

Environmental Liability in Commercial Real Estate Transactions: BFPPs and VCCs



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A prospective purchaser wants to buy a piece of land with potential environmental contamination. What steps should be taken to limit the liability of the prospective purchaser? This article will answer this question but will first provide a general background of these types of scenarios in South Carolina.

The Brownfields/Voluntary Cleanup Contract (VCC) program is an effective tool to limit the liability of a prospective purchaser of industrial or commercial real estate. Any commercial or industrial site with real or perceived environmental contaminants may apply for the VCC program as long as the site is not listed on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 105. However, joint and several liability attaches with ownership of contaminated property, a theme discussed further below.

To identify suspected environmental contamination, an environmental consultant should conduct an “all appropriate inquiry” by a Phase I Environmental Site Assessment (ESA) using the current American Society for Testing and Materials (ASTM) standard. The current ASTM standard is ASTM E 1527-13. An ESA identifies *recognized environmental conditions* (RECs) on a site. If the consultant discovers substantial or serious RECS, the consultant may advise the prospective purchaser to conduct further investigation into the contamination on the property.

The ESA provides a legal defense to the prospective purchaser known as the bona fide prospective purchaser (BFPP) defense. The BFPP defense allows a prospective purchaser to avoid CERCLA’s joint and several liability. Under CERCLA, the mere ownership of property with

environmental contaminants creates joint and several liability for the cost of cleanup. CERCLA also assigns joint and several liability to “operators” for the cost of environmental cleanup of a site. Beyond the BFPP defense, a prospective purchaser may seek additional legal protections through application into the VCC program with the S.C. Department of Health and Environmental Control (SCDHEC).

When an applicant applies for a VCC with the SCDHEC, there are a number of matters the applicant affirms to the SCDHEC:

First, the applicant affirms he has performed an ESA and qualifies for the BFPP defense. Second, the applicant certifies he is a “nonresponsible party” (NRP) for the existing environmental contamination. A NRP is defined as a party that is neither “(i) a responsible party at the time the voluntary cleanup contract is signed . . . nor (ii) a parent, subsidiary of, or successor to a responsible party.” See S.C. Code Ann. § 44-56-720(5). Third, the applicant affirms he did not cause the environmental contamination and that he will work with the SCDHEC to assess the level of contamination and cleanup or remediate the contamination in order to protect human health and the environment. Finally, the applicant certifies he has the financial viability to clean up the contamination and may be required to submit financial statements.

In the NRP-VCC applicant, the applicant certifies he is not (1) a current owner of the property, (2) a responsible party (RP) for the site, (3) a parent, successor or subsidiary of any RP or owner of the property, and (4) involved with the property in the past other than activities performed in anticipation of participation in the VCC. A RP is defined as an “owner, operator, arranger, or transporter” of hazardous substances. See S.C. Code Ann. § 44-56-720(10).

For NRPs, the purpose of the VCC program is to “1) enable the expansion, redevelopment or return to use of industrial and commercial sites whose redevelopment is complicated by real or perceived environmental contamination, 2) provide an incentive to conduct response actions at a site by providing NRPs a covenant not to sue, contribution protection, and third-party liability protection . . . and 3) provide reimbursement to the department for oversight costs.” See South Carolina Code Annotated § 44-56-710 *et seq.* Response action is defined as “any cleanup, containment, inspection, or closure of a site . . . necessary to remedy actual or potential damages to public health, the public welfare, or the environment.” See S.C. Code Ann. § 44-56-20(14). To meet the redevelopment standard of the VCC program, the proposed use and activities cannot knowingly aggravate or contribute to existing contamination or pose a significant threat to human health or environmental risks on the property.

If SCDHEC approves the applicant into the VCC program, the prospective purchaser will be required to submit a work plan, health and safety plan, and provisions for written progress reports to the SCDHEC for assessment and cleanup of discovered environmental contaminants. The VCC program provides an incentive to conduct response actions at a site by providing NRPs (1) a covenant not to sue, (2) contribution protection, (3) third-party liability protection pursuant to S.C. Code Ann. § 44-56-710, and (4) eligibility to file annual application for Voluntary Cleanup Activity Tax Credits pursuant to S.C. Code Ann. § 12-6-3550.

Upon completion of the assessment and cleanup, SCDHEC will grant the buyer a certificate of completion and covenant not to sue. This covenant means that the SCDHEC will not include the buyer

in an enforcement action brought for environmental cleanup of the site. Rather, the SCDHEC will look to other prior owners and operators - known as potentially responsible parties (PRPs) - for cleanup costs. Finally, SCDHEC may require the prospective purchaser to record Declarations of Covenants and Restrictions on the property which may restrict certain use on the property.

Along with the covenant not to sue and certificate of completion, third-party liability and contribution protection inure to the benefit of the prospective purchaser upon completion of its obligations under the VCC. The third-party liability protection will protect the prospective purchaser from a claim by a third party. Contribution protection shields the NRP from future liabilities from contaminants addressed in the VCC.

Consider this example: Property Owner A owns property adjacent to Property Owner B. Owner A's property has a petroleum release beneath the soil that migrates onto Owner B's property. Owner B might bring a common law claim for trespass or nuisance against Owner A. Owner A will have to prove that he is not responsible for the petroleum release onto Owner B's property and will incur attorney's fees, court costs and additional costs to prove his innocence. However, Owner A could avoid a lengthy and costly lawsuit by raising the BFPP defense and using his third-party liability protection under the VCC, so long as the ESA and VCC was aware of this specific petroleum release prior to the Owner A's purchase of the land. In this case, Owner B would need to look for other PRPs for cleanup costs of the petroleum release.

Likewise, contribution protection would shield Owner A from a claim for contribution from another PRP. Under the South Carolina Code, an "NRP is not liable to any third-party for contribution, equitable relief, or claims for damages arising from a release of contaminants, petroleum, or petroleum products that is the subject of a response action included in the NRP-VCC." See S.C. Code Ann. § 44-56-710(H)(1).

A prospective purchaser has a number of environmental matters to consider when purchasing industrial or commercial real estate. The BFPP and VCC are two noteworthy legal tools to limit liability in this type

Letter from the President

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or the election. And Julie recently planned and implemented iCivics Day where young lawyer volunteers traveled to a variety of middle schools and gave presentation regarding civics. Everett Stubbs organized the Second Annual Lawyer-Legislator and Courthouse Keys Clay Shoot in Richburg. Sam Bass organized a professional development event focused on marketing and business development in Spartanburg, and John Linton organized a similar event in Charleston. During the first week of May, thanks to the leadership of Meggie Baker and Edward Rawl, we had Community Law Week events across the state, including programs at elementary schools where young lawyers spoke to hundreds of students about the importance of reading as part of Cocky's Reading Express. And it was not long ago that the "fairy godmothers" of the Cinderella Project organized events across the state to provide new and gently used prom dresses and other accessories to financially challenged high school students.

The above is just a sampling of recent events, and our volunteers will have implemented even more events around the state by the time this letter is published.

The most lasting impression I have from my year as president—as cheesy as it sounds—is how lucky I am to practice law in the state of South Carolina. Getting to know and work closely with a large sample of young lawyers from different practice areas and different parts of the state has convinced me that our Bar is composed of many caring, hard-working and selfless individuals who want to do more than just practice law. They want to give back to the profession and to the public. Thankfully, we have a Bar that provides all of us with an excellent avenue

of real estate transaction. With the right approach, a prospective purchaser can take advantage of the redevelopment potential of a site even if it has environmental contamination.

for doing that via the YLD. Anyone who has attended a national ABA YLD conference can tell you that the South Carolina YLD is renowned as being one of the most active and successful YLDs in the country, and we have a Bar that is incredibly supportive of the YLD's efforts. If you are not already taking advantage of the opportunities presented by the YLD, I would strongly encourage you to do so. Please take a look at the committees on the YLD website and offer to get involved with one that interests you, or shoot an email to me, Ryan, Lindsay or Ashleigh, and we will point you in the right direction.

My good friend Ryan Neville of Wills Massalon and Allen takes over as president of the YLD on July 1. There is no question he will do a great job. He is highly competent and organized and works about as hard as anyone I know. These qualities were on display to all the YLD leaders who were in Myrtle Beach in April for the planning retreat Ryan organized. It may have been the most well-attended retreat in the history of the YLD. The future of the YLD is looking brighter than ever with Ryan, Lindsay Joyner and Ashleigh Wilson in line to lead.

In closing, I note that the YLD has been incredibly valuable to my professional and personal development—providing me with an opportunity to grow in the areas of leadership, teamwork, communication and public speaking, among others. I will never forget my time as president and am grateful to those who encouraged me to become and stay involved with the YLD. I hope all of you have a great summer and that I see you soon.

Sincerely,



Patrick C. Wooten