because the mere purchase of property may result in the buyer’s liability for clean up costs even if someone else actually disposed of the hazardous substances on the property, buyers will often seek a warranty or affirmative representation from the seller that no hazardous substances exist on the property.

In addition to federal regulations, the California Su-

perfund statute requires sellers of nonresidential real property to disclose in writing to buyers the existence of any hazardous substances that they know or have reason to believe are located on or beneath the surface of the property.<sup>2</sup> Failure to notify a buyer of such fact will subject the seller to actual damages and a fine of up to \$5,000 for each willful failure to notify.<sup>3</sup> A seller who does not disclose to the buyer known hazardous substance conditions on the property forfeits its right to assert any statutory defenses to CERCLA and California Superfund liability.<sup>4</sup>

Although parties to a transaction can allocate liabilities for remediation costs *between themselves*—for example a seller indemnifying a buyer for preexisting conditions—such allocations are, at least in the Ninth Circuit and in California, ineffective against the federal or state government.<sup>5</sup> In other words, parties are jointly and severally liable with respect to the government in order to insure that the taxpayers are not forced to bear the cost of responding to the illegal disposal of hazardous substances. Nevertheless, private parties, are free to contractually allocate the costs associated with the liability among themselves but cannot alter or excuse the underlying liability.

## ***Natural Hazards***

California’s Natural Hazard Disclosure Law imposes another separate and independent duty on sellers to disclose the existence of area-wide natural and man-

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made hazards *regardless of personal knowledge*. The required disclosure includes whether the property lies within areas designated as flood hazards, fire hazards, wildlands fire hazards, earthquake fault zones and seismic hazard zones.<sup>6</sup> Thus, if the natural hazard is known to the seller or shown on a list or map maintained by the applicable county, it must be disclosed to the prospective buyer. Consequently, sellers will be considered to have constructive knowledge of any hazard area information available through local agencies. In turn, the exposure for failure to disclose can be significant to sellers. Fire, flood, or earthquake victims may seek to recover from the seller if appropriate disclosures were not made.

### **Toxic Mold**

The Toxic Mold Protection Act of 2001 enacted disclosure and remediation requirements regarding mold in buildings.<sup>7</sup> It requires the Department of Health Services to study the adverse health effects of exposure to molds, develop permissible exposure limits, establish practical standards to assess the health risk of indoor molds, and establish guidelines for identification and remediation. The Toxic Mold Protection Act will not take effect until after the Department of Health Services adopts these standards and guidelines.

### **“As Is” Provisions**

If market conditions permit, sellers may consider inclusion of an “as is” provision in the purchase agreement. However, there is no guarantee as to the effectiveness of such a provision in limiting the seller’s liability. Not only can a buyer still obtain contribution for clean up costs under CERCLA,<sup>8</sup> but in California such a provision does not enable a seller to avoid other disclosure requirements imposed by statute.<sup>9</sup> Moreover, the inclusion of an “as is” provision will not protect a seller from future claims unless the buyer specifically waives the provisions of Civil Code § 1542.<sup>10</sup> Lastly, an “as is” clause is ineffective against governmental agencies for investigations and clean ups.

### **Environmental Investigations**

While applicable laws and regulations impose disclosure obligations on sellers, a buyer of nonresidential real property will likely conduct an independent environmental investigation. Not only will the investigation reveal the condition of the property in order to address and correct environmental problems, it may be helpful in establishing certain defenses to liability for the presence of environmental contamination. Furthermore, it will assist with the buyer’s negotiation of the purchase price, allocation of risks, warranties, and indemnities from the seller to limit environmental risks. In most instances the buyer’s lender will also require an independent environmental audit due to the risk that the lender may be deemed an owner or operator if it elects to exercise security rights or takes the property through foreclosure.

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<sup>1</sup> 42 U.S.C.A. §§ 9601-9675.

<sup>2</sup> Health & Safety Code § 25359.7.

<sup>3</sup> Health & Safety Code § 25359.7.

<sup>4</sup> 42 U.S.C.A. § 9601(35)(C); Health & Safety Code § 25359.7(a).

<sup>5</sup> 42 U.S.C.A. § 9607(e); Health & Safety Code § 25364; *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1461-1463 (9th Cir. 1986).

<sup>6</sup> Govt. Code §§ 8589.3-8589.4, 51183.5; Pub. Res. Code §§ 2621.9, 2694, and 4136.

<sup>7</sup> Health & Safety Code §§ 26100-26156.

<sup>8</sup> 42 U.S.C.A. § 9607(e).

<sup>9</sup> See e.g., Health & Safety Code § 25359.7.

<sup>10</sup> Civil Code § 1542 provides: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”