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Problems with Underground Oil Storage Tanks

Many homes in the Greater Vancouver area built before 1957 were originally heated with furnace oil. When natural gas became available, the oil storage tanks, which were normally located underground in backyards, were filled with sand or capped. However, as these unused tanks start to corrode and rust, the remaining oil can leak out and flow onto the rest of the owner's property, the neighbour's property, storm sumps and waterways, resulting in contamination of soil and water. Apart from the negative financial impact on the market value of the property, the owner can face substantial legal liability under various statutes and bylaws for such contamination.

The BC Fire Code and by-laws of twelve municipalities (including the City of Vancouver) all essentially require that out of service underground oil storage tanks ("UST") be removed and that all contaminated soil must be removed and replaced with clean fill.

A very limited exception may be granted by the fire authority where the removal of the UST is impractical because it is located under a permanent structure or its removal would endanger the structural integrity of nearby buildings. In that case, the owner would still have to render the UST "inert" in accordance with "good engineering practices" which would include arranging, at their own expense, for the remaining oil to be pumped out, for the tank to be filled with sand and all piping to be capped as well as arrange for the removal of contaminated soil and replacing it with clean fill. In addition, written verification of such work must be provided by a licenced contractor to the fire authority.

The responsibility for the removal of the UST and remediating any contamination falls on the current property owner. The costs of such removal can be expensive depending on how much remediation work is involved. However, if the UST is ignored and not dealt with promptly and correctly, the costs can be exponentially more. In one case that was reported in 2008, an owner of a West Vancouver home, who bought the home in 2000 not apparently aware that there was a buried UST, had to spend close to \$160,000 to remove 5,000 liters of contaminated fuel from a leaky home-heating UST that had not been used

in 25 years! Such cases are rare but it does highlight the need to conduct due diligence when buying a home that may have an unused UST.

In addition to the BC Fire Code and municipal by-law requirements, the owner may also be subject to the Environmental Management Act of BC if the concentration of the contaminants present in the soil or groundwater exceeds the allowable limits prescribed for residential properties and therefore meets the definition of a “contaminated site”. In that event, the owner can be ordered to undertake remediation of the property and neighbouring properties if the contamination has spread. It may be possible for the owner to recover some of the costs incurred from more culpable previous owners through a “cost recovery action” pursuant to the Environmental Management Act but only if they can be found and have the resources to pay. An owner or former owner may also be found liable under common law nuisance for failing to take steps to prevent seepage of oil to neighbouring properties.

What are the Seller’s obligations?

The Seller normally will provide a prospective buyer with the Property Disclosure Statement (“PDS”) that requires disclosure of a number of potential defects, including the presence of an UST. If the Seller declares that the property does not to their knowledge contain an UST and/or is not contaminated, which later proves incorrect, the Seller can be liable for negligent misstatement. Moreover, if the PDS is expressly stated to form part of the Contract and there is an unqualified statement that there is no UST then this becomes an actual warranty so that if an UST is discovered on the property the Seller will be liable for breach of contract. Similarly, if the Seller states expressly in the Contract that there is no contamination at the property, the Seller will be contractually liable to the Buyer if contamination is discovered. As well the courts have held that Sellers have a duty to disclose a latent defect that could be dangerous or a hazard to human health and failure to do so may well make them liable to the Buyer for damages sustained as a result of their failure to warn.

In summary, if there is an UST, then the Seller should be advised to disclose this fact to the Buyer and ensure their representations are accurate. The Seller can then go ahead and arrange for a qualified tank removal contractor to remove the UST and clean up any contamination in accordance with all permits and applicable statutes, bylaws and BC Fire Code and provide sufficient written proof to the Buyer prior to completion. Alternatively, if the Seller does not have the money to do this, they could try and negotiate a price reduction in exchange for a release and indemnity from the Buyer with respect to the UST and remediation of any contamination. However, the Seller can still remain liable under the EMA and the Buyer may not be able to agree to this because of the requirements of their insurer and lender, who will want the UST and any resultant contamination issues dealt with prior to completion before funds are committed.

What can Buyers do to protect themselves?

If there is a suspicion that there may be an UST and the Seller will not or can not confirm either way, the Buyer should be advised to make the offer subject to a satisfactory

inspection that satisfies the Buyer there is no UST and that the property is not a contaminated site. It would be prudent to engage the services of a specialized UST inspector to conduct a magnetic survey to detect an UST and then, if located, the integrity of the tank can be examined and surrounding oil can be checked for the presence of contaminants. The Buyer should also put in another condition precedent into the Contract that, if there is an UST, the offer is subject to the Seller arranging, at their own expense, for the UST to be drained and removed and for the soil and groundwater to be assessed for contamination and, if so contaminated, the Seller will ensure the soil and groundwater is fully remediated in compliance with all applicable statute, bylaw and BC Fire Code requirements. The contract should also provide that it is a fundamental term of the contract that all the work will be done by a qualified tank removal contractor and that the Seller shall provide to the Buyer on or before the completion date all necessary written certificates and reports from the tank removal contractor and the fire authority that all work was completed in compliance with the applicable statutes, bylaws and BC Fire Code.

A Buyer should be strongly advised, even in the face of competing offers for a property, to not remove any conditions without the UST and remediation work having been completed properly by the Seller. Similarly, the Buyer should not agree to take on the responsibility of the removal of the UST and the remediation of any contamination in exchange for a price reduction without fully realizing the potential liability that would ensue upon becoming the new owner.

Insurance issues

As insurance companies are worried about the potential impact and expense of any environmental contamination caused by a leaking corroded oil tank, it is very hard to obtain home insurance for homes which have an exterior oil tank older than 15 years. Even if home insurance is obtained, there will undoubtedly be a leakage/pollution exclusion which would make the property owner bear the full costs of such an event. Another scenario may be that as a condition of providing insurance the owner must remove the oil tank within 30 days of the policy been issued which again will result in a big cost for the owner to pay.

Also, an owner will not be able to obtain financial protection from a residential title insurance policy as the policy will have exclusion for any environmental damage, including that caused by a leaking oil tank even if the owner had no idea the oil tank was there.

Financing issues

For commercial real estate, lenders are much more focused on environmental issues, depending on the history and the previous uses of the land, and sometimes will require special environmental reports to be obtained before they will commit to funding a transaction. However, even for residential transactions concerning a known UST, the lender will normally insist, before approving any funding commitment, that the UST to be removed in accordance with the applicable statutes, bylaws and BC Fire Code and for

the soil to be tested for contamination and remediated as necessary. In such a situation, a prospective buyer should not remove any financing condition until they receive written confirmation that the lender has approved of the UST removal and remediation process, is satisfied with all required reports issued by the tank removal contractor and is still prepared to provide mortgage financing for the purchase.

Underground Oil Tank Removal Process

Property owners should always hire an experienced and qualified contractor in tank removal. If an UST is found and has to be removed, then, upon obtaining a tank removal permit from the applicable municipal fire authority:

1. the remaining oil has to be pumped out and taken to an approved recycling/disposal facility;
2. the UST must be removed;
3. the soil must be assessed for contamination. If contamination is present, soil and groundwater must be properly remediated, which may include complete removal; and
4. the property owner must obtain a report, and photos, from the tank removal company, detailing the removal process, what was pumped out of the UST, a receipt from the facility where the UST was taken to and the amount of soil brought in. The report should confirm that the UST was removed in accordance with all applicable statutes, bylaws and the BC Fire Code and, in the event of contamination, that the soil and groundwater have been remediated in accordance with the standards prescribed in the EMA and further testing is not necessary. This report can then be provided to prospective buyers in the future as evidence that the UST has been dealt with.

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