

COVER YOUR BASES - INNOCENT PURCHASER LIABILITY PROTECTIONS

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With baseball season back in full swing, it is easy to analogize the game with purchasing commercial real estate. A baseball team's success largely hinges on its defense and its ability to cover first, second, and third base. If you're purchasing commercial real estate, you must play the field and perform your due diligence, with particular focus on the property's environmental history.

Let's say you've found the perfect location. You've secured necessary financing. You're ready to close. But, have you performed all your due diligence? Do you know who or what occupied the property in years prior? More importantly, are there any environmental issues with the property, hidden or disclosed? Worse yet, what if you discover contamination you did not cause? Will you be liable for it? Under New Jersey and federal law, there are protections available to purchasers of contaminated properties.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), more commonly known as Superfund, is a federal statute that, among other things, provides the federal government authority to respond directly to releases of hazardous substances that endanger public health and the environment. CERCLA establishes liability protection for those who purchase properties suspected or known to be contaminated under the All Appropriate Inquiries Rule.

To qualify for protection, a potential purchaser must perform a Phase I Environmental Site Assessment, pursuant to the ASTM E1527-13 standard. A Phase I generally includes: a visual inspection of the property and structures; a review of historic property records, maps, and deeds; a review of databases for the presence of contaminated properties in the immediate vicinity and known contamination and remedial activities at the subject property; and a summary of findings and recommendations for further investigation. The scope of a Phase I typically does not include an assessment of asbestos, lead-based paint, and mold present at the subject property, although such may be included at the purchaser's request.

All appropriate inquiries must be performed within one year prior to the date of purchase. Additionally, to retain such protection, the purchaser must comply with all continuing obligations after acquiring the property.

New Jersey's Site Remediation Reform Act of 2009 (SRRRA) provided a sweeping change to how contaminated properties in the state are remediated. SRRRA ushered in a new era in site remediation - now, privatized Licensed Site Remediation Professionals (LSRPs) oversee the clean-up and closure of impacted properties. With SRRRA's passage also came amendments to the state's Brownfield and Contaminated Site Act, the Industrial Site Recovery Act, and the Spill Compensation and Control Act ("Spill Act").

Similar to CERCLA's purchaser liability protections, the Spill Act provides relief to potential purchasers in the form of an innocent purchaser defense. To qualify as an innocent purchaser, the Spill Act requires a potential purchaser to conduct a preliminary assessment ("PA") and if necessary, subsequent site investigations. Unlike a Phase I however, a PA must comply with the New Jersey Department of Environmental Protection's Technical Requirements for Site Remediation (N.J.A.C. 7:26E-1.1, et seq.), which differ materially from those of the ASTM variety.

Under the NJDEP's standard, potential purchasers must inquire more thoroughly into historic site documents, including tax records, deeds, chains of title, and business directories, as well as compare historic remediation results with current or contemporary state standards. Accordingly, if a PA unearths contaminants, or environmental areas of concern, a site investigation conducted by an LSRP is necessary.

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Should a site investigation be required, SRRA permits the LSRP to issue a response action outcome (RAO) upon a determination the property is protective of human health and the environment. The issuance of an RAO establishes a covenant not to sue the person who undertook the remediation - i.e., the purchaser. The covenant runs with the land to successors in ownership, as well as to those who lease or conduct business at the property. The innocent purchaser defense does not however, attach to a person who does not have a defense to liability under NJ law or to a property owner who fails to maintain continuing compliance obligations.

It is important to note that, according to NJDEP's Preliminary Assessment Technical Guidance document, a Phase I "by law, is NOT an acceptable replacement for a preliminary assessment in New Jersey." While environmental professionals may prepare a combined Phase I and PA report, the report itself must encompass the requisite elements of both ASTM and NJDEP technical standards.

A prudent purchaser should contact an attorney experienced in real estate and environmental law to facilitate the due diligence necessary to insure eligibility for liability protections under federal and state law. Expectedly, the liability and clean-up associated with environmental contamination can be costly and a potential purchaser should take all necessary steps to protect the viability of his or her commercial interests.



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