

Statute of Limitations for Massachusetts Hazardous Waste Property Damages Claims Clarified (And, Possibly, Extended)

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Recently the Massachusetts Supreme Judicial Court found that the statute of limitations for a property damage claim brought by a private party under Chapter 21E did not begin to run until that private party knew that the environmental damage to their property was permanent. As noted in the Court's opinion, "The plaintiff must have knowledge that he or she suffered damage that is not curable by the MCP remediation process."

This ruling could be seen as having effectively extended the statute of limitations for these claims from what had previously been understood as being the rule, namely that the statute of limitations would begin to run when a plaintiff knew that there was damage to their property and also knew which party had caused that damage.

The land that was the subject of the case, *Grand Manor Condominium Association & others v. City of Lowell*, had been acquired by the City of Lowell in 1906. During the 1940s and 1950s, the City used the property as a landfill. The landfill was eventually covered and sat vacant until 1983, when the City conveyed the subject property to a real estate developer. The developer constructed the Grand Manor Condominium on the property and recorded the master deed for the condominium in 1985.

In 2008, site-work related excavation at the property on behalf of the Grand Manor Condominium Association identified contamination, which was consistent with the former use of the property as a landfill. In 2009, further investigations were performed by the Licensed Site Professional (the "LSP") for the Condominium Association, as a result of which the property was reported to the Massachusetts Department of Environmental Protection (the "DEP"). The LSP for the Condominium Association concluded at that time that the nature and extent of the contamination was "not yet known." Later in 2009, the Condominium Association sent a letter to the City regarding the identified contamination. The City subsequently filed several MCP reports with the DEP, including a combined Phase II/Phase III Report, which was submitted to the DEP in June 2012. The City's Phase III Report indicated that it was not feasible to remove all of the landfill-related contamination from the site and so, instead, concluded that the most appropriate remedy was to install a cap over the former landfill materials. The plaintiffs then filed suit in October 2012, bringing both response costs and property damage claims.

Interestingly, no mention is made of any pre-purchase due diligence performed on behalf of either the condominium developer or the purchasers of the individual condominium units, which could have identified the former landfill use at the subject property. It is not clear how rigorous environmental due diligence efforts were in connection with these transactions in the 1980s.

The Court's decision, particularly to the extent that it is seen as extending the time period within which a Chapter 21E property damage claim could be brought, reflected an effort by the Court to satisfy one of the stated goals of Chapter 21E, namely "to ensure that costs and damages are borne by the appropriate responsible parties." In addition, the Court noted that a cleanup in compliance with Chapter 21E and the MCP might not remove all of the identified contamination, particularly when doing so would be cost prohibitive. The Court reasoned that the plaintiff would not know whether contamination would remain until the relevant cleanup had been completed, (i.e., the plaintiff would not know whether the property damage it had suffered due to the residual contamination was permanent).

Note that Chapter 21E also provides a slightly different statute of limitations for the recovery of response costs, as opposed to property damages. In that case, the suit must be filed within three years of, among other things, the date when the plaintiff has finished cleaning up the property and incurred all of its response costs.

While the Court's decision may have added some flexibility regarding the deadline by when a property damage claim must be brought under Chapter 21E, bringing those claims comfortably in advance of the deadline still is the much preferred path to follow.