Post-Ashley II
What’s a Brownfield Developer to Do?

by Gale Lea Rubrecht

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In Ashley II, the court of appeals for the 4th Circuit declined to hold that the U.S. Congress intended a new, relaxed standard of liability to apply to buyers of contaminated property under Superfund when it enacted the Brownfields Amendments in 2002. The case offers guidance on how courts are likely to interpret elements of the bona fide prospective purchaser (BFPP) defense and the evidence necessary to satisfy each element. The article examines tools available to supplement the BFPP defense and provide liability protection.

Ashley II was a cost-recovery action lawsuit under the Comprehensive Environmental, Compensation, and Liability Act (CERCLA or Superfund) involving liability disputes concerning a former fertilizer plant and container cleaning and storage facility in Charleston, SC. Ashley II of Charleston LLC (Ashley) purchased parcels for a mixed-use project. The company sought to acquire the property as a bona fide prospective purchaser (BFPP) and hired an environmental engineer to ensure compliance with all requirements. Before Ashley purchased the site, the consultant prepared a Phase I environmental site assessment. After acquisition, Ashley secured the site, provided security, conducted inspections, performed extensive environmental sampling and testing, and submitted a remediation plan to the U.S. Environmental Protection Agency (EPA). After incurring response costs, Ashley sued PCS Nitrogen Inc. (PCS), successor of a corporation that owned and operated the site at the time of disposal. PCS counterclaimed and brought third-party contribution actions against parties with past and current connections at the site. Ashley claimed BFPP protection.
What Is BFPP Protection?

Briefly, a BFPP is a party who acquires ownership of a brownfield after January 11, 2002, the enactment date of the Brownfields Amendments, and who satisfies the following eight requirements by a preponderance of the evidence: (1) establishes that all disposal of hazardous substances on the facility occurred before acquisition; (2) undertakes all appropriate inquiries (AAI) before acquisition; (3) provides all legally required notices; (4) exercises appropriate care by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to previously released hazardous substances; (5) provides full cooperation, assistance, and access to persons authorized to conduct a response action or natural resource restoration; (6) complies with all land-use restrictions and does not impede the effectiveness of any institutional controls at the facility; (7) complies with information requests and administrative subpoenas under CERCLA; and (8) establishes it is not potentially liable for response costs, is not affiliated with a potentially responsible party (PRP) through a family, contractual, corporate, or financial relationship, and is not the result of a reorganization of a business entity that was potentially liable.

The court of appeals declined to hold that Congress intended a relaxed standard of liability to apply to buyers of contaminated property under Superfund in 2002 when it enacted the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments). The Ashley II case is significant because it is the first appellate decision to consider the BFPP defense to Superfund liability established by the Brownfields Amendments. The case offers guidance on how courts are likely to interpret elements of the defense and the evidence necessary to satisfy each element. The court of appeals also left undecided, important issues on which I invite EPA to provide guidance. Meanwhile, liability protection tools to supplement the BFPP defense are available for those interested in brownfields redevelopment. Further, EPA’s recent endorsement of ASTM International’s 2013 standard for Phase I environmental site assessments will provide enhanced information on potential contamination at a site. The enhanced information may provide an opportunity to proceed to a discussion of steps likely to be required after closing, including cost and timing of such steps.
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The BFPP defense is not limited to entities who acquire property knowing, or having reason to know, of its contamination. It is also available to prospective tenants leasing contaminated property. Additionally, many of the elements of the BFPP also apply to contiguous property owners and innocent landowners.

The trial court found that Ashley satisfied all of the elements except 1, 4, and 8. Applying the court of appeals’ previous interpretation of “disposal” as including passive conduct such as spilling or leaking, the trial court found it “likely” that disposals occurred after Ashley demolished the buildings but not the concrete pads, trench, and sumps because the sumps “contained hazardous substances, were cracked, and were allowed to fill with rainwater.”

The court faulted Ashley for failing to test under the concrete pads, trench, or sumps and struck expert testimony that no disposals occurred after Ashley’s acquisition of the site for nondisclosure before trial. The trial clarified it did not intend to hold that “BFPP status can be defeated by continued leaching of contaminants through the soil.”

The trial court also found that Ashley failed to exercise appropriate care with regard to the sumps, a debris pile, and a crushed limestone cover on the site. Experts at trial testified that Ashley should have capped, filled, or removed the sumps when it demolished the buildings. The court concluded that Ashley’s investigation was insufficient to establish that the structures did not leak and that Ashley may have exacerbated the conditions when it demolished the buildings but failed to clean out and fill in the sumps leaving them exposed to weather conditions. The court also found that Ashley’s failure to prevent a debris pile from accumulating on the site, investigate the contents of the debris pile, and remove the debris pile for over a year indicated a lack of appropriate care. Finally, the trial court found that Ashley failed to maintain the crushed limestone cover that had deteriorated.

Based upon releases and environmental indemnity agreements that Ashley entered into with the sellers, coupled with a letter that Ashley wrote urging EPA to refrain from an enforcement action against them, the trial court held that Ashley failed to prove non-affiliation with a PRP. The trial court concluded that Ashley took the risk that the past owners might be liable for response costs and that Ashley’s “efforts to discourage EPA from recovering response costs covered by the indemnification reveals just the sort of affiliation Congress intended to discourage.”

Reasonable Steps Argument Went ‘Too Far’

On appeal, Ashley contended that “the purposes of the Brownfields [Amendments] necessitate that courts apply a less-stringent standard of ‘appropriate care’ and ‘reasonable steps’ than that applied by the [trial] court,” but the court of appeals found that Ashley’s argument went “too far.” Noting that both the BFPP exemption and the innocent landowner defense require a demonstration of “reasonable steps,” the court of appeals concluded that Ashley “fail[ed] to provide a persuasive rationale for requiring a lower level of ‘care’ from a BFPP… than from an ‘innocent landowner’” and stated:

Logic seems to suggest that the standard of “appropriate care” required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be higher than the standard of “due care” required of an innocent landowner, who by definition did not know and had no reason to know of the presence of hazardous substances when it acquired a facility.

The court of appeals concluded it did not need to “determine whether the BFPP standard of ‘appropriate care’ actually is higher than the standard of ‘due care’ mandated elsewhere in CERCLA, because in all events ‘appropriate care’ under [the BFPP exemption] is at least as stringent as ‘due care’ under [the innocent landowner defense].” The court of appeals looked to CERCLA’s “due care” jurisprudence to determine what “reasonable steps” must be taken to demonstrate “appropriate care” and agreed with the Second Circuit’s test in an innocent landowner case that the “due care” inquiry asks whether a party “took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.”

Applying this test, the court of appeals held that “Ashley’s inactions clearly show that it failed to
exercise ‘appropriate care’. Focusing on ‘Ashley’s delay in filling the sumps—which even Ashley’s expert admitted should have been filled a full year before Ashley did so,’ the court of appeals held that the trial court did not err in finding Ashley failed to demonstrate it exercised “appropriate care” at the site.16

Importantly, the court of appeals did not address the trial court’s ruling that the indemnification created a disqualifying “affiliation” so as to deny BFPP liability protection. Before the court of appeals’ decision, EPA distinguished the trial court’s holding in guidance, but now that the court of appeals failed to rule, EPA should issue clarifying guidance. Indemnification agreements are too common in real estate transactions involving contaminated property for there to be uncertainty if they might result in loss of liability protection.

Similarly, the requirement that all “disposal” occur before acquisition of the property, while addressed by the trial court, was not before the court of appeals. The issue is important in states within the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) because the court of appeals has held that “disposal” includes passive acts for purposes of Superfund liability, and if “disposal” includes leaching and other passive acts for purposes of CERCLA BFPP provisions, the defense will be illusory for many Fourth Circuit sites. I invite EPA to clarify the meaning of “disposal” for BFPP purposes.

Ashley II also illustrates the types of evidence courts may find sufficient to satisfy other BFPP elements. On the AAI requirement, for example, the court found that Ashley acted reasonably in hiring and relying upon an expert to conduct the AAI, notwithstanding “inconsistencies” between Phase I reports and the relevant standards. On the requirement of full cooperation, assistance, and access, Ashley established it notified EPA when it acquired the site, asked to be informed “if EPA desired ‘specific cooperation, assistance, access or the undertaking of any reasonable steps,’” granted EPA access to the site, and otherwise cooperated.17 The court found this evidence sufficient to meet Ashley’s burden.18
Conclusion
The importance of full and timely compliance with each element of the BFPP defense cannot be overemphasized. Failure to satisfy one of the eight elements is all it takes to lose BFPP status. Fortunately, there are tools available to supplement the BFPP defense.

State voluntary cleanup programs, like the West Virginia Voluntary Remediation Program, provide an attractive backstop measure for limiting liability of those engaged in brownfields redevelopment. Parties who successfully complete the West Virginia program, and their assigns, receive liability protection against the state for further remediation liability and against third-party contribution claims.19

Additionally, many states, including West Virginia, have a memorandum of agreement with EPA that offers liability protection against enforcement actions under Superfund for sites completing the state voluntary cleanup program. West Virginia and some other states also have agreements for any federal environmental cleanup action under the Resource Conservation and Recovery Act or the Toxic Substances Control Act.20

Brownfield developers may also ask EPA for a comfort/status letter suggesting reasonable steps at a specific site. Such letters are discretionary and limited to sites where EPA has sufficient information to form a basis for suggesting reasonable steps. If a developer wants to perform cleanup work beyond the “reasonable steps” required to maintain BFPP status at sites of federal interest, EPA and the U.S. Department of Justice (DOJ) have developed a model BFPP Work Agreement, which provides a covenant not to sue for “existing contamination,” as well as contribution protection and requires the person performing the removal work to reimburse EPA’s oversight costs. Parties may also seek a comfort/status letter from EPA to understand the potential for or actual EPA involvement at a site. In limited circumstances, prospective purchaser agreements (PPAs), which provide a covenant not to sue, may be negotiated with EPA/DOJ before acquisition.21

For environmental professionals and others working with brownfield developers, Ashley II teaches the importance of a prospective purchaser or tenant understanding its continuing obligations before closing the deal.

References
20. For a discussion of West Virginia’s memorandum of agreement with U.S. EPA Region III for corrective action sites under the Resource Conservation and Recovery Act, see EPA’s intermediate final rule, titled “West Virginia: Final Authorization of State Hazardous Waste Management Program Revisions,” that was published in the Federal Register on November 25, 2013 (78 Fed. Reg. 70,225). For a list of state and tribal response programs agreements, including West Virginia’s Superfund memorandum of agreement, see http://www.epa.gov/brownfields/state_tribal/moa_mou.htm.
21. For additional information on enforcement tools that address liability concerns for brownfields and land revitalization, see http://www2.epa.gov/enforcement/landowner-liability-protections#tenants. 