

ENVIRONMENTAL ISSUES IN REAL ESTATE TRANSACTIONS

DBA REAL ESTATE COMMITTEE

Thursday, March 08, 2012

Presented by:

Daniel A. Brown, Esq.



Land Ownership Liability

- **CERCLA or Superfund**

- Comprehensive Environmental Response, Compensation and Liability Act of 1980
- Enacted to provide funding for the cleanup of abandoned hazardous waste sites across the country.
- Provides “joint and several liability”.
- Amended in 1986 and 2002 to clarify defenses.

CERCLA Responsible Parties

- **Current owners and operators** of contaminated property (whether or not the contamination occurred during their ownership or operation)
- **Former owners and operators** of contaminated property that either owned or operated during the time that the property became contaminated
- persons that arranged for the disposal of hazardous substances at the property (“**arrangers**” or “**generators**”)
- persons that transported hazardous substances for another to the property and chose the property for the place of disposal (“**transporters**”).

Defenses to CERCLA Liability

- **Innocent landowner defense**
 - a person who takes title to contaminated property after the release disposal or placement of hazardous substances on, in or at the property, and at the time of acquisition, the person had no reason to know that hazardous substances were released, disposed of or placed on the property.
- **Contiguous property owner defense**
 - a person who owns property that is contiguous to or otherwise similarly situated with respect to, and that is contaminated by a release of a hazardous substance from a property that is owned by an unrelated person.
- **Bona fide prospective purchaser defense**
 - person that acquires ownership of a contaminated property after January 11, 2002 and establishes that disposal of hazardous substances on the property occurred prior to acquisition.

Qualifying for a Defense

- To qualify for any of the landowner defenses to CERCLA liability, the person must prove by a “preponderance of the evidence” that he/she:
 - made “**all appropriate inquiries**” into the previous ownership of the facility in accordance with generally accepted good commercial and customary standards and practices; and
 - **took reasonable steps** to: i) stop any continuing release; ii) prevent any threatened future release; and iii) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances.

42 U.S.C. § 9601 (35)(A) & (B)

All Appropriate Inquiry (“AAI”)

- For properties purchased prior to May 31, 1997, AAI is satisfied by considering:
 - any specialized knowledge or experience of the purchaser
 - the relationship between the purchase price and the value of the property if it had not been contaminated (separate appraisal not required)
 - commonly known or reasonably ascertainable information about the property
 - the obvious or likely presence of contamination at the property
 - the purchaser’s ability to detect the contamination by an appropriate inspection

All Appropriate Inquiry (“AAI”)

- For properties purchased **between May 31, 1997 and November 1, 2006**, AAI is satisfied by compliance with ASTM Standard E1527 titled “Standard Practice for Environmental Site Assessment” adopted by the American Society for Testing and Materials (ASTM).
- For properties purchased on or **after November 1, 2006**, AAI is satisfied by following the new AAI rule adopted by USEPA and found at 40 CFR Part 312. In adopting that rule, USEPA also recognized that ASTM Standard E1527-05 was consistent with the final AAI rule.

All Appropriate Inquiry (“AAI”)

- In defining “good commercial and customary practice” for conducting environmental site assessments, the goal is to identify **recognized environmental conditions**.
- **REC** means “the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property.”

Limitations of AAI

- Focuses on past releases of hazardous substances.
- Does not take the place of an environmental compliance audit for ongoing operations at an industrial, manufacturing or commercial properties that emit air or water pollutants, or that generate hazardous waste.
- Does not require any investigations regarding asbestos, radon, mold, wetlands, lead based paint or vapor intrusion on the site.

Initial Property Assessment

- Phase I Environmental Site Assessment (“ESA”)
 - Review of all available records
 - Physical inspection of the site
 - Interviews with people familiar with the site’s history of use
 - Determine if there is the potential for the presence of contamination
 - If a potential for contamination is found, proceed with Phase II ESA

Determine Extent of Contamination

- Phase II ESA
 - Sampling of soil, soil vapor, groundwater, surface water and/or sediment to determine
 - the extent of contamination
 - the types and probable sources of contamination
 - Determine the level of risk to humans and the environment associated with the measured contamination
 - Decide whether contamination must be cleaned up

Ohio Regulations

- **Ohio's Voluntary Action Program ("VAP")**
 - Established a system of liability similar to CERCLA and standards for conducting Phase I & II property assessments (OAC 3745-300-06 & 3745-300-07).
- **Cessation of Regulated Operations" ("CRO")**
 - Prohibits the unsafe abandonment of property where hazardous chemicals were used and/or stored.
 - Applies to facilities that are required to submit annual reports to the State Emergency Response Commission ("SERC").