

New Liability Protection for Purchasers of Contaminated Properties in Ohio

By Cory Novak

On September 14, 2020, Ohio incorporated the federal “Bona Fide Prospective Purchaser” (“BFPP”) defense to hazardous substance liability into state law through the enactment of House Bill 168. The BFPP defense allows purchasers to buy property with knowledge of contamination and claim an affirmative defense to liability provided they perform All Appropriate Inquiries (“AAI”) and comply with a number of specific conditions.

The BFPP defense was previously unavailable to owners and purchasers facing liability under Ohio state law. For the last 25 years, the State of Ohio provided protection from state enforcement actions through its Voluntary Action Program (the “VAP”). The VAP protects property owners and future owners if a volunteer investigates possible environmental contamination, cleans it up if necessary, and receives a covenant not to sue from the Ohio Environmental Protection Agency. Now, purchasers and owners who knowingly purchased contaminated property after January 11, 2002 can use the BFPP defense to avoid cleanup costs, provided all applicable requirements are met. It is important to note that BFPP protections do not require entry into the VAP.

The BFPP defense, codified in Ohio Revised Code § 3746.122, adopts the federal definition of “BFPP,” which requires the person claiming to be a BFPP to demonstrate that they are not potentially liable, or affiliated with any other person who is potentially liable, for response costs at the property in question. The person must also demonstrate that they conducted AAI due diligence and satisfy applicable “continuing obligations” requirements.

In promulgating Ohio Revised Code § 3746.122, Ohio adopted the federal AAI standards in 40 CFR 312.20, which standards require the purchaser to make all appropriate inquiries into the previous ownership and uses of the property. For example, the purchaser must have an environmental professional interview current and past owners, conduct a review of historical information and records, visually inspect the property and adjoining properties, and produce a written report documenting the results of the AAI investigation. The AAI investigation must be conducted or updated within one year before the date of acquisition. However, some components of the AAI investigation, such as interviews and record searches, must be conducted or updated within 180 days of, and prior to, the date of acquisition.

Continuing obligations include:

1. Providing all legally required notices with respect to the discovery or release of any hazardous substances at the facility;
2. Exercising appropriate care with respect to hazardous substances found at the facility and taking reasonable steps to stop any continuing release, prevent future release, and prevent or limit exposure to previously released hazardous substances;

3. Cooperating with authorities performing response actions and responding to any requests for information or subpoenas;
4. Complying with land use and institutional controls; and
5. Continuing to have no affiliation with a potentially liable party.

Ohio's adoption of the federal BFPP defense to state enforcement actions is a beneficial tool and useful alternative to the VAP for prospective purchasers and some owners of contaminated properties. Without a VAP covenant not to sue, prospective purchasers of contaminated properties could not be assured that they would not incur cleanup costs for contamination for which they had no responsibility. Purchasers and owners (who purchased their property after January 11, 2002) can now expect to be protected should a suit be brought by the state to recover additional costs related to the property so long as they can demonstrate that they are a bona fide prospective purchaser under Ohio law.

The BFPP defense alleviates concerns regarding the uncertainty of the environmental risks when purchasing and developing contaminated properties in Ohio, and encourages and promotes the development of contaminated sites across the state. Development encouraged by House Bill 168 would be further supported by the passage of House Bill 675. House Bill 675, introduced in May 2020, intends to provide new funding for the Clean Ohio Revitalization Fund, which funds Brownfield revitalization projects in targeted investment areas such as inner cities.

If you have any questions or concerns, please don't hesitate to contact any of the listed Roetzel attorneys.

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