



# New environmental protection for commercial property owners

For more than 25 years, owners of contaminated property have been held liable for the costs of cleaning up contamination on their property – whether they caused it or not. Commercial real estate owners know well the huge environmental liability they may incur merely for being on title to contaminated property.

The law regarding such liability, however, has changed recently, affording a new purchaser of contaminated urban property an opportunity to limit its environmental liability significantly.

This new legislative scheme, effective Jan. 1, 2005, allows the purchaser of environmentally tainted urban property to establish the extent of contamination on the property, identify parties responsible for the contamination and avoid liability for the costs of environmental cleanup and related third-party claims. Unfortunately, the statutes are complex, confusing and untested by the courts. Already, legislation has been proposed in Sacramento to clarify ambiguities in the law.

Nevertheless, commercial real estate purchasers should be aware of these new environmental laws and seek to maximize their potential legal protections. This article briefly summarizes the new statutes and argues that state agencies must interpret the new law consistent with its expressed legislative intent. That is, agencies must view these statutes as a mandate from the legislature to enforce environmental statutes against those parties who caused the pollution, not those who seek to develop tainted properties.

## BONA FIDE PURCHASER DEFENSE

The California Land Reuse and Revitalization Act of 2004 took effect in January 2005. One of the express purposes of the act is to relieve purchasers of contaminated urban property from the liability for cleaning it up, imposing that obligation instead on the parties who caused or contributed to the contamination.

Another of the stated goals of these new statutes is to promote the sale and development of contaminated properties in urban areas. The particular defense that applies to a potential purchaser of contaminated property is called the Bona Fide Purchaser defense.

This defense states essentially:

1. The Bona Fide Purchaser (BFP) is not liable to any person or entity, other than a governmental agency, for cleanup costs or damages associated with the release of hazardous materials on the property.

2. A governmental agency, such as the Regional Water Quality Control Board, shall not take action against a BFP to require the cleanup of hazardous materials on the property unless the conditions on the property pose an imminent danger to the public and the agency is either unable to compel a responsible party to take action, or the agency can find no responsible party with "sufficient financial resources to perform the required response action at the site."

The ability to claim this new immunity, however, is not simple. Several conditions must be met before a purchaser of contaminated property may assert its status as a BFP. These include the following:

- The BFP must acquire title to the property after Jan. 1, 2005. Accordingly, purchasers of contaminated property prior to this date do not qualify as a BFP.

- The BFP must establish that the hazardous material on the property was released before the purchase of the property.

- The BFP may not be involved in any way with the release of the contamination, and the BFP may not be potentially liable to, or affiliated with, any other person who is potentially liable for the contamination on the property, through any direct or indirect familial, contractual, corporate or financial relationship, other than the relationship arising solely from the purchase agreement or a contract for sale of goods

or services or reorganization of a business entity that was potentially liable for the release of hazardous material at the site.

- All reasonable care must be taken by the BFP respecting the hazardous material at the site.

- The BFP must cooperate, assist and provide access to the persons doing remedial work and cooperate and assist with requests for information by government agencies.

- The BFP must comply with all land-use controls pertinent to remedial work and may not impede the effectiveness or integrity of any remedial work at the site.

- The BFP must provide all notices and satisfy all reporting requirements required by state or federal law with respect to the discovery or release of hazardous substances at the site.

- An All Appropriate Inquiry (AAI) has been completed prior to the purchase of the property.

## ALL APPROPRIATE INQUIRY

The requirement of an AAI report replaces what was formerly acceptable as a Phase I analysis of the property. Old Phase I reports varied remarkably from one to another, both in substance and breadth of investigation. The United States Environmental Protection Agency recognized the inconsistencies and determined to standardize the reporting requirements.

Accordingly, on Nov. 1, 2005, the EPA announced the final "All Appropriate Inquiry" Rule as required by the Small Business Liability Relief and Brownfields Revitalization Act of 2002. The final AAI Rule formalizes the manner in which environmental due diligence and Phase I Environmental Site Assessments are to be conducted for potentially contaminated property.

The final AAI Rule requires that "all appropriate inquiry" include, among other things:

1. Certification that the inquiry into the property and the resulting report was

prepared by a qualified "Environmental Professional" with requisite experience in accordance with the final AAI Rule

2. Visual inspections of the property and adjacent properties by the Environmental Professional

3. Interviews with past and present owners, operators, occupants and the prospective purchaser

4. Review of historical sources back to the first obvious use of the property

5. Review of government records

6. Commonly known or reasonably attainable information regarding the property, including an evaluation of the purchase price of the property

7. An evaluation of the commonly known or reasonably attainable information, including the degree of obviousness of the presence of contamination and the ability to detect the presence of such contamination

8. An evaluation of data gaps, and the significance of those data gaps, in the Environmental Professional's opinion

9. An inquiry by the purchaser of the property for any environmental cleanup liens filed against the property, whether the person has any specialized knowledge or experience, the relationship of the purchase price to the fair market value of the property if the property was not contaminated and any commonly known or reasonably ascertainable information about the property

10. There is a time limit under which all appropriate inquiries must be conducted. For all transactions, all appropriate inquiry must be conducted within one year prior to the date on which a person acquires a property. If any inquiry was completed more than 180 days prior to the date of acquisition of the property, certain components, including interviews with past and present owners, operators and occupants, searches for environmental liens and visual inspections of the property and adjoining properties, must be updated 180 days prior to the date of property acquisition.

#### **AGENCY AGREEMENT**

After meeting the BFP requirements, and to obtain the immunities provided for in the statutes, a new owner must reach an agreement with the governmental agency having primary jurisdiction over the site and cleanup. Such agreements

address 1) the hazardous materials on the site, 2) prior owners and responsible parties and 3) specific workplans necessary to remediate the property. The precise terms of the agreement will be site specific and subject to negotiation between the BFP and the agency.

#### **BFP OPPORTUNITIES AND OBLIGATIONS**

The BFP statutes seek to establish a baseline of the contamination caused by entities other than the new owner. The BFP requirements document the history of hazardous materials on the property and who is liable for the cleanup. With this information in place, the laws now provide for the potential of holding new owners immune from environmental claims relating to the property. Instead, the government's focus remains on those owners who allowed the release of hazardous materials onto the property.

Still, a BFP's ongoing obligations of cooperation may be burdensome, and the new owner is not able to avoid completely the expense and burden of dealing with environmental issues and remedial work. Dealing with environmental consultants and contractors, in conjunction with a building's tenants and neighbors, will likely remain a formidable task. The precise degree of cooperation an owner will owe to governmental agencies and environmental workers can only be estimated at this time, however, one should assume that the policy supporting the statute will require a great deal of collaboration.

Nevertheless, the avoidance of environmental liability is potentially very valuable. Experienced purchasers of commercial real

estate should recognize the prospective opportunities presented by these new environmental laws.

#### **POLICY DECISIONS MUST ADVANCE THE INTENTIONS OF THE STATUTES**

As stated previously, this new statutory scheme of environmental defenses is new and has not been tested in the courts. Nevertheless, the intentions and stated purposes of the statutes are clear. The law expressly states it is intended to: (a) establish the cleanup of urban properties to protect the public health and safety, (b) relieve BFPs "of liabilities and responsibilities that should be borne by those who caused or contributed to the contamination," (c) encourage the development and redevelopment of unused or underused properties in urban areas and (d) establish a voluntary process for BFPs to make certain the extent of their liability, if any, under state law for contamination caused by other persons.

These purposes will be achieved most readily only by enforcing environmental laws against those causing contamination. As long as innocent property owners are held liable for environmental cleanups, contaminated property will suffer from contamination blight. It will go unsold, undeveloped and eventually unused. This law seeks to change this inequitable result and promote an effective system through which contaminated properties may continue developing along with the rest of our urban areas.

While agencies continue to pursue economic and efficient remediation of polluted properties, they must accept the BFP laws as a progressive attempt to further protect the public welfare: equitably, economically, socially and environmentally.

#### **ABOUT THE AUTHOR**

Cameron Scott Kirk is a shareholder with Beyers Costin PC. He has emphasized environmental, real estate, land use and water law within his litigation and regulatory practice. He has extensive experience in complex litigation, and he has lectured and published numerous articles concerning his areas of expertise.

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