

Protecting Purchasers in Commercial Property Transactions

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Congratulations! Your company just bought a large commercial property to manufacture its widgets. Unfortunately, you just received a notice from the Nevada Division of Environmental Protection (NDEP) that the previous owner dumped its manufacturing chemicals down the drain. The pipes leaked and now the soil and groundwater are contaminated. The seller is out of business, dissolved or in bankruptcy. You are left holding the proverbial hot potato. NDEP can and will hold you liable for the costs of cleanup.

In a 2013 opinion, Ninth Circuit Judge Mary M. Schroeder wrote, “Two environmental statutes everyone loves to hate are the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). In combination, they make owners of contaminated property and contributors to contamination responsible for cleaning up toxic waste and, if someone else cleans up the waste, liable for the costs of that cleanup.” These federal acts have similar counterparts in Nevada’s environmental statutes. But generally, environmental enforcement is delegated by the federal EPA to NDEP.

People love to hate environmental laws because they impose strict liability on landowners for cleanup costs, even if the landowner did not cause or contribute to the hazardous spill in the first place. Even though environmental laws are designed to ensure that the cost of clean-up is born by those responsible for the contamination, a business could purchase land, discover hazardous substances and be hit with the cleanup costs—even if the contamination existed prior to ownership.

However, all is not lost. Under Nevada law, subsequent owners can protect against liability by obtaining status as a bona fide prospective purchaser. This status protects buyers from liability relating to property they bought in good faith and did not contaminate. Under Nevada law, a bona fide prospective purchaser is not liable for any response action or cleanup undertaken or enforced by NDEP.

Nevada has adopted CERCLA’s requirements to become a bona fide prospective purchaser and qualify for liability protection, and these requirements provide a long “to do” list before the buyer obtains protection from environmental contamination.

First, a bona fide prospective purchaser must purchase property after the contamination by hazardous substances occurs. Although pro-

tections exist for landowners whose property is newly contaminated by third parties, bona fide prospective purchaser protections are afforded only to buyers of already contaminated property. Additionally, to qualify for liability protection, the buyer must not be affiliated in any way with the party that caused the spill.

Prospective buyers must also take several affirmative steps to qualify for protection. A prospective purchaser must make all appropriate inquiries before it purchases the property. This includes hiring an environmental professional to examine the land; collecting information about the property, its history and its value; interviewing past owners and operators; searching for environmental cleanup liens; reviewing government records; consulting various sources; inspecting the property and obtaining a declaration from the environmental professional no more than 180 days before the purchase.

After making appropriate inquiries, a bona fide prospective purchaser must then take steps to contain and/or prevent any further spills or exposure to the hazardous substance. They must provide all legally required notices with respect to the discovery or release of the hazardous substance and exercise appropriate care to stop any continuing spill, prevent any future spill and prevent or limit further exposure to the hazardous substance. The purchaser must report any discovery, response or cleanup of contamination to the State Environmental Commission.

Finally, a prospective purchaser must comply with any applicable land use restrictions and cooperate with the persons or agencies that are authorized to conduct response actions or cleanups.

Qualifying as a bona fide prospective purchaser can be costly. But the costs generally pale in comparison of removing thousands of tons of contaminated soil or treating groundwater for decades to reach acceptable levels. Qualifying as a bona fide prospective purchaser is a smart move for any business buying commercial property. It is an investment against unknown future cleanups and the associated costs. 🌿

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