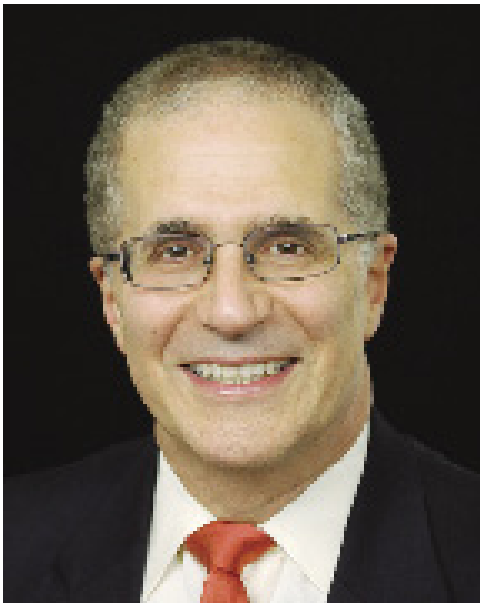


# Real Estate Journal

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## Why commercial real property investors need an environmental attorney



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In today's real estate market, real estate investors, developers and their attorneys need to know when to call in an experienced environmental attorney, one who can help them reduce environmental risk that could otherwise kill a deal. Environmental lawyers are particularly helpful in deals on property in a highly developed city like New York, where most of the land has been previously developed and many of those properties have some degree of contamination from prior industrial activity or from fill material.

Environmental lawyers have studied and experienced the application of complex environmental statutes and regulations to particular properties and situations.

That study and experience enables them to evaluate when apparent risks threaten the economic viability of the investment or proposed project, and when those risks are more theoretical. How environmental provisions should be written into real estate contracts is highly fact-dependent; one size does not fit all!

Environmental attorneys pride ourselves on turning breakdowns into breakthroughs. Here's one example: we represented the buyer of a car dealership property, which was contaminated. The seller, a major car manufacturer, insisted it could not vary its standard, nation-wide contract, which provided that if the estimate (to be developed post-contract signing) of cleanup costs exceeded \$50,000, the seller could unilaterally terminate the contract. My unhappy client - knowing that such costs could well exceed that amount, and not wanting to spend money on transaction costs for a doomed deal - asked me for a solution: I turned to seller's environmental counsel (and business people) and asked whether my client couldn't be given the option of picking up the costs of cleanup beyond the \$50,000. That is, without additional exposure for the seller, my client could and did successfully complete the deal. It was a win-win all around. The deal went through with that change.

Environmental lawyers can also deal with lenders, whose concerns about environmental risk have increased in recent years, better than any of the other professionals who help protect the real estate investor. For example, lenders don't want to worry about the value of their collateral plummeting when an old environmental issue re-surfaces, or about their borrower's impaired ability to pay its mortgage loan due to unexpected expenditures for environmental cleanup.

Here are the ways in which an experienced environmental attorney can help in a real estate transaction:

- \* They draft environmental provisions in a real estate contract to protect the client from the risk of and actual future liabilities.
  - \* They can suggest both conventional and more creative ways that the business people can allocate the costs of cleaning up environmental contamination.
  - \* When the seller already knows that the property has contamination from a leaking tank or deteriorated asbestos, but hasn't done anything about it because it seemed too complicated or expensive or risky.
  - \* When the lender requires a Phase I Environmental Site Assessment.
  - \* When the Phase I Environmental Site Assessment concludes there are "recognized environmental conditions," but it is unclear what the next steps are.
  - \* When a Phase II Environmental Site Assessment has been prepared, but it is unclear whether the report tells how to fix it.
  - \* When the parties need advice about whether and how environmental insurance might solve some of the difficult problems in the deal.
- An environmental attorney is also a necessary part of real estate law practice, when a client wants to know:
- \* How to get a "no further action" letter from a government agency to meet a lender's requirement.
  - \* Whether development of the property satisfies the requirements of New York's or EPA's Brownfields program.
  - \* How to get the best estimates of the costs of, and how to evaluate the adequacy of, proposals to clean up a contaminated property.
  - \* Whether there is a potential claim against the prior owner of a contaminated property.
  - \* Whether there is a potential claim against an adjacent owner of a contaminated property.
  - \* What the scope of his liability is for property damage and personal injury to nearby properties from contamination migrating from his property, both before and after purchase.
  - \* What the impact of contamination is on the value of his property.
  - \* Whether, even after cleanup, there is a legally cognizable "stigma" attached to the property.
- In today's world, and especially in New York City, the environmental aspects of real estate transactions should be taken very seriously and an environmental attorney should be part of any real estate transaction. Your client deserves it.
- James Periconi, Esq., is the founder of Periconi, LLC, New York, N.Y.