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Innocent Landowner Defense and the All Appropriate Inquiry

It is standard practice in the United States to have an environmental professional conduct a Phase I environmental site assessment of a parcel of commercial real estate prior to purchase or transfer of title. The purpose of which is to identify past and present environmental conditions on a specific parcel of commercial real estate to determine the potential environmental risk and liabilities associated with the parcel of land.

The Comprehensive Environmental Response, Compensation and Liability Act

(CERCLA), 42 U.S.C. §§ 9601 et seq., commonly called the Federal Superfund Act, imposes strict liability for the cleanup of hazardous substances disposed of or released onto a property. CERCLA, however, provides certain defenses to liability, one of which is commonly called the innocent landowner defense. To achieve the innocent landowner defense under CERCLA, the person must show, in part, that at the time he/she acquired the property, he/she "did not know and had no reason to know" of the hazardous substance(s) disposed of or released onto the property. (42 U.S.C. § 9601(35)(A)). To establish that the landowner "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." (42 U.S.C. § 9601(35)(B)), as amended by the Small Business



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Liability Relief and Brownfields Revitalization Act ("The Brownfields Law"). This provision is commonly referred as the "all appropriate inquiry."

The Brownfields Law, which was signed by President Bush on January 11, 2002, directed EPA to promulgate regulations to clarify the standards and practices to satisfy the "all appropriate inquiry" requirement. EPA issued a final rule in May of 2003 clarifying that compliance with ASTM Standard E 1527-00 (entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process") will satisfy the requirements for conducting "all appropriate inquiry" into the environmental condition of a property to establish the innocent landowner defense and the other defenses under CERCLA.

On August 26, 2004, EPA is-

sued a proposed rule to establish the standards for conducting "all appropriate inquiry" ("AAI Proposed Rule"). The requirements under the AAI Proposed Rule are greater in substance and more expansive than the requirements under ASTM Standard E 1527-00. Until the AAI Proposed Rule becomes final, which is not expected until January of 2006, ASTM Standard E 1527-00 will continue to be the standard and practice to satisfy the innocent landowner defense and the other defenses under CERCLA.

Does compliance with ASTM Standard E 1527-00 provide a defense to liability under the Pennsylvania Hazardous Sites Cleanup Act (HSCA), 35 P.S. §§ 6020.101, et seq.? The Pennsylvania Department of Environmental Protection (PADEP), who has independent authority to impose liability and enforce cleanup of sites in the Commonwealth of Pennsylvania that are releasing or threatening the release of hazardous substances, does not address or clarify this issue.

HSCA is Pennsylvania's equivalent to CERCLA. HSCA doesn't provide an innocent landowner defense per se, but it does provide exceptions to being responsible for the release or threatened release of hazardous substances (hereinafter referred as the "responsible party exception"). The practices under ASTM Standard E 1527-00 are structured to only articulate the level of inquiry appropriate to qualify for the innocent landowner de-

fense under CERCLA; that is, the practices that constitute "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice" as specified under 42 U.S.C. § 9601(35)(B). This "all appropriate inquiry" language is identical to the language found in the responsible party exception under HSCA. However, HSCA doesn't provide guidance on what level of inquiry into the previous ownership and uses of the property is necessary to meet the responsible party exception under HSCA.

One can assume that the level inquiry under HSCA is similar to the level of inquiry under CERCLA, and compliance with ASTM Standard E 1527-00 will meet one of the requirements of the responsible party exception under HSCA. This assumption is reasonable considering that the responsible party exception under HSCA makes reference to using "good commercial or customary practice" for appropriate inquiry into the previous ownership and uses of the property, and at the present time, the customary practice is to use ASTM Standard E 1527-00. Come January of 2006, when EPA issues the final AAI rule, the customary practice of using ASTM Standard E 1527-00 will become obsolete.

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