

What Developers Must Know About New Ohio Brownfield Law

By **Heather Richardson, Patrick Abell and Robyn Smyers**

On June 16, Ohio Gov. Mike DeWine signed Ohio H.B. 168, which provides purchasers of brownfield properties who meet certain criteria outlined in the bill with bona fide prospective purchaser defenses, similar to what is already available at the federal level and in many other states.

The bill, which goes into effect on Sept.14, is intended to encourage the development of Ohio real property that may have a checkered environmental history. The following is an analysis of H.B. 168's impact on Ohio brownfield development, the provisions that give property owners more protection from state-level environmental liability and the elements of the affirmative defense created by H.B. 168.



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Impact on Brownfield Development

Former industrial properties that are or may be contaminated are often referred to as brownfield properties. For urban redevelopment projects in areas with post-industrial economies (particularly common in Ohio), brownfield properties can be hard to avoid.

Even if a developer did not cause the contamination, it may be on the hook for the costs of cleanup and other liabilities, which may far exceed the value of the property. Real estate developers of brownfield sites face not only known costs for environmental testing and remediation — such as Phase 1 and 2 assessments conducted prior to purchasing the property — but also unknown costs of potential future cleanup obligations, enforcement actions or litigation that may be uncovered in connection with redevelopment.

H.B. 168 aims to encourage the development of brownfield properties in Ohio by providing an affirmative defense to owners of such properties involved in claims by the state.

Expanding Federal Affirmative Defense to Ohio

Prior to the enactment of H.B. 168, Ohio did not have a mechanism that allowed buyers to assert immunity for historic releases of hazardous substances under state law, other than going through Ohio's Voluntary Action Program, or VAP.

Though the VAP is still an option for developers who want to obtain a covenant not to sue from the state of Ohio, H.B. 168 is self-implementing, and provides



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an affirmative defense that can be asserted in court and does not require governmental approval. A prior draft of the legislation would have included an option to obtain a concurrence letter from the Ohio Environmental Protection Agency, which was excluded from the final bill.

The bill also enhances elements of the VAP by eliminating provisions that automatically voided a covenant not to sue when an applicant did not strictly comply with the terms of the institutional controls or activity and use limitations imposed on a property as part of a VAP cleanup.

H.B. 168 incorporates the federal definition of "bona fide prospective purchaser" from Title 42 of the U.S. Code, Section 9601(40), and brings the federal defense to Ohio law. One element of the bona fide prospective purchaser defense is referred to in federal law as the "all appropriate inquiry" requirement under the Comprehensive Environmental Response, Compensation, and Liability Act. In most real property purchases, a developer should attempt to meet all appropriate inquiry requirements and exercise due care to attempt to obtain the bona fide prospective purchaser status.

The bona fide prospective purchaser definition applies retroactively to any person who, after Jan. 11, 2002, acquires ownership or a leasehold interest in a facility, and can establish by a preponderance of the evidence the items listed in Title 42 of the U.S. Code, Section 9601(40)(B)(i)-(viii) — which include that the hazardous substance disposal occurred at the facility prior to the person acquiring the facility; that the person made all appropriate inquiries (by conducting a Phase I environmental site assessment in accordance with ASTM standards) into the previous ownership and uses of the facility; and that the person exercised appropriate care by taking reasonable steps to stop any continued releases and prevent exposure to hazardous substances.

Title 42 of the U.S. Code, Section 9601(9) broadly defines a facility as a building, structure or site where hazardous material were deposited, stored, disposed of or placed. Whether a buyer satisfies all elements of the defense will be determined by a court on a case-by-case basis, which presents risks to parties relying on the defense.

If a property owner becomes a defendant in a civil action against the state of Ohio relating to the release or threatened release of hazardous substances from a facility, H.B. 168 creates a pathway to claim an affirmative defense through the enactment of Ohio Revised Code Section 3746.122(B). If the property owner effectively raises the affirmative defense detailed below, they should not be liable for actions brought by the state relating to investigative or remedial costs for contamination that occurred prior to their becoming the property owner.

O.R.C. Section 3746.122(B) requires that the defendant establish the following three elements to successfully implement the affirmative defense:

- The defendant must first establish that they are a "bona fide prospective purchaser" of the facility. As described above, and as defined in Title 42 of the U.S. Code, Section 9601(40), the defendant must show that they meet all criteria outlined in the federal definition.
- The second element the defendant must establish is that the state's case rests upon the defendant's status as owner or operator of the facility. If the defendant is a party to the action for reasons outside of their ownership or operation of the facility, this affirmative defense is not available against the state's claims.

- Finally, the defendant must establish that they have not impeded a response action or natural resource restoration at the facility.

H.B. 168's Limits

A real estate developer should continue to conduct appropriate diligence to fully assess a property's environmental conditions, as unexpected environmental conditions can add significant costs and delays to a project. Though H.B. 168 fills a gap in Ohio law, the defense is one that would be raised in court once litigation or claims have already been asserted by the state of Ohio — a situation that property developers will want to avoid.

An important distinction from the federal statute is that H.B. 168 does not apply to private citizens' claims. Additionally, as mentioned above, the buyer must comply with the "appropriate care" requirements to secure the defense, which could necessitate costly remedial action to ensure that there are no continuing releases and to prevent or limit human, environmental or natural resource exposure to previously released hazardous substances.

Further, the defense does not protect the current owner from common law claims if contamination is migrating from the property.

Applicability

The affirmative defense created in O.R.C. Section 3746.122(B) may be asserted by defendants in civil actions pending as of H.B. 168's effective date, and initiated after its effective date.

The legislature explicitly stated that the new provision is "remedial in nature," and that its purpose is to make available the affirmative defense created under O.R.C. Section 3746.122(B) in civil action pending as of the bill's effective date.

Not a Panacea

H.B. 168 brings Ohio in line with other states, like Indiana and Michigan, that have revised state statutes to be consistent with federal law. Though the bill is positive for developers, it does not guarantee that there will be no environmental liabilities or risks associated with the purchase of a contaminated property.

There are exceptions to the defense, and risks that a court would conclude the requirements to meet the defense were not met or maintained. Therefore, it is important that a prospective buyer assess the potential historic environmental risks relating to any business or property being acquired.

In addition to attempting to meet the bona fide prospective purchaser defense, a prospective buyer of Ohio brownfield property should consider addressing unknown environmental conditions in other ways, including negotiating for contractual allocation of liabilities, establishing an escrow fund, purchasing environmental insurance or enrolling in the VAP.

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