The Non-Use Of LSRPS For Due Diligence Under SRRA 2.0

By: Steven M. Dalton, Esq.

The New Jersey Site Remediation Professional Licensing Board's recent proposal (PRN 2022-138) to change its rules (N.J.A.C. 7:26I) for the purpose of making them consistent with the 2019 legislative amendments to the Site Remediation Reform Act (SRRA 2.0) brings renewed focus on SRRA 2.0 provisions relating to the use (or more aptly, non-use) of a Licensed Site Remediation Professional (LSRP) for pre-acquisition due diligence.

SRRA 2.0 presented the Legislature an opportunity to address a practice that developed in real property transactions of parties not utilizing, and expressly excluding, LSRPs for pre-acquisition due diligence. This practice became common based on the concern that LSRPs had a heightened obligation to report discharges of contamination discovered in the due diligence process, and if a prospective buyer were to terminate, and the seller learned of a discharge discovered during buyer's due diligence, seller would be left with an obligation to remediate without the benefit of the intended sale.

Prior to SRRA 2.0, an LSRP was only required to report a discharge of contamination for sites "for which he is responsible". N.J.S.A. 58:10C-16.k.[1] SRRA 2.0 amended this provision to require an LSRP to report a discharge with respect to any site for which she "is retained." This change ensures continuation of the prevalent practice of non-use of LSRPs for pre-acquisition due diligence.

Prior to SRRA 2.0, parties to transactions were often concerned that the LSRP reporting obligation under Section 16.k would apply even in the context of due diligence work performed by an LSRP, even though such work should be readily distinguishable from implementation of a remedial action. Others were comfortable with the position that a distinction existed between hiring an LSRP for remediation, in which case the reporting obligations of Section 16.k would apply, and hiring a person who holds an LSRP license for the purpose of pre-acquisition due diligence rather than as an LSRP "responsible for the site". This latter interpretation comports with the Brownfield Act, N.J.S.A. 58B:1.3.d(2), which expressly provides that a person conducting pre-acquisition "all appropriate inquiry" is not required to utilize an LSRP, a clear recognition that such persons do not have a remediation obligation and, despite conducting activities akin to remediation work, are not actually performing remediation.

This issue was hotly debated in Senate environment committee stakeholder sessions preceding SRRA 2.0. New Jersey Department of Environmental Protection (DEP) representatives strongly objected to the position that a person holding an LSRP license could be hired for pre-acquisition due diligence and not have a reporting obligation under SRRA section 16.k, taking the position that an LSRP may never perform environmental consulting work in a capacity other than as an LSRP.

DEP also opposed the argument of industry group representatives, including NJBA, that due diligence is not "remediation", relying upon the definition's inclusion of investigation of a suspected or threatened release for the position that a person conducting the pre-acquisition due diligence investigation is actually performing remediation, notwithstanding the fact that such person has no legal obligation to implement a remedial action to address any contamination that is found, did not cause a discharge and is not performing what any lay person would reasonably consider to be "remediation." The Legislature accepted DEP's position and rejected industry proposals to amend the definition of remediation to exclude preliminary assessment and site investigation work performed by a person conducting pre-acquisition due diligence, which would have been consistent with the Brownfield Act allowance for completing such work without hiring an LSRP. Favorably, at the behest of NJBA and other industry organizations, the Legislature declined DEP requests to eliminate the Brownfield Act LSRP exception for due diligence.

To remove uncertainty regarding the reporting obligation of LSRPs hired to perform due diligence, the Legislature amended section 16.k of SRRA replacing "responsible for site" with "retained,"

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[1.] An LSRP's obligation to report an identified "immediate environmental concern" remains unchanged. N.J.S.A. 58:10C-16.j.

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and added a definition of "retained." An LSRP is "retained" if they are hired to perform any activity within the definition of "remediation," including a preliminary assessment and site investigation for a suspected or threatened release. With this action, a person who engages a consultant holding an LSRP license to perform pre-acquisition due diligence has retained that person as an "LSRP," and a "retained" LSRP has an obligation under section 16.k to report a discharge even though discovered during due diligence.

The Legislature and DEP were warned in the stakeholder sessions of the implications of this action. These amendments have only solidified the industry practice of excluding LSRPs from pre-acquisition due diligence. If the underlying premise of the LSRP program is that LSRPs are representative of the highest level of qualifications and professionalism with respect to environmental remediation consulting, then use of LSRPs in due diligence should be incentivized. Moreover, often times efficiencies may be achieved in utilizing an LSRP in due diligence if the transaction consummates and some remedial action is required.

DEP and the Legislature were offered a solution in the SRRA 2.0 stakeholder process of amending the definition of remediation to exclude pre-acquisition due diligence work, which would be consistent with the premise under the Brownfield Act that persons conducting "all appropriate inquiry" are not actually conducting remediation and thus have an allowance not to hire an LSRP. Their failure to do so, or implement some other solution that would allow a person holding an LSRP license to be hired for due diligence without having a duty to report the findings of such work, has ensured for the time being that the practice of non-use of LSRPs for pre-acquisition due diligence will continue as the prevalent industry practice. That DEP pressed so strongly on this issue and the Legislature capitulated certainly portends of potential future renewed efforts by DEP to retract the Brownfield Act LSRP exception.

Mount Laurel in the "Fourth Round" – What Happens Next?

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so, and *Mount Laurel* compliance may be achieved in that way. We would once again need a mechanism for establishing the magnitude of fair share obligations. This was done by the Hon. Mary C. Jacobson, A.J.S.C. (now retired), during the third round, and the courts could once again establish the obligations, presumably based upon fair share methodologies that have been used in the past. As in the third round, builders could seek rezonings to assist municipalities in achieving fourth round *Mount Laurel* compliance. Builders are well advised to begin the process of identifying sites that could be utilized in this regard, be they vacant sites or possible redevelopment sites.

The Bottom Line

The third round *Mount Laurel* cases are winding down, with most being resolved at this point. That is not to say that third round rezoning opportunities do not currently exist. As noted above, they do exist in a number of towns, depending on the circumstances. Summarized above are some of the additional opportunities that will arise during the fourth round, with the details depending on which process is employed to achieve fourth round compliance.

Systematic Approach to UST Removal Saves Historic Landscape Design

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keeping the root ball intact.

Since 75% of the Corinthian Linden tree's roots exist within the first 2.5 ft of soil depth, the team began digging approximately 12 ft. away from the tree trunk and pulled the tank out below the 2.5 ft vertical threshold. This systematic approach combined manual digging, using a backhoe to locate the tree's primary root system, and excavating around it as much as possible.

During the process, the team intermittently probed for contaminated soil using a small diameter auger to drill narrow holes from which soil samples were taken and tested to establish the contamination limits. This soil was then replaced with uncontaminated soil and testing continued until the results revealed there was no further contamination.

Once this process was completed and the site was successfully backfilled, they continued to water the tree heavily for first three weeks, then trickle-irrigated it for the next two months. Going into spring, the tree was lightly fed with macro and micronutrients.

Conclusion

Because the estate owner brought in the right team of experts, the site was successfully remediated and cleared of any soil contamination which satisfied the strict DEP residential standards. As a result, the property would not be listed as a contaminated site going forward and the integrity of the original landscape design would be protected for the natural lifecycle of the tree and preservation of design.