

UNDERGROUND STORAGE TANKS

Over the last twenty years, the fate of aging, unwanted or compromised underground oil storage tanks (“USTs”) has become the subject of increasing scrutiny and concern for participants in real estate transactions on Long Island. A home buyer on Long Island, as a matter of standard due diligence, will look for the presence of USTs, and frequently request their removal or abandonment before committing to the purchase of the property. This is a sensible demand. Many underground storage tanks have been in place for 35 to 50 years, and if not already leaking are in danger of doing so. Such leaks can cause serious environmental damage, especially on Long Island where, uniquely, the drinking water is supplied by an underground aquifer.

Addressed below are the various problems encountered by buyers, sellers, and brokers in the Long Island real estate market with regard to underground oil storage tanks. The statutes and laws governing this environmental issue are described, and essential information for managing the abandonment or removal of these is provided.

A. STORAGE TANKS - GENERALLY

An UST is any fuel storage tank with at least 10% of its storage capacity below ground elevation. *40 Code of Federal Regulations 280*. These tanks may store fuel oil, gasoline, kerosene, diesel or waste oil. Overwhelmingly, residential tanks on Long Island contain fuel oil. Most of the older tanks are built primarily of steel. As such, USTs are susceptible to a number of

corroding factors: internal erosion due to age, water having seeped into the tank and corrosive surrounding soil, to name a few. Once the tank reaches a certain age, it is both financially and environmentally responsible to be proactive about its removal or abandonment

On Long Island, aging USTs are of particular concern given the sheer number of tanks found in the area and the sensitivity of the Long Island ecosystems and water supply. According to the Department of Environmental Conservation, there are approximately 70,000 tanks on Long Island, with 40,000 in Nassau and 30,000 in Suffolk County. The majority of tanks in these counties were installed years ago and are coming to the end of their functional life span.

B. HISTORY

The abundance of old tanks is largely the result of a residential building boom that took place following World War II. Faced with the need to maximize oil storage capacities, builders understandably opted to install underground tanks. These tanks enabled homeowners to buy fuel in bulk, lowering costs. The ability to buy oil when prices were lower (such as in the summer) and store it for future use, was an important economic component in the development of Long Island, the nation's first conventional suburb. Furthermore, this underground storage allowed for more living space and avoided fire hazards that could arise should the storage unit be aboveground.

C. STATUTES

In New York State, the storage of petroleum and hazardous chemicals must meet minimum standards set by the Environmental Protection Agency and the Department of Environmental Conservation. *40 Code of Federal Rules 280; 6 NYCRR Parts 612-614*. While most home heating oil tanks are not regulated by the State - being that they are not over 1100 gallons in capacity - certain delegated counties have regulations that do apply. Nassau and Suffolk Counties are such delegated counties. In Nassau County, the Department of Health regulates. *Article XI Nassau County Health Ordinance*. In Suffolk County, the governing body is the Department of Health Service. *Suffolk County Sanitary Code Article 12*. . However, neither of these bodies mandates residential tanks under 1100 gallon capacity to be registered by the homeowner unless a leak is discovered or it is to be abandoned or removed.

If, however, the tank has a capacity of 1100 gallons or greater, Suffolk County requires the storage facility to be registered. According to Suffolk County Health Services, many of these large tanks were replaced in the 1990s by single or double-walled non-corrodible tanks, and, therefore, do not require testing. *Suffolk County Sanitary Code Article 12*. However, those that were not replaced must be tested. The Suffolk County Sanitary Code requires that initial testing occur on or before the tenth anniversary of its installation, and then once every five years thereafter. *Id.*

In Nassau County, a tank holding a capacity of 1100 gallons or more must also be registered and follow a leak testing schedule. *Article XI Nassau County Health Ordinance*. Corrodible tanks that were installed prior to August 1, 1966 must be tested annually. *Id.* The County further mandates that non-corrodible tanks of this size must be tested for structural

soundness every 5 years. *Id.*

Whether one must register their tank is a primary issue. Most residential tanks are less than 1100 gallons and do not require registration. However, a further conflict may also arise as to removal or abandonment when a homeowner wishes to sell their home. Commonly, the home buyer in a real estate transaction either wants the tank abandoned before sale, or wants the tank tested for leakage. The seller, on the other hand, is usually unwilling to disturb the status quo. It must be noted that any tank treatment company is legally obligated to report evidence of a leak within 2 hours of detection. *6 NYCRR Section 613.8*. In fact, any person with knowledge of a leak must report within 2 hours and failure to report a spill can subject a person to legal penalties under the Environmental Conservation Law. *New York Environmental Conservation Law, Sections 71-1929, 71-1983*. This requirement creates a burdensome disincentive with regard to the seller's willingness to undergo tank testing. Often, in an effort to resolve this conflict, the seller will either credit the purchaser for the cost of abandonment/removal or hire a certified tank servicing company to do it at the seller's expense.

In certain cases, a previous homeowner may be held liable for leaks that occurred prior to sale. Federal Navigation Law provides, "any person who has discharged petroleum shall be strictly liable for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained..." *Navigation Law Section 181 (2007)*. This rule would come to bear in a situation where the previous homeowner abandoned the tank and the new homeowner finds contamination in the soil surrounding the buried tank. In such a case, the buyer would be found to have been a "discharger" under the law, and would be responsible for the costs of clean-up.