Introduction

When I started work on the first edition of this book nearly twenty years ago, the effect of environmental laws on real estate and commercial transactions was just starting to be felt. Although environmental lawyers had been involved in the 1970s and early 1980s in well-known cases like Love Canal and Times Beach, it was not until later that transactional attorneys realized that some of the very same laws involved in those cases could—if their clients were particularly unlucky—affect their deals. (In an early negotiation I had over an impacted property, the seller’s representative said, with a genuinely straight face, that he did not see what the big deal was, since the substance in question was “just good, clean petroleum.” Things have changed a bit since then.)

At that time, there was no book that dealt with the topics at the intersection of environmental and real estate law. Many lawyers on one side of that divide did not understand the practice of their colleagues on the other. Environmental lawyers were not trained to understand the difference between a mortgage and a deed of trust; even sophisticated real estate practitioners had no reason to know the difference between CERCLA and RCRA. To bridge that gap, I sought out practitioners who knew their subjects well and could explain their topics both to beginners and to more experienced attorneys. From the beginning, I asked other practitioners to peer-review the chapters in this book, both to provide a double check on the chapters’ contents and to suggest alternate insights and perspectives.

This is the fourth edition of the book, and much has changed since the first edition. As the development of environmentally impacted properties has gained in frequency and sophistication, the scope of chapters on related issues—environmental insurance, institutional controls, brownfields—has broadened as well. Commercial development at formerly impacted military bases, which had not been attempted when we first went to press, is now routine. Concern over specific substances—asbestos, lead paint, and mold, to name a few—has ebbed and flowed over the years, and the book has changed accordingly. All the authors have updated and revised their chapters to reflect changes in law and practice.

How to Use This Book

This book is divided into five parts. Part I covers the basic issues of environmental liability—both statutory and under the common law. Given the importance of lenders to real estate and commercial transactions, there is a chapter on lender liability. Also included are chapters on environmental disclosure requirements and criminal environmental liability.

Part II focuses on environmental due diligence, with coverage of the environmental audit process, the role of environmental consultants, and the science behind consultants’ reports.

Part III deals with environmental matters in the transactional and business context, and includes chapters on how deals are structured and documented to allocate environmental risks, landlord-tenant environmental issues, tax issues related to environmental cleanups, environmental disclosures under the securities laws, and environmentally related bankruptcy issues. Also included are chapters on brownfields, the institutional controls often used at brownfields sites, and environmental insurance.
Part IV addresses the most common environmental problems affecting developed properties, including underground storage tanks, asbestos, lead-based paint, indoor air pollution, and mold.

Finally, Part V highlights environmental problems that arise in the land development process—wetlands, endangered species, stormwater issues, and the constitutional “takings” implications of environmental laws. The book concludes with discussions of environmental justice, conservation easements, environmental issues related to the development of former military bases, and the emerging topic of smart growth.

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