A Creative Mediation

Dealing with environmental contamination and limited time and funds

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On March 5, 2000, a Southwest Airlines flight approached California's Burbank Airport from Las Vegas for a routine landing. As the Boeing 737 airplane landed, it was going much too fast for the runway conditions. It hurtled through the blast shields at the end of the runway, crashed through an airport fence, skidded onto Hollywood Way and stopped only a few feet from an adjacent gas station and a retail building. Fortunately, the crash resulted in only a few minor injuries and caused very little property damage.

In direct response to this incident, the Airport Authority decided to reexamine the airport's runway safety zone—the cleared buffer area that reduces the risk of errant aircraft collisions in emergency situations. At the time, the runway safety zone at this location extended only a few feet beyond the end of the runway. An expansion was deemed to be critical.

Acquiring the Property

The Airport Authority decided to expand the runway safety zone by acquiring and removing the nearby gas station and adjacent retail building. Anticipating a difficult acquisition, the Airport Authority reviewed the potential soil and groundwater contamination issues posed by the gas station. This business had an older system of underground storage tanks, which had not been formally inspected for several years. In anticipation of potential cleanup costs, the Airport Authority allocated additional funds in the project budget. However, they were pleasantly surprised to learn that the underground gasoline storage tanks and the soil beneath the property were relatively free of contamination and required only a minimal amount of soil remediation. A settlement agreement was quickly reached with the gas station owner-operator and the business successfully relocated to a nearby corner property.

What turned out to be a more complex acquisition was the adjacent retail building that was leased to three tenants: a restaurant, a rental car agency and a dry cleaner. The Airport Authority performed a due diligence inspection of the property for environmental conditions and discovered that there were no contamination issues within the restaurant or rental car unit portions of the property. Both business quickly reached a negotiated settlement and

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successfully relocated. But the dry cleaner was another story.

Having been in this location for over 10 years, the dry cleaner retained legal counsel to assist them with settlement negotiations. In this case, an inspection of the property for environmental conditions revealed a major problem. The dry cleaner business used the liquid chemical perchlorethylene (commonly called "Perc") onsite to clean the garments. Perc is a recognized pollutant that is highly regulated in both its use and disposal. An inspection of the dry cleaner unit identified several Perc spills on the concrete floors near the dry cleaning production machines. There were also chemical spills in and around the dirt found outside and below the metal barrels where the business stored used Perc while awaiting removal.

Who's Responsible?

Before the Airport Authority could take ownership of the property, the contamination had to be remediated. Environmental laws dictate that property owners and business operators are jointly liable for cleanup of unacceptable levels of soil contamination. Soil vapor testing under and near the dry cleaner's unit revealed significant Perc contamination, and the Airport Authority's environmental report concluded that it was a direct result of the dry cleaning business. After obtaining the remediation cost estimate and establishing the approved cleanup procedures, the cleanup project was estimated to take up to ten years.

The property owner believed that the dry cleaner tenant should pay for all the costs. The dry cleaner tenant argued that the property owner collected rent for decades and therefore, they had a financial stake in the property conditions and should contribute to the remediation costs. The Airport Authority had neither liability for the cleanup nor any obligation to pay for remediation of contamination, but because this was a public safety project, they wanted to immediately clear the property and couldn't wait ten years. When the parties reached a stalemate, they opted to voluntarily participate in mediation.

Reaching an Agreement

After some tense back and forth negotiations, the parties reached a very creative 4-part solution. First, it was agreed that all settlement monies due to the dry cleaner business would be used to pay for the remediation. If the remediation costs were less than the original estimates, then any remaining funds would be returned to the dry cleaner business owner.

Second, a fixed amount from the property owners' settlement funds would be held in escrow to pay for remediation costs that exceeded the amount of the dry cleaner business funds. Third, the dry cleaner would pay for a "cost cap insurance" policy. This is an unusual insurance policy that guarantees project costs will continue to be funded even for unexpected expenses (up to an additional $2 million. Fourth, the parties opened an escrow to facilitate payments to the remediation contractors, issue progress reports to the parties and complete the transfer of the property upon completion and approval of the remediation work.

In the end, the parties agreed that pending the completion of the 12 year remediation project, property could be immediately cleared by the Airport Authority for public safety. ✪

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