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OUTSIDE COUNSEL

New Duties to Tell Tenants If Indoor Air Tests Exceed Markers

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On Sept. 4, 2008, the state legislature amended the Environmental Conservation Law to include a new section called, "Tenant Notification of Indoor Air Contamination."[1] As its title suggests, this law, which took effect on Dec. 3, 2008, places new obligations on property owners to inform their tenants when indoor air test results exceed New York Department of Health (DOH) or federal Occupational Safety and Health Administration (OSHA) guidelines.

However, the new law is a bit more complicated and raises more questions as to its application.

Background

The sources of indoor air contamination are many and varied, but the largest emerging area of public concern, the one that the law's legislative history reveals gave rise to it, is indoor air contamination caused by "soil vapor intrusion."

Soil vapor intrusion is the process by which volatile chemicals move from a subsurface source (either contaminated groundwater or contaminated soil) into the indoor air of overlying or adjacent buildings. The subsurface contaminated groundwater or contaminated soil releases vapors into the pore spaces in the soil. Those vapors then enter the building by migrating through the soil directly into basements and foundation slabs through infiltration.

Vapor intrusion can also be the result of contaminated groundwater entering the basement and releasing volatile chemicals into the air, but that is rare.

In recent years, the Department of Environmental Conservation (DEC) and the DOH have taken on soil vapor intrusion as a pet project. In this regard, both agencies have developed guidance to evaluate vapor intrusion pathways at all remedial sites in New York with the goal of conducting soil vapor intrusion evaluations as efficiently and effectively as possible. Under this guidance, all past, current, and future contaminated sites, including Resource Conservation and Recovery Act (RCRA) Corrective Action sites, inactive hazardous waste disposal sites (State Superfund), Voluntary Cleanup Program sites, Brownfield Cleanup Program sites, and Environmental Restoration Program sites, will be evaluated to determine whether these sites have the potential for human exposures to soil vapor intrusion. The agencies will use their guidance to rank sites according to certain criteria to ensure that the sites more likely to have soil vapor intrusion issues are investigated first.

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This law encompasses more than just indoor air contamination caused by soil vapor intrusion, however, and, indeed, covers other sources of indoor air contamination, as it specifically references DOH and OSHA guidelines, which regulate other contaminants such as asbestos, BCPs, mold, lead, radon and mercury.

Requirements of New Law

The new law requires the owner of any real property to notify its tenants and occupants if test results (as defined) indicate that indoor air quality exceeds NYSDOH and OSHA guidelines. The law imposes no restrictions on types of building subject to the law's requirements (unlike, say, lead-based paint requirements, which do not apply to commercial buildings). It applies to the results of any tests conducted on indoor air, subslab air, ambient air, subslab groundwater samples, and subslab soil samples.

The requirements of the new law are triggered when an owner of residential or commercial property receives test results from an "issuer" that exceed DOH or OSHA indoor air guidelines. "Issuers" fall into several categories:

(1) any person subject to an order issued for an Inactive Hazardous Waste Disposal Site under either the Environmental Conservation Law[2] or the Public Health Law,[3] or issued under the Oil Spill law[4];

(2) a participant in the Brownfield Remediation Program[5];

(3) a municipality participating in the Environmental Restoration Projects program[6]; and

(4) the Department of Environmental Conservation (DEC).

Within 15 days of the property owner receiving indoor air contamination test results from such an "issuer" where those results exceed DOH and OSHA guidelines, the property owner must provide all tenants and occupants with a fact sheet and timely notice of any public meeting to discuss the test results. While not initially required, the property owner must also provide the actual test results and any closure letter if a tenant or occupant requests. Note that "occupant" would seem to include employees of a commercial tenant, an important category.

For the purposes of supplying facts sheets, the new law provides that the DOH will prepare generic fact sheets on the compound or contaminants of concern. The fact sheets will identify the reportable detection levels established by DOH indoor air guidelines and OSHA guidelines for indoor air quality, health risks associated with those contami- » Page 8

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nants and a means to obtain more information.

More strict requirements apply to the case in which an owner has a duty to disclose to a prospective tenant if (1) there is an engineering control in place at the property to mitigate indoor air contamination, or (2) if the property is subject to ongoing monitoring pursuant to an ongoing remedial program.

In these two situations, the owner must also provide a prospective tenant with fact sheets and, if requested, the test results or the disclosure letter. This information must be provided prior to the signing of the binding lease or rental agreement. The notice must also be included in the rental or lease agreement with the following language in large type:

> NOTIFICATION OF TEST RESULTS: The property has been tested for contamination of indoor air. Test results and additional information are available upon request.

Fines for failure to comply with this new law can be assessed at up to $500 per day of noncompliance.

Unanswered Questions

Although its requirements seem at first blush fairly straightforward and appear only to cause some additional paperwork burden on a property owner, the new law in fact poses several potential problems for the landlord-tenant relationship.

First, the law requires the reporting of soil gas and sub-building groundwater contamination levels ostensibly to alert tenants about possible problems of indoor air in their leased spaces. But the science that purports to link sub-building slab soil gas and groundwater contaminant levels to actual indoor air contaminant levels has not been fully developed or tested very much in practice. At all levels of government, various theories and mathematical models now purport to more accurately than ever before link sub-building contamination to indoor air contamination. The new mathematical models are intriguing to the environmental professional but may not be easily translatable in the context of providing "test results" to tenants and even less so to "occupants," that is, employees of commercial tenants. Empirical evidence confirming that the models accurately predict indoor air contaminant levels is still somewhat limited.

That being so, how will landlords explain to actual and—worse, prospective—tenants what the level of risk associated between such sub-slab soil or groundwater contamination levels and actual levels of indoor air breathed by building occupants or all sorts? Counsel representing landlords who, because of tenant complaints, take indoor air samples for mold levels, for example, already have enough difficulty explaining to such tenants what those results mean. Admittedly, some of that difficulty may arise from the fact that there are not actual regulatory levels of acceptable and unacceptable mold.

In addition, a requirement to warn prospective tenants more than implies a confirmed stigma on the space to be rented, when that may well be unwarranted. In the commercial context, lessors will find they have to make "deals" with prospective tenants—whether more free rent, more money for a buildout, etc.—while residential landlords may well lose prospective tenants (especially elderly tenants or families with children) who are frightened by the nature of the notice and the seemingly ominous nature of air pollution.

Generic fact sheets identifying contaminants of concerns and their health risks are bound to leave questions raised in the particular situation of each property unanswered, such as what is the risk posed to occupants of lower-level apartments as compared to occupants of upper-level apartments in multistory buildings.

Next, though the law seems to impose this duty on lessor, what duty will commercial tenants themselves then have to provide test results to employees working within those spaces? Compliance by lessors with the requirement to supply "occupants" (individuals), as well as commercial tenants (i.e., businesses), with test results is likely to be spotty. Even if no such legal obligation is imposed on the tenants vis-à-vis their employees, will the existence of this law create an implied duty, when, as will undoubtedly happen, test results sent first or only sent to actual lessees, i.e., the employer, find their way to one or more employees, as happens when fears about the air they are breathing is the issue?

This will compound the difficulty of explaining the real meaning of the test results to the tenant-employer themselves. This office typically represents lessors of commercial buildings that face the delicate task of supplying accurate and complete information about indoor air quality test results to commercial lessees. We expect that task will be much harder under the new law. Additionally, this office has represented lessee clients who have faced claims by serially ill employees that "something" in the building is making them sick. There will now be more fodder for such claims of real or imagined problems.

In addition, does this new law apply retroactively? If it does, then prudent legal representation requires counsel to advise their landlord-clients to review their due diligence data files, follow the leads, and perhaps affirmatively provide notice of historic test results to existing tenants and other building "occupants."

Finally, are property owners only required to report actual indoor air quality violations? The law does not definitively state whether property owners must report sub-slab sample results the DOH or DEC might conclude result in indoor air violations, but which an independent environmental professional might conclude are unlikely to result in indoor air quality violations.

Conclusion

One can expect with such an ambitious law that actual practice will reveal even more ambiguities and issues; one can also expect that litigation arising out of the enforcement of this new law will magnify the law's ambiguities and weaknesses. Only time will tell whether landlord and the agencies in the first instance, and then the courts, are able to define the contours of a fair application of the law so as to provide adequate notice of genuine problems with indoor air quality—but also avoid unwarranted fears among commercial tenants and their employees from overreaction to evidence.

1. ECL §27-2405
2. ECL §§27-1301-27-1321
3. PBH §§1389A-1389E.
4. NAV §§12-170-12-197
5. ECL §27-1405(1)
6. ECL §§56-0501-0515