

ENVIRONMENTAL ISSUES RELATING TO ACQUISITION OF LAND BY A MUNICIPALITY

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1. **HOW MUNICIPALITIES CAN ACQUIRE LAND**

Municipalities can acquire land in a number of ways:

- (a) purchase;
- (b) as part of the approval of a development - such as parkland dedication or road widenings;
- (c) expropriation;
- (d) vesting after an unsuccessful tax sale.

There are two key environmental questions that need to be asked before acquiring land:

- (a) Is the land clean?
- (b) Can the land be used for its intended purpose without any regulatory approvals?

2. **IS THE LAND CLEAN?**

In order to answer the question “Is the land clean?” a municipality must carry out what has generally been referred to as “due diligence”.

2.1 **Due Diligence When Purchasing Land**

In the case of a purchase, “due diligence” means ensuring that you have first

included in an Agreement some or all of the following provisions:

- (a) the requirement of disclosure of existing information that the Vendor has available;
- (b) the right of inspection including the right to take samples and undertake tests. This would include the right to carry out environmental assessments.
- (c) the right to contact government agencies and have access to all their records respecting the land. Because of the protection of privacy legislation in place accessing this information in a timely manner often requires the Vendor's consent which would be included in the Agreement.
- (d) representations and warranties given by the Vendor respecting the condition of the property; and
- (e) an indemnification given by the Vendor for subsequent third party claims after the municipality becomes the owner of the property.

The Agreement should contain a condition for the benefit of the municipality that allows it to terminate the Agreement if it is not satisfied with the results of its due diligence investigations.

These Agreements can be extremely complex and, if the form of Agreement is prepared by a sophisticated Vendor, it will often contain many potential traps that can catch a purchaser. Some example of these are:

- (i) a reverse indemnification,

- (ii) limitations on the right of a purchaser to terminate the Agreement after carrying out its due diligence,
- (iii) purchaser liability for off-site contamination caused by the Vendor or the Vendor's predecessors,
- (iv) confidentiality or non-disclosure provisions.

2.2 Lands Acquired Through the Development Approval Process

Usually when lands are acquired through the development approval process the formality of an Agreement of Purchase and Sale does not exist, but the same matters of "due diligence" can be dealt with as conditions of approval of the development. The municipality is usually in a better position here to negotiate favourable conditions compared to the situation where the municipality is purchasing the land.

2.3 Expropriation

When land is expropriated there is no right to inspect the property before it vests in the municipality. In this case the best you can do is off-site research (such as a title and other records searches to determine what former uses may have been made of the property) or off-site investigations. However, once the land vests in the municipality then the presence of contamination and the cost of clean up could affect compensation that must be paid to the owner for the lands expropriated.

2.4 Vesting After a Failed Tax Sale

When a tax sale fails to produce a successful purchaser the Treasurer has several options to consider:

- (a) vest the property immediately in the name of the municipality;
- (b) conduct a second public sale within 2 years of the date of the unsuccessful sale;
- (c) enter the property and carry out investigations to determine whether or not to vest the land or conduct a second public sale. This is the opportunity for the municipality to carry out “due diligence”. The right to investigate includes excavation of test pits and taking and removing soil samples.
- (d) do nothing. In this case the Tax Arrears Certificate is automatically cancelled two years after the failed public sale. The Treasurer may then consider writing off the taxes and taking advantage of the chargeback provisions in the Municipal Act for any portion of the uncollected taxes that had to be paid to other bodies such as an upper-tier municipality or a school board.

The *Environmental Protection Act* does provide some relief to municipalities if they vest a property which is contaminated. Section 168.13 of the Act gives the municipality up to a 5 year holiday from any ministerial orders to clean up contamination; however, this holiday is somewhat illusory as it does not apply if the MOE decides that there is a danger or risk to health or safety of any person or there is or may be impairment of the quality of the natural environment. Also, this holiday does not relieve a municipality from civil liability for off-site migration of

contaminants or the change of use provisions which I will refer to below.

3. CAN THE LAND BE USED FOR THE INTENDED PURPOSE WITHOUT ANY REGULATORY APPROVALS?

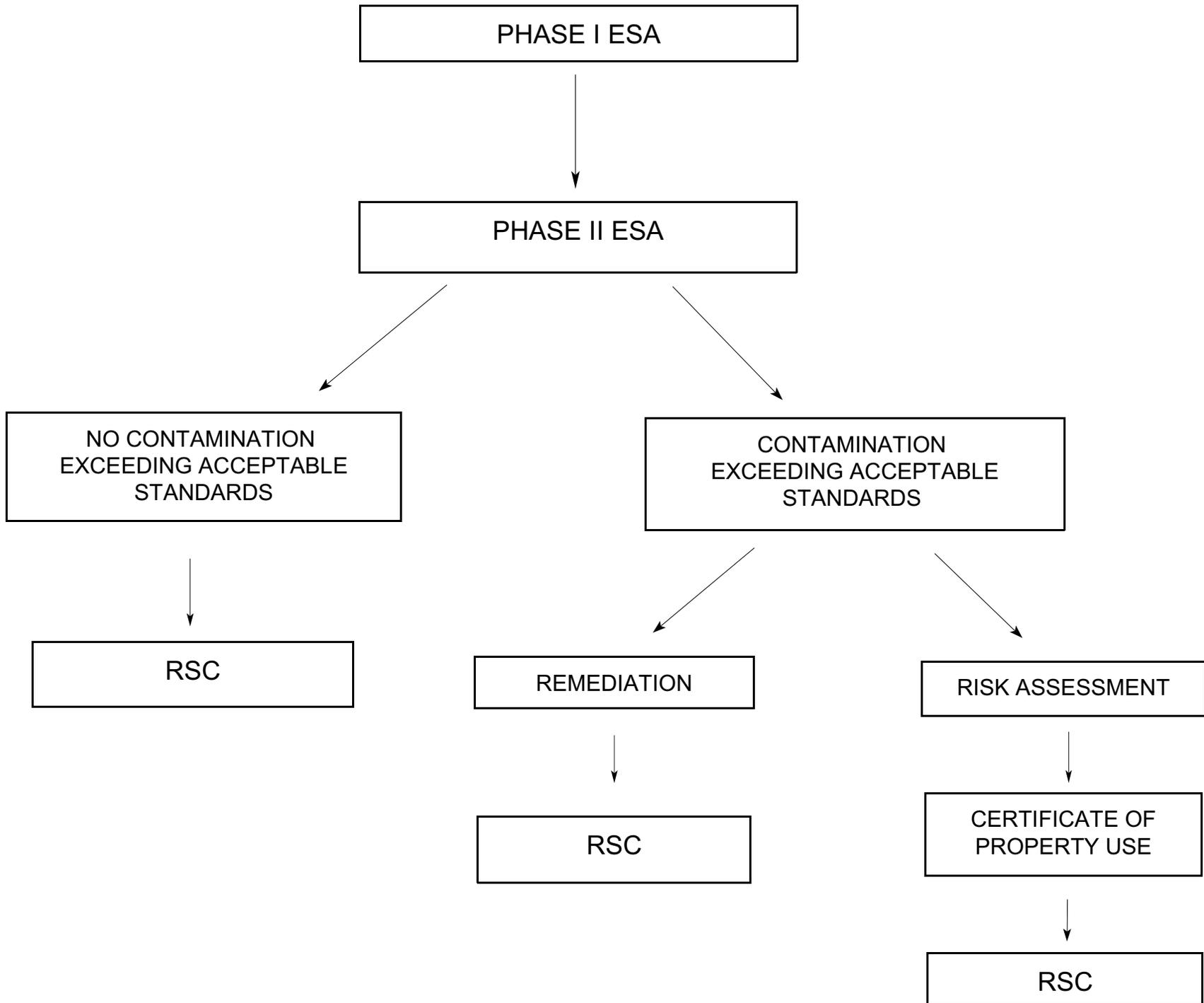
3.1 Record of Site Condition - Change of Use

The *Environmental Protection Act* prohibits the change of use of a property from an industrial or commercial use to a more sensitive land use such as residential, parkland, institutional or agricultural without the property owner first filing a Record of Site Condition (RSC) in the Environmental Site Registry maintained by the Ministry of Environment and Climate Change (MOE). The RSC is a document containing certain information about a property including current property use and the use proposed. Most importantly the RSC provides the results of one or more Environmental Site Assessments of the land and confirms:

- (a) that there is no evidence of contaminants at the property which would interfere with the proposed use;
- (b) that contaminants at the property do not exceed certain concentration limits which are set out in the Soil, Groundwater and Sediment Standards published by the MOE;

- (c) that contaminants exceeding those limits have been removed - this is called Remediation - or the contaminants can be scientifically managed on site to avoid adverse affects to human health and the environment - this is referred to as a Risk Assessment.

A building permit cannot be issued without an RSC if the building will be used in connection with a change of use that requires an RSC. Obtaining an RSC can be a time consuming and expensive process. Generally speaking the property owner must undertake a Phase I Environmental Site Assessment, a Phase II Environmental Site Assessment and then if there are contaminants exceeding levels allowed for the proposed use then the property must either be remediated or risk assessed. A Risk Assessment will be carefully reviewed by MOE and, if finally approved, will result in the issuance of a Certificate of Property Use. This Certificate can contain a myriad of conditions and restrictions on how that proposed use may be carried out. I have seen one Certificate of Property Use that contains over 40 pages of conditions, restrictions and requirements for developing the site. At a minimum ongoing monitoring and reporting to MOE is required. The following chart may assist in understanding the process.



These change of use restrictions in the *Environmental Protection Act* underscore the importance of a municipality making sure that it knows what it is buying before committing to ownership of a property. This again points out the importance of a “due diligence” period. In some cases municipalities have required the Vendor of the property to obtain the Record of Site Condition as a condition of the completion of the purchase. However, here you still must be careful because if the Record of Site Condition is the result of a Risk Assessment then you may find that the conditions and restrictions contained in the Certificate of Property Use make development of the property much more expensive than anticipated or budgeted for. A prime example of this might be where the municipality is acquiring parkland that was formerly a brownfield site. That change of use would require a Record of Site Condition and could result in remediation expense or restrictions on the way that the property is developed that may make it a poor choice for acquisition.

3.2 Civil Liability and Ministerial Orders

Buying contaminated land has more problems than its future development. One must also consider civil liability if contaminants from the property are migrating onto other properties, and also Orders issued under the *Environmental Protection Act* requiring cleanups. These Orders can be made against municipalities even if they did not cause the contamination. For example, recently there was a case in the City of Kawartha Lakes that went to the Ontario Court of Appeal. A residential heating oil tank failed and

oil escaped from the property and moved through municipal ditches and culverts leading to a lake. An Order was made by the Director under the EPA requiring the City to clean up the oil on its property although it was innocent and could not have taken any steps to prevent the failure of the oil tank. The Court confirmed the Order made to clean up the property and effectively by-passing the “polluter pays” principle.

4. CONCLUSION

In summary, municipalities must be cautious when acquiring real property. The environmental rules and regulations are becoming more complex and the minimum levels of contamination allowed with respect to a particular use are being reduced. In many cases it is wise for a municipality to retain an Environmental Consultant before purchasing a property and even before drafting an Agreement of Purchase and Sale. The Consultant, along with the municipal solicitor, can assist in structuring an Agreement to best protect the municipality.