

LEASING GASOLINE STATIONS: AVOIDING THE ENVIRONMENTAL TRAP

Part One in a Two Part Series

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Leasing a gasoline station in the current economy is fraught with many challenges; and one of the most important (yet overlooked) challenges is avoiding the environmental traps caused by the actions or inactions of your tenant. Lessors of gasoline service stations live in constant fear that an environmental liability, such as contamination caused by a spill or discharge, or penalties levied by NJDEP, will devastate their business or investment. Fault is not necessary for liability. Despite this reality, lessors of gasoline stations rarely take the proactive measures necessary to minimize their environmental exposure. Unfortunately, as too many of us know, the failure to take such actions can be tragic. Environmental liabilities fall into two categories: contamination and compliance. In New Jersey, many of the state's environmental statutes, such as the Spill Compensation and Control Act (Spill Act), and New Jersey Underground Storage of Hazardous Substances Act (UST Act), impose joint and several liability on the property owner and facility operator. Because of this, lessors, as the real property owner, often find themselves liable to the government for remediation contaminated property caused by their tenant. Current property owners can be held responsible for the site cleanup even if they did not own the property when it was contaminated and even if the contamination was caused by another party, such as a tenant, a prior tenant, or previous owner. Similarly, a lessor can be held liable for their tenant's failure to comply with other state statutes and regulations. For example, the UST Act imposes joint and several liability on the current owner (lessor) and the facility operator (tenant) for failure to comply with the UST Act provisions. Should the operator/tenant be unable, or simply unwilling, to correct the violations or pay the NJDEP levied penalties, NJDEP will deem will deem with the lessor (as the property owner) responsible for compliance and/or payment of fines.

So, what can lessors (as owners of the service station property) do to prevent being held responsible for the environmental liabilities caused by other parties?

What follows are some suggested steps a lessor could take to avoid falling into the environmental trap.

1. Know your property: The initial step in determining the environmental condition of your property is to complete a file review at NJDEP. Check to ensure there are no active/open cases. If there are open cases, speak with the NJDEP case manager to determine the status of the case and the responsible party. Open cases should be clearly denoted in any lease. Next, a phase I investigation should be completed. This investigation includes a more thorough file review (e.g., files maintained by local, state, and federal agencies), a site inspection, a report, of observations, findings and recommendations. Should the Phase I indicate areas of potential or apparent environmental concern, a Phase II assessment could be conducted. That investigation would usually involve soil and groundwater sampling.
2. Take a "snapshot": Building upon these site assessment, you can now take an environmental "snapshot" of your property so to establish an environmental baseline. This "snapshot" will form a record by which all site conditions will be compared especially at lease termination; and will be critically important if there is subsequent litigation over responsibility for cleanup or compliance.
3. Environmental clauses in the contract: When drafting the lease, lessors should include provisions compelling the tenant to: a) comply with all applicable environmental laws and regulations; b) maintain good housekeeping; c) undertake annual compliance inspections; d) indemnify the landlord for all on-site and off-site contamination and for any penalties (or obligations) relating to the tenant's non-compliance; e) restore the property in good order at lease termination; and f) pay rent (beyond the original lease term) if the property cannot be rented while undergoing remediation.
4. Compliance inspections: Annual compliance inspections should be mandatory: The findings should be reported to you; and any items in non-compliance should be immediately corrected by tenant at its sole cost. Consider retaining the inspection firm directly and recouping the cost by adding that expense as an additional rent item.
5. Insurance: Consult with an insurance broker that specializes in gasoline stations to determine the appropriate type and levels of coverage. To make certain that there is current and appropriate coverage, consider paying the premium for the tenant and recouping the cost by adding that expense as an additional rent item.
6. Take another "snapshot": Complete a second environmental baseline right before the lease is terminated. If there has been spills/discharges or non-compliance during the lease term, this "second snapshot" will supply data that (when coupled with the pre-lease baseline) will aid the owner/lessor in determining the responsible party. Ideally, the operator/lease should have insurance that could be tapped if a serious issue is found. These proactive steps are in no way meant to be fully exhaustive. Rather, it is offered to sensitize property owners to the risks inherent with owning a gasoline station property. Therefore, before leasing your property, owners should consult with their attorney and the professionals referenced here to develop a strategy regarding how to minimize their environmental exposure. Otherwise, owners risk walking into an expensive environmental trap.