

O·H·I·O  
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NEWSLETTER**



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## WHAT REAL ESTATE AGENTS SHOULD KNOW ABOUT UNDERGROUND STORAGE TANKS

*By Robert Ireson, Chief*

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One of the motion pictures released earlier this year was a real estate horror film. The tremors of foreboding elicited by the latent peril represented in the movie may have been all too familiar to certain Ohio brokers and landowners. Lurking beneath the surface of the earth was a monster—a giant, man-eating worm which, at the most inopportune times, would spring up from the depths to snatch away prospective purchasers and ruin pending real estate deals. This revenge of the fish-bait made sales pitches all the more challenging for the cinematic real estate agent; landowners couldn't sell their property until something was done about the worm.

The worm eventually met its demise . . . as did the movie. But for some real-life real estate agents and landowners, there is indeed a very genuine below-ground threat which has emerged and with which they will have to cope for some time to come. The danger is LUST—Leaking Underground Storage Tanks—a federal government acronym for a menace which is grabbing the attention of more and more parties to real estate transactions.

According to federal estimation, one 25 percent of all underground storage tanks (USTs) are

leaking their contents (primarily petroleum) into the environment. More USTs are expected to leak, especially those without any corrosion protection. Ohio's experience is proving to be no different.

A LUST can poison drinking water, kill wildlife and plants, cause fires and explosions, and lead to big dollar lawsuits. As a result of these troubles, Congress established a program in 1984 to prevent and detect leaks of petroleum and hazardous substances and then supplemented it in 1986 with a trust fund to help pay for the cleanup of petroleum leaks (where financially solvent UST owners or operators are absent). The federal program is administered by the states under the watchful eye of the U.S. EPA. In this state, BUSTR (the acronym for the Bureau of Underground Storage Tank Regulation) was created in the Fire Marshal's Office to enforce the program.

The program is composed of four major components: release prevention, UST closures, release corrective action, and financial responsibility requirements for petroleum tanks. A real estate transaction can touch on any one of them.

The presence of an UST does not necessarily mean, however, that delays will occur in closing a real estate transaction. Beginning November 5, 1990, the only federal or state mandate relating to a real estate transaction will be a stipulation that the seller of an UST system inform the buyer of his or her responsibility to notify BUSTR of the change of ownership and pay a

\$25 per UST fee. (USTs must be registered annually with BUSTR.) There is no federal or state requirement that the buyer be alerted about the other elements of the program.

However, one of the consequences of the governmental spotlight on LUSTs has been a heightened wariness on the part of potential real estate buyers and financiers. Increasingly, both parties want assurances from the seller or broker that the property is free of LUSTs. Usually, the purchaser and the financial institution simply want ~~any~~ USTs removed. This is when real estate transactions are most commonly subject to the other, ~~more~~ complicated UST program requirements necessitating the expenditure of what frequently can be considerable amounts of time ~~and~~ money.

In order for an UST to be legally removed (or abandoned in place), U.S. EPA regulations stipulate that the owner or operator must perform a proper "closure assessment." The purpose of the closure assessment is to check for the presence of spilled or leaked petroleum products where it is most likely to be found at or near the site.

Because of the complexities of the process, both the U.S. EPA and BUSTR strongly recommend that owners and operators seek the assistance of professional environmental consultants. This is perhaps the most important first step because if the assessment (and, should it become necessary, the

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# “UST: What It Is and What It’s Not”

Federal and state statutes define an UST as “one or any combination of tanks, including the underground pipes connected thereto, that are used to contain an accumulation of regulated substances (that is, petroleum or myriad hazardous substances) the volume of which, including the volume of the underground pipes connected thereto, is ten per cent or more beneath the surface of the ground.”

The different types of USTs listed

below are exempted from the definition and thereby from the federal and state UST program. Some, however, are regulated already by other federal or state agencies, or by the Ohio Fire Code. The exemptions are:

- Certain natural gas and hazardous liquid pipelines
- Farm or residential tanks of 1,100 gallons or less used for storing motor fuel for noncommercial purposes
- Tanks storing heating oil for use

- on the premises
- Surface impoundments, pits, ponds or lagoons
- Storm or waste water collection systems
- Flow-through process tanks
- Storage tanks located on or above the floor of cellars, basements, mines, etc.
- Septic tanks
- Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations

## “Who’s Who and Who’s What?”

Under federal and subsequent state law and rules, owners and operators of tanks are responsible for a number of actions: registering, monitoring and upgrading their existing tanks, paying fees, conducting assessments, reporting and abating leaks, acquiring permits, etc. But who is an owner? Who is an operator? What responsibility or liability does a real estate agent have?

Under federal and state law, either the “owner” or the “operator” can fulfill any of the responsibilities associated with the LUST program, but both are liable if either one fails to perform.

An operator is technically the “person in daily control of, or having responsibility for the daily operation of, an (UST) system.” Examples would be the entrepreneur running a service station under contract with a major oil company or a resident manager handling for a landlord property on which underground storage tanks are located.

The definition of owner is keyed to a point in time. If an UST was not in use on or after November 8, 1984, the person responsible for it is the one who owned it “immediately before the discontinuation of its use” even if the property was subsequently sold. That person also can be anyone who had “a legal, equitable, or possessory interest of any kind in (the UST) system or in the property on which the (UST) system is located, including, without limitation, a trust, vendor, vendee, lessor, or lessee.” In other words, the owner could be a landlord or agent who owned or rented the real estate when it was last used prior to November 8, 1984.

The law goes on to clarify that an

owner “does not include any person who, without participating in the management of an underground storage tank system and without otherwise being engaged in petroleum production, refining, or marketing, holds indicia of ownership in an underground storage tank system primarily to protect the person’s security interest in it.” A mortgage-holding bank would be exempt, for example, as long as it remains simply a mortgagee.

For any tank in use on or after November 8, 1984, the owner is the person who owns it when a deadline arrives or problem develops—regardless of the number of real estate transactions which may have occurred since that date. In other words, if a leak is detected the day after the property’s sale, the buyer is the new owner and is the “RP” person responsible for reporting the leak and cleaning it up. If contaminants have seeped into public drinking water or private wells, the new owner could be sued.

If BUSTR performs corrective actions at the site and if the owner or operator can prove that the leak was caused solely by the actions of a third party, the third party must pay the cost of LUST corrective actions. If the guilt of a third party is only alleged, though, the owner or operator must pay but can recoup the expenses if the third party is later found to be the cause of the leak and is thereupon made subject to a judgment by a court.

No owner, operator or third party can transfer liability by an indemnification, hold harmless or any similar agreement or conveyance. Such a party may, however, be insured, held harmless or indemni-

fied against the liability but would need to initiate his or her own private action against the insurer or indemnitor after having initially paid the cost of LUST corrective actions.

Those owners or operators who are responsible for cleanups are not totally on their own, however. Recognizing the seriousness of the fiscal burden, the state has created a financial assurance fund, financed by annual UST fees and administered by a special board, to help owners and operators cope with cleanup costs. The fund provides financial assistance of up to one million dollars for any one LUST. Owner/operators must meet financial responsibility standards to ensure that they can pay a \$10,000 or \$50,000 deductible. They also must abide by all applicable UST laws, rules and orders. Owners/operators of six or fewer USTs can qualify for the lower deductible by paying a higher premium (currently \$300 per UST).

As to the liability of a real estate agent, the contract with the seller (or buyer) as well as state real estate law define the agent’s duties. Generally speaking, the presence or absence of an UST does not necessarily alter the agent’s responsibilities. Whether it’s an UST, central air conditioning, the neighborhood school system or some other feature of the property, Article 5.3 of the Canon of Ethics still applies to the agent who “should ascertain all material facts concerning every property for which he accepts the agency, so that he may fulfill his obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.”

- D. Real estate financing
- Mortgage terms and concepts
    - Mortgagor
    - Mortgagee
    - Principal and interest
  - Mortgage payment plans
    - Fixed rate, level payment
    - Adjustable rate
    - Buydown
    - Other
  - Types of mortgages
    - Conventional
    - Insured
- VI. VALUATION PROCESS  
% Weight: 2-4%  
Level of Difficulty: Conceptual
- A. Definition of the problem
- Purpose and use of appraisal
  - Interests to be appraised
  - Type of value to be estimated
  - Date of the value estimate
  - Limiting conditions
- B. Collection and analysis of data
- National and regional trends
  - Economic base
  - Local area and neighborhood
    - Employment
    - Income
    - Trends
    - Access
    - Locational convenience
  - Site and improvements
- C. Analysis of highest and best use
- D. Application and limitations of each approach to value
- Sales comparison
  - Cost
  - Income capitalization
- E. Reconciliation and final value estimate
- F. The appraisal report
- VII. PROPERTY DESCRIPTION  
% Weight: 2-4%  
Level of Difficulty: Conceptual, Definitions
- A. Site Description
- Utilities
  - Access
  - Topography
  - Size
- B. Improvement description
- Size
  - Condition
  - Utility
- C. Basic construction and design
- Techniques and materials
    - Foundations
    - Framing
    - Finish (exterior and interior)
    - Mechanical
  - Functional utility
- VIII. HIGHEST AND BEST USE ANALYSIS  
% Weight: 5-7%  
Level of Difficulty: Conceptual, Definitions  
Analysis/Application
- A. Four tests
- Physically possible
  - Legally permitted
  - Economically feasible
  - Maximally productive
- B. Vacant site or as if vacant
- C. As improved
- D. Interim use
- IX. APPRAISAL MATH AND STATISTICS  
% Weight: 3-5%  
Level of Difficulty: Conceptual, Analysis/Application
- A. Compound interest concepts
- Future value of \$1
  - Present value of \$1
  - Future value of an annuity of \$1 per period
  - Present value of an annuity of \$1 per period
  - Sinking fund factor
  - Installment to amortize \$1 (loan constant)
- B. Statistical concepts used in appraisal
- Mean
  - Median
  - Mode
  - Range
  - Standard deviation
- X. SALES COMPARISON APPROACH  
% Weight: 10-12%  
Level of Difficulty: Conceptual, Definitions  
Analysis/Application
- A. Research and selection of comparables
- Data sources
  - Verification
  - Units of comparison
    - Income
      - Potential gross income multiplier
      - Effective gross income multiplier
      - Overall rate
    - Size
      - Square foot
      - Acres
      - Other
    - Utility (examples only)
      - Motel and apartment units
      - Theater seats
      - Other
- B. Elements of comparison
- Property rights conveyed
    - Easements
    - Leased fee/Leasehold
    - Mineral rights
    - Others
  - Financing terms and cash equivalency
    - Loan payment
    - Loan balance
  - Conditions of sale
    - Arms length sale
    - Personality
  - Market conditions at time of contract and closing
  - Location
  - Physical characteristics
  - Tenant improvements
- C. Adjustment process
- Sequence of adjustments
  - Dollar adjustments
  - Percentage adjustments
  - Paired sales analysis
- D. Application of sales comparison approach
- XI. SITE VALUE  
% Weight: 3-5%  
Level of Difficulty: Conceptual, Definitions  
Analysis/Application
- A. Sales comparison
- B. Land residual
- C. Allocation
- D. Extraction
- E. Ground rent capitalization
- F. Subdivision analysis
- Development cost: direct and indirect
  - Contractor's overhead and profit
  - Forecast absorption and gross sales
  - Entrepreneurial profit
  - Discounted value conclusion
- G. Plottage and Assemblage
- XII. COST APPROACH  
% Weight: 9-12%  
Level of Difficulty: Conceptual, Definitions  
Analysis/Application
- A. Steps in cost approach
- Reproduction vs. replacement cost
    - Comparative unit method
    - Unit-in-place method
    - Quantity survey method
    - Cost service index
  - Accrued depreciation
    - Types of depreciation
      - Physical deterioration
        - Curable
        - Incurable
        - Short-lived
        - Long-lived
      - Functional obsolescence
        - Curable
        - Incurable
      - External obsolescence
        - Locational
        - Economic
    - Methods of estimating depreciation
      - Age-life method
      - Breakdown method and sequence of deductions
      - Market extraction of depreciation
- B. Application of the cost approach

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# DISCIPLINARY ACTIONS

Here is a summary of recent Commission activities and decisions pursuant to Section 4735.03(E) of the Ohio Revised Code.

The Commission has taken the following action with regard to these licensees:

## REVOCATIONS

DAVID W. BOERGER, broker, Beaver Creek, Ohio, had his broker's license revoked for violating Ohio Revised Code Sections 4735.18(A)(6) and (A)(9) as it incorporates Sections 4735.01 and 4735.02. This revocation became effective August 29, 1990. While Mr. Boerger's broker's license was under suspension, he drafted two purchase agreements concerning the sale of two properties. On each of these purchase agreements, Mr. Boerger represented that he was a real estate broker and noted a commission to be paid to his brokerage.

In a separate case, Mr. Boerger had his broker's license revoked for violating Ohio Revised Code Sections 4735.18(A)(1), (A)(8) & (A)(9) as it incorporates Section 4735.13(C). While Mr. Boerger was licensed as a real estate broker, he was convicted of theft in violation of Ohio Revised Code Section 2913.02(A)(2) in the Common Pleas Court of Montgomery County. Boerger failed to notify the Superintendent of the Ohio Division of Real Estate of this conviction within 15 days of the conviction. Also, Mr. Boerger completed a broker reinstatement application wherein he swore that the statements he made on the application were true. He indicated he had not been convicted of any unlawful conduct when he knew he had been. Mr. Boerger had also been convicted of mail fraud in violation of Title 18 U.S.C. Section 1341 in The United States District Court for the Southern District of Ohio.

## SUSPENSIONS

DUANE D. CAMPBELL, broker, Parma, Ohio, had his broker's license suspended for 30 days for violating Sections 4735.18(A)(1), (A)(6) and (A)(8) of the Ohio Revised Code. However, due to mitigating circumstances, imposition of the suspension was waived by the Ohio Real Estate Commission. Mr. Campbell completed a broker reinstatement application wherein he swore that the state-

ments he made on the application were true. He indicated on the application that he had not been convicted of any unlawful conduct when he knew he had been. Mr. Campbell had been convicted of five violations of Section 3734.02(F) of the Ohio Revised Code, those being hazardous waste violations, unclassified felonies.

JOAN G. CLIPSE, sales associate, Mr. Vernon, Ohio, had her sales license suspended for 60 days for violating Section 4735.18(F) of the Ohio Revised Code. Upon reconsideration and due to mitigating circumstances, imposition of the suspension was waived by the Commission. A prospective buyer of real estate deposited with Ms. Clipse's brokerage an earnest money deposit in connection with a purchase agreement regarding the subject property. Ms. Clipse assisted in having these funds disbursed to the prospective buyer without assuring that a release had been obtained from the seller.

RITA DUFALA, sales associate, Maple Heights, Ohio, had her sales license suspended for five days for violating Section 4735.18(A)(6) of the Ohio Revised Code. However, due to mitigating circumstances, imposition of the suspension was waived by the Commission. While Ms. Dufala had a property listed for sale, she permitted members of her family to occupy the property for one night. Ms. Dufala allowed these individuals access to the property without the knowledge and consent of the owners.

J. ROBERT GROSS, sales associate, Dayton, Ohio, had his sales license suspended for 30 days for violating Section 4735.18(A) of the Ohio Revised Code. Due to mitigating circumstances, however, imposition of the suspension was waived by the Commission. Mr. Gross was convicted of grand theft in violation of Ohio Revised Code Section 2913.02(A)(2) in The Common Pleas Court of Montgomery County. Mr. Gross' conduct in this regard constituted a conviction of a felony and/or a crime of moral turpitude.

V. ALICIA MORENO, sales associate, Defiance, Ohio, had her sales license suspended for 10 days for violating Ohio Revised Code Sections 4735.18(A)(6) and (A)(9) as it incorporates Ohio Revised Code Sections 4735.01 and 4735.02. However, due to mitigating circum-

stances, imposition of the suspension was waived by the Commission. Ms. Moreno showed a property to prospective purchasers at a time when she was not licensed as a real estate sales associate. She held herself out as engaged in the business of selling real estate and assisted in the procuring of prospects which resulted in the sale of the subject property.

NORMAN PAPOLA, sales associate, St. Clairsville, Ohio, had his sales license suspended for 30 days for violating Section 4735.18(A)(6) of the Ohio Revised Code. Due to mitigating circumstances, however, imposition of this suspension was waived by the Commission. Mr. Papola allowed the sellers of a property to enter into a purchase agreement when he knew, or should have known, there existed an outstanding contract for the sale of the subject property. Mr. Papola failed to designate this second agreement as a back-up contract or contingent upon the first contract being void.

JOSEPH PASTO, broker, Cleveland, Ohio, had his broker's license suspended for violating Section 4735.18(A)(28) of the Ohio Revised Code. Mr. Pasto had a judgment entered against him in The Cuyahoga County Court of Common Pleas. This final judgment which arose out of Mr. Pasto's conduct as a licensed real estate broker had not been satisfied. Mr. Pasto's license was ordered to remain suspended until he repays the real estate recovery fund the amount he owes plus interest, or 180 days, which ever is greater.

DUANE J. TILLIMON, sales associate, Toledo, Ohio, had his sales license suspended for 10 days for violating Section 4735.18(A) of the Ohio Revised Code. However, due to mitigating circumstances, imposition of this suspension was waived by the Commission. Mr. Tillimon was convicted of gross sexual imposition in violation of Ohio Revised Code Section 2907.05(A)(3) in The Common Pleas Court of Lucas County. Mr. Tillimon's conduct in this regard constitutes a conviction of a felony and/or a crime involving moral turpitude.

LILLIE M. WHITAKER, broker, Kenton, Ohio, had her broker's license suspended for 10 days for violating Section 4735.18(A)(6) of the Ohio

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