



Cleaning up

When it comes to investing in property developments or acquisitions, environmental due diligence can save your client an unpleasant shock and much expense. **Kevin Cleary** gets down and dirty

KEVIN CLEARY IS OPERATIONS DIRECTOR WITH [VERDE ENVIRONMENTAL CONSULTANTS LIMITED](#)



Nobody likes unpleasant surprises when buying commercial property. Neither you nor your client wants to lose profit on the deal. Yet a nasty shock – and the risk of having the profit on a purchase eaten up by environmental liabilities such as unforeseen clean-up costs – is exactly the kind of gamble property buyers make when they neglect or leave it too late to do an environmental due diligence (EDD).

The practice of EDD originated in the United States in the 1970s. It's based on the principle that, if land is contaminated, the owner must clean it up. Critically, though, US courts have decreed that buyers or leasers of property can sometimes be on the hook for land remediation – even if it was a prior owner who caused the contamination. The news has been a cold shower for companies acquiring property, and has fuelled the growth of EDD as part of property transactions.

The story is slightly different in Ireland, where the EDD industry

has grown out of development. Environmental regulations here are more 'polluter pays' in principle, but there are legal pathways for a lender and a non-polluting owner/operator to become liable for contamination.

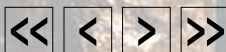
In Ireland, EDD has tended to focus entirely on determining whether contamination has occurred. Although contaminated land evaluation is typically the main purpose, it ought not to be the sole objective of EDD. A comprehensive approach to EDD should also include

a more thorough assessment of many environmental aspects, with associated liability concerns, for example:

- The operational practices of the current and historical site occupier,
- The presence of asbestos in buildings,
- The condition of the buildings,
- Regulatory compliance with various licence or permit conditions,
- Radon gas, and
- Impact from neighbouring sites.

AT A GLANCE

- Environmental due diligence is based on the principle that, if land is contaminated, the owner must clean it up
- In Ireland, there are legal pathways for a lender and a non-polluting owner/operator to become liable for contamination
- Buyers need to know the condition of a site they're purchasing and must price the risk of clean-up costs into their purchase price



LIABILITIES CAN RESULT IN REMEDIATION COSTS RANGING FROM €10,000 TO OVER €1 MILLION, TRANSACTION DELAYS AND, IN SOME CASES, THE COLLAPSE OF THE DEAL

PICT: SHUTTERSTOCK

Why is it important?

During the industrial revolution, industry was heavily furnace-based. The waste residue from burning activities was essentially dumped and used as landfill along, for example, the Liffey, Lee and Lagan rivers, and the inner parts of Dublin, Cork and Belfast, respectively.

Additionally, and prior to the 1990s in Ireland, it was common practice for commercial and industrial operations to bury or burn waste on-site, which included hazardous waste. With this in mind, buyers need to know the conditions of a site they're buying. They must price the risk of clean-up costs into their purchase price. Otherwise they're taking a shot in the dark.

We have come across many examples of potential money-pits in the course of completing EDD for clients on properties across Ireland. EDD has identified issues such as illegal waste-disposal sites in Dublin, Meath and Cork; buried asbestos in Limerick, Clare and Cork; burning grounds in Mayo and Kerry; leaking underground chemical

storage tanks at numerous sites across Ireland; and a variety of other environmental liabilities. These liabilities can result in remediation costs ranging from €10,000 to over €1 million, transaction delays, and, in some cases, the collapse of the deal.

So, before your client buys a site, they need to know what's on the site. Has the site operated in compliance with environmental regulations? What's buried underneath it? What must be done with any waste material uncovered, and how much might it cost to address a problem with contaminants?

A classic example as to when EDD is an essential part of the land or property acquisition process is where a client looks to redevelop in Dublin or on another city-centre site around the country. Say it wants to put in a car park as part of its development, and space is at a premium – better, then, that the development includes underground basements for parking, because the client is trying to squeeze in the optimum number of offices or apartments on the site.

By digging into the ground for basements,

your client will likely unearth all kinds of historical waste and debris. It is legally required to dispose of that material off-site at an appropriately licenced/permitted waste facility. Some of the material may be classified as hazardous and, as there are no facilities that accept hazardous industrial waste in Ireland, it will need to be ferried to facilities in northern Europe. A multi-million euro bill can accrue, as has been the case on numerous redevelopment sites along the Liffey. The final cost depends on the volume and composition of the soil and the site where it can be sent.

EDD surveys

Here's how the EDD survey process works. It's typically conducted in phases, which are based on international guidelines. The EDD will include desk-based research, including analysis of geology, ground conditions under the site (trying to identify sensitive environmental receptors, such as rivers or wetlands), and looking at past activities to build up a picture of historical operations



Whose copy of the
Gazette are you reading?

Why not
subscribe?

€65
FOR
10 ISSUES

I would like to subscribe to the *Law Society Gazette*

☐ I enclose my cheque for €65 (Subscribers in the Republic of Ireland)

☐ I enclose my cheque for €95 (Overseas subscribers)

Please charge my ☐ Access ☐ Visa ☐ Mastercard ☐ Eurocard

Credit card number:

Expiry date:
MONTH/YEAR

Name: _____

Address: _____

Telephone: _____

Signature: _____

Please return to *Law Society Gazette*, Blackhall Place, Dublin 7.

ENVIRONMENT



on the site. Are there residential homes near the site's boundary? Who could be affected if there were an environmental problem from this site?

Then you do a site visit. If possible, interviews are undertaken with the facility manager or long-standing operations staff. Typically, there is also consultation with regulatory staff or the relevant local authority. What were the site's waste disposal practices? What chemicals are, or were, used and how are/were they stored on-site? Was asbestos used as a building material or for insulation purposes? Did they comply with their environmental permits or licences?

You need to identify if there are any fuel storage areas. Are the fuel storage tanks bundled – in other words is there protection that, if a leak happened, it was contained? Is there evidence of staining on the ground? A small drip of fuel oil over 20 years can create a significant volume of contaminated soil.

It is essential that a client requiring EDD is aware of the scope of work to ensure that all relevant risks are assessed. Rather than falling back on the same old plan used for previous projects, the plan should be tailored to the particular transaction and facility or company being purchased. For example, asbestos should be considered in relation to a site that will ultimately be renovated or demolished.

The risk to maintenance workers must also be considered. While an assessment of these aspects would not serve as a substitute for a comprehensive asbestos survey, it would provide a general indication of potential issues. Ignoring these aspects could result in

AS THE POET AND ORATOR GEORGE HERBERT NOTED AS FAR BACK AS THE 17TH CENTURY: 'THE BUYER NEEDS A HUNDRED EYES; THE SELLER NOT ONE'



PIC: SHUTTERSTOCK

unexpected cost and liability implications in the future.

The fallout from not doing an EDD can be significant, not to mention the cost to a client's reputation if it becomes embroiled in cleaning up a site. In 2005, for example, the Environmental Protection Agency refused to grant Roadstone approval for a legal landfill on a site the company owned in Blessington, Co Wicklow. The ruling left Roadstone with a sizeable clean-up bill, including a €25,000 annual licence charge, and a fee of €100 for disposal of each tonne of illegal waste. Over 200,000 tonnes of illegal waste were excavated. You can do the maths.

Frequently, your clients' sites will be in

residential settings and, so, knowledge is everything. You can bury your head in the sand, ignoring issues, gambling that you'll deal with them as they arise, or you can plan for challenges and understand what you're going to encounter. As the poet and orator George Herbert noted as far back as the 17th century: "The buyer needs a hundred eyes; the seller not one."

Timing is also critical. It's no use doing an EDD as an afterthought, as a box-ticking exercise. It is best to do an EDD concurrently with other investigations or due diligence enquiries like, for example, a building survey or a title-deeds search. If you leave it to the last minute, you lose the opportunity to use it as a key negotiating tool.

There is, after all, a silver lining: if you're armed with an EDD that catalogues contamination on a site, it presents an opportunity for negotiation. It can be a powerful bargaining chip. It can help to get a reduction on the price of the property deal. It also presents the opportunity to walk away from the deal, knowing that you don't want this liability – that you're not willing to carry the can for historical contamination to the site.

There is a compelling case for EDD. Without it, and failing to do it early in the purchase of a site, you're missing a trick. And you could end up costing your client a lot of undue expense.

FOCAL POINT

MISCONCEPTIONS

'You don't need to do it'

Without an EDD, your client can be exposing themselves to a costly clean-up job.

'It's an expensive process'

Depending on the complexity, an EDD will cost from €2,500 to €20,000. The range in cost is subject to the complexity of the site and the deal, sensitivity of location, and the volume of material to be reviewed.

'It will delay the project'

It won't, if it's started with enough lead-time. It typically takes two weeks to a month to conduct an EDD, and it can be done alongside other property due-diligence work. EDD can, in fact, speed up the process by identifying issues early so that they can be resolved.

'We can do it at the end'

It takes time to do an EDD properly.