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## BUYER BEWARE

# Title Searches Won't Always Protect Your Homebuyer from Environmental Hazards

In Massachusetts, Burden Rests on Buyer to Ferret Out Spills and Liability

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**C**ommercial real estate buyers, attorneys, and lenders appreciate the consequences of Massachusetts as a “caveat emptor” state. This Latin term, which translates to “buyer beware,” means the burden rests with the buyer, not seller, to ferret out environmental conditions and assess liability.

Due diligence, including a Phase 1 Environmental Site Assessment, is completed to identify recognized environmental conditions that might impact the property’s use and buyer liability under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, known as 21E for short, a reference to the chapter of the statute.

Unfortunately, it comes as an unpleasant surprise to homebuyers that this same burden applies to them. Yet homebuyers and their attorneys rarely perform robust environmental due diligence. First-time homebuyers, desper-

ate to secure a home, assume the seller will make certain disclosures, like hazardous waste disposal at the property.

In fact, there are few disclosures required of sellers in Massachusetts. While a seller can’t outright lie if asked about specific environmental conditions, if buyers aren’t asking the right questions, buyers may be purchasing property and assuming liability for environmental conditions that far exceed their financial ability to remediate.

## Owners Responsible, When There’s Proof

Owners are liable for their property’s cleanup. While the law provides an avenue for owners to pursue financial contributions from prior owners, this typically involves long and expensive litigation against prior owners who may not have the funds to contribute. Interestingly, owners of property with an oil release cannot pursue an action against previous owners unless there is proof the past owner caused the oil release.

Housing shortages compound the problem. A search is stressful; high prices, competition and variable interest rates create desperation and a power imbalance that gives the buyer substantially less leverage, making them even more likely to overlook even the most basic due diligence requirements.

The 2024 Affordable Homes Act recognized

this – and prevents offers from being contingent on home inspection waivers. However, the 2024 law did not address disclosures regarding the presence of hazardous materials.

Currently under Section 5(h) of the 21E law, a buyer of a one- to four-family residential property, who intends to permanently reside on the property, is required to make a simple visual inspection of the premises for “obvious signs” of a release to avoid liability.

It would be rare to find evidence of a heating oil release in a title search.

If there are obvious signs of a release, or if a release is disclosed to the buyer, then a buyer is expected to hire an environmental professional to further assess. Under federal law, this includes ensuring that a title search does not reveal any reason for further inquiry.

## Why Title Search Isn’t Sufficient

In Massachusetts, a residential buyer’s attorney, or their lender’s attorney, typically reviews title, taxes and other amounts owed to the municipality, and plot plans to determine the existence of encroachments. We anticipate that the attorney would inform a buyer if the title identifies known releases on the property, but

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in Massachusetts, evidence of a release is not typically recorded on the property's title.

It would be rare to find evidence of a release in a title search in Massachusetts. Only an Activity and Use Limitation, as defined in 21E, is required to be noted on the title; other indications of a release are not. Unlike due diligence of a commercial property, a search of the waste site database, or other inquiries, is not standard practice. The typical title review would not reveal waste sites nearby a residential property.

Recently, we talked to buyers who discov-

ered, belatedly, that their new home suffered a past oil or hazardous waste release that was partially addressed by the prior owner but not closed out with MassDEP, or an old release of oil migrated off the property to a brook.

Each would have not purchased the property, at least at the prices paid, had they known about the release. Each has limited recourse because the existence of the releases is public information.

Even in 2026, we should remind ourselves as practitioners on both sides of the real estate

transaction the consequences of practicing in a "buyer beware" state.

With housing a top priority for Gov. Maura Healey, Massachusetts should consider an expansion of residential due diligence to include at least a review of the waste site database. ◀

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