

Recent Changes To Federal "Superfund" Law Pave The Way To Brownfield Redevelopment

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Over two decades ago, Congress passed the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("Superfund"), creating justifiable concern for owners, developers, and others involved with commercial real estate. Strict liability under the Superfund generally extended to "owners" and "operators" of polluting businesses, as well as to owners of polluted property where the pollution was caused by a previous owner or had migrated from other locations. This potential liability has had a significant impact on commercial real estate transactions, in some cases killing a sale, the financing for a sale, or the development of polluted property. In cases where a transaction has moved forward, the threat of Superfund liability has required extensive pre-acquisition negotiations in order to allocate the risks created by the Superfund. As a result, many polluted properties -- known as "brownfield" sites -- have been left abandoned or underdeveloped.

On January 11, 2002, President Bush signed into law the "Small Business Liability Relief and Brownfields Revitalization Act," Pub. L. 107-118, 115 Stat. 2356 (the "Act"). Among other changes, the Act amends the Superfund law to provide: (1) exemption from Superfund liability to certain owners of real property adjacent to property on which there is environmental pollution; (2) exemption from Superfund liability to prospective purchasers to the extent liability is based solely on ownership or operation of polluted property; and (3) clarification regarding the circumstances under which a person will be deemed to have undertaken "all appropriate inquiry" prior to purchase of polluted property.

The Adjacent-Property Defense

As noted above, under the Superfund, "owners" of polluted property are generally liable for costs necessary to clean up their property, even if the pollution originates from a neighboring property. The new statute amends the Superfund to provide a new defense to such "owner" liability. Specifically, the Act provides liability protection for landowners who are essentially victims of pollution incidents caused by their neighbors' actions. The statute requires parties raising this defense to have taken reasonable steps to address the pollution problem, such as notifying appropriate federal, state, and local officials regarding the situation and erecting and maintaining signs or fences to prevent public exposure. However, except under exceptional circumstances, landowners are not expected to conduct groundwater investigations, install remediation systems, or undertake other cleanup actions that should be paid for by the parties who caused the pollution.

The Prospective-Purchaser Defense

The Superfund, as amended, now provides liability relief for purchasers of polluted property whose liability "is based solely on the purchaser's being considered to be an owner or operator of" polluted property. To qualify for this defense, the purchaser must have acquired ownership of the polluted property after January 11, 2002 and be able to establish each of the following conditions (which also generally apply to the adjacent-property defense discussed above):

1. the pollution occurred before the person acquired the property;
2. the person made "all appropriate inquiry" into the previous ownership and uses of the property. The inquiry should include reviews of historical sources and documents, such

as title and restriction documents that may indicate prior uses and site conditions. However, with respect to the purchase of residential property, an inspection and title search that does not reveal any basis for further investigation will generally satisfy this requirement;

3. the purchaser exercised appropriate care by taking reasonable steps to stop any further pollution;
4. the purchaser provided full cooperation to entities conducting the property's cleanup; and
5. the purchaser is not potentially liable, or affiliated with another party that is or was potentially liable for the pollution.

The Innocent-Landowner Defense

The Superfund allows persons who purchased polluted property after the polluting activities occurred to escape liability if they can show that they undertook "all appropriate inquiry" prior to purchase. Unlike the prospective-purchaser defense, this "innocent-landowner" defense requires that the owner neither knew, nor had reason to know, that the property was polluted prior to completing the purchase. Landowners have had a difficult time establishing this defense in the past, partly because there have been no clear guidelines governing the required "all appropriate inquiry." The new Act amends the Superfund to clarify that obligation, not only for the innocent-landowner defense, but also for the new prospective-purchaser defense provided by the Act, which, as noted above, also requires an "all appropriate inquiry."

All-Appropriate Inquiry

The Act has amended the Superfund to direct the Environmental Protection Agency (EPA) to establish by regulation "standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries." Some of the factors the EPA must include are:

1. the results of an inquiry by an environmental professional;
2. interviews with past and present owners, operators, and occupants of the property for the purpose of gathering information regarding the potential for pollution at the property;
3. reviews of historical sources, such as chain-of-title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the property since the property was first developed;
4. reviews of federal, state, and local government records -- waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records -- concerning pollution at or near the property;
5. visual inspections of the property and of adjoining properties;
6. commonly known or reasonably ascertainable information about the property; and
7. the degree of obviousness of the presence of pollution at the property and the ability to detect the pollution by appropriate investigation.

The Act also sets forth interim standards that the EPA will take into consideration in determining whether "all appropriate inquiry" was made prior to purchase.

Conclusion

The new Act and the Superfund statute it amends are complicated and filled with apparent inconsistencies and contradictions. It will take time for the courts to work out the Act's significant effects on owner liability. Additionally, one drawback of the new law is that it does not address other environmental statutes, such as the Clean Water Act and the Resource Conservation and Recovery Act, which can also impose substantial liability on property owners.

With our experienced team of attorneys and support staff, the Business Law Group and Environmental Law Group at Bullivant Houser Bailey PC are highly qualified to advise businesses in structuring and negotiating commercial real estate transactions potentially affected by these complicated and evolving areas of the law and to provide timely and effective defenses to environmental claims already asserted.