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AS SEEN IN THE NEW JERSEY LAW JOURNAL

State must share records to protect buyers and facilitate environmentally responsible economic development during COVID-19

By **Kenneth M. Morgan and Melissa A. Morgan**

When Governor Phil Murphy declared a State of Emergency and Public Health Emergency on March 9, a number of state offices shuttered that New Jerseyans rely on to conduct essential oversight and share information with the public. Among these was the New Jersey Department of Environmental Protection (NJDEP) and, notably, the department's Office of Record Access (ORA), which buyers in commercial real estate transactions need to access in order to make informed decisions about a property's environmental health and history. Because New Jersey law designates current owners strictly liable for environmental issues on their property, no matter how or by whom they were created, environmental records furnished through the ORA are essential for buyers to be sure that sellers are not passing environmental liability onto them. Wary buyers are delaying or backing out of deals - or dangerously moving ahead without knowing whether they could become responsible for arranging an environmental cleanup and footing the bill. Delayed action on environmental issues, risks for buyers, and massive tax revenue deferrals and losses through broken deals are the dismal results.

For environmentally responsible buyers and sellers, access to the ORA's records is essential. Under the New Jersey Spill Compensation and Control Act, any person who owns real property acquired since 1993 with a hazardous substance that she knew or should have known about is strictly liable for all cleanup and removal costs. That means a buyer will be liable for any environmental contamination on the property caused prior to their ownership unless they have taken steps to provide defenses. Under New Jersey's "innocent purchaser defense," a buyer could prove that he had no reason to know about environmental damages because he conducted "all appropriate inquiry" prior to purchase, including obtaining environmental records from the property and arranging a site investigation. But without access to NJDEP records, buyers cannot know a property's full environmental history, and cannot say that they had no reason to know, either.

These environmental due diligence concerns often make or break deals, as environmental issues are typically the most significant risk associated with any real estate acquisition, especially in a heavily developed and often contaminated state like New Jersey. Prudent buyers want to understand their risks and maximize their ability to develop and eventually re-sell the property, while lenders involved in these purchases often require borrowers to conduct environmental due diligence to help assess their financing risks. These transactions are also a major catalyst for actually remediating environmental issues that an owner was previously unaware of or ignored. Without the ability to bring environmental issues to light through state records and inspections, a crucial opportunity is lost to address the environmental issue itself.

Under normal circumstances, buyers (or more likely their environmental consultants) submit Open Public Record Act (OPRA) record requests for information concerning releases and threatened releases of environmental activities on the site, including landfill and disposal records and permits, government listing of sites and spill reports. While some files are digitized, many are stored only physically, including older files, larger materials, and microfilm. The NJDEP's ORA receives and processes all these requests, which are typically required to be fulfilled within seven (7) business days. But during the State of Emergency, these timelines are suspended, with requests to be completed "as soon as possible." When environmental consultants cannot complete a full review of

the public records, they must note an information gap and cannot ensure compliance of their report with state and federal regulations, leaving the innocent purchaser defense unavailable to buyers as long as public environmental records remain inaccessible. Buyers are faced with the choice of proceeding with uncertain information and greater risk, or delaying or terminating the transaction and potentially losing costs already incurred, like deposits, due diligence costs, and attorneys fees.

This dilemma is particularly damaging for commercial real estate transactions, which typically close within 60-90 days but are now potentially delayed by five (5) months and counting. Time kills deals, and many are falling apart amid these indefinite pauses. One solution for parties under contract would be to extend the due diligence period until after ORA and its records warehouse are fully operational. But even then, ORA will face a massive backlog of records requests and is advising environmental consultants that the usual seven (7) day turnaround of records requests could take eight (8) to twelve (12) weeks after re-opening. In this scenario, a deal that was signed in the winter of 2020 and was contractually required to close within 60 days may not be able to close within 2020 at all. By extending due diligence periods, buyers can obtain the information they need to comply with environmental standards and establish adequate liability defenses. Even if buyers are willing to take a leap of faith and proceed despite the potential environmental risks, lenders will typically choose not to take on such financing risks and kill the deal anyway.

Beyond harm to individual deals and buyers, these delays are stymieing economic activity in the state at large and causing massive losses to the tax revenue the State typically gains through the bulk sales process and other revenues. For a deal that manages to stay together through a successful closing, many of the economic benefits will not be realized in 2020, as the buyer will not receive the sales proceeds; the brokers will not receive their commissions; the attorneys, consultants, engineers, and inspectors may not get paid for their work until the closing occurs; and the title company will not get paid for its searches or receive a premium for its title insurance policy. All of that lost or deferred income will not have generated tax revenues for the State, which almost definitely would greatly exceed the costs and expenses of keeping ORA fully operational by taking reasonable measures to protect the health and safety of ORA personnel.

Despite these damages, the NJDEP is only slated to reopen during Phase III of the state's recovery plan, which will begin at some unknown time in the murky future. The NJDEP remains closed and its workers furloughed, but these employees can be protected and supported in safely returning to their jobs and incomes. In ORA's large records warehouses, employees can easily keep their distance from each other, and its office setting normally operates by appointment only without walk-in customers. The relevant files in presumably nearly all cases have not been touched since before the pandemic began, making the risks of transmission by touch negligible. And most on-site environmental inspections - like those that confirm flood hazard areas, wetlands, and other sensitive areas - take place nearly entirely outdoors at a safe distance from other people. All told, the State can take measures to protect its workers and restart their stable employment as the economic ramifications of the pandemic continue.

The closure of the NJDEP during the coronavirus pandemic has created a lose-lose-lose situation: ORA employees lose their income; the State loses massive tax revenues; property buyers, sellers, inspectors, attorneys, and other players see transactions cancelled, delayed, or proceeding at great risk to buyers; and environmental issues are ignored rather than addressed and remediated. The State has a responsibility to protect its workers, the environment, and local economic development, and with appropriate safety measures in place, it can accomplish all three by increasing transparency and sharing environmental records with the public.

Kenneth M. Morgan is a transactional real estate lawyer with Morgan Law LLC in Marlton.
Melissa A. Morgan is a Program Associate at the Center for Court Innovation in New York City.

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