COMMENTARY

ENVIRONMENTAL LAW

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Charities, Donated Property and Environmental Liability

What are the obligations of and risks to a charity that receives potentially contaminated property as a gift? This is not a new issue, but some recent conversations suggest that a review may be in order.

But first I digress to address practical concerns. Many charities or nonprofit organizations have as their very purpose receipt of or control over risky real estate. Many community gardens, for example, seek to green up vacant lots. Some of those lots have a residential former use, but others have commercial or industrial histories. More importantly, most have histories of being vacant. They have been the sites of what may just have been littering, but may also have been the disposal of materials that count as hazardous substances from old crankcase oil to old tires to waste industrial chemicals.

Other nonprofits and charities may be engaged in redevelopment or rails-to-trails or preservation work. The sites they target have industrial histories by virtue of the charities' purposes.

When the purpose of a nonprofit or charity is to do good with old industrial property or property used for fly dumping, the property cannot shy away from vacant or old industrial sites. Taking that real estate with a less-than-pristine environmental history is the whole point. Organizations in the business of addressing properties like that have to manage risk much like a brownfield redeveloper.

A parcel of land may have an industrial or littered past, but that does not mean in all cases, or even in most cases, that that parcel will carry with it a significant liability. To the contrary, most brownfield sites have very modest environmental problems. However, the low probability of a significant liability presents a risk that impedes their reuse, even for a charitable purpose. Assessing and managing that uncertainty costs money. Therefore, charities have to remember that gifts of land often have to be paired with financial resources to address that risk.

So, what is the risk?

A charity or nonprofit entity does not get special treatment under either the federal Superfund statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or the Pennsylvania Hazardous Sites Cleanup Act (HSCA). To restate the familiar, under either statute the current owner or operator of a "facility" from which there has been a "release" of a "hazardous substance" bears liability—often joint and several—for "all costs" of responding to the release. A parcel of land is a facility. Migration of hazardous substances from the land can be a release, as can leaking from a landfill or a tank.

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Those that acquire real estate and do not themselves cause a release or a threatened release and do not have a relationship with the original contaminator can obtain defenses to liability. The defenses typically require an investigation of the property for environmental contamination. The investigation must be "all appropriate inquiry," and the appropriateness of the inquiry is tested as of the time of the acquisition. Thus, if the charity acquired the land a long time ago, the standards of investigation of that time would be applied, not the standards of today.

There are current federal regulations defining the scope of "all appropriate inquiry" currently. Those rules generally align with the standards for "Phase I Environmental Site Assessment Process" adopted by ASTM.

Note, by the way, that under the federal regulations, the fact that land was donated itself provides a reason to suspect the environmental condition of the property. The person conducting Phase I must consider whether the fact that the purchase price is less than the fair market value if uncontaminated is because of contamination. That means that a Phase I investigation of donated property, at least in theory, must address an issue that would not arise if the land were acquired for full value.

Assuming one has conducted a Phase I investigation, if the investigation misses the existence of contamination, a person that acquires without knowledge of preexisting contamination may be an "innocent purchaser." Once contamination is discovered, the charity (or other owner) must exercise "due care" with respect to the contamination and must give notice of the contamination to any subsequent purchaser.

One does not conduct a Phase I investigation to miss contamination, however; one conducts that investigation to find it. Indeed, the mere fact that one did not discover contamination raises a question as to whether the inquiry one conducted was "all appropriate inquiry."

Under CERCLA, one may acquire property as a "bona fide prospective purchaser" and nevertheless avoid liability. A bona fide prospective purchaser also must take "appropriate care with respect to hazardous substances found at the facility by taking reasonable steps" to cut off current releases, to limit human or environmental exposure to past releases.

The Environmental Protection Agency has provided guidance on many of the elements of these two defenses, known as the "common elements" guidance. However, it offers almost no direction about whether "due care" and "appropriate care" entail the same steps or different ones. The statutory language tends to suggest that a "bona fide prospective purchaser"—one who has to exercise "appropriate care"—may have to do some affirmative cleanup.

That dovetails somewhat nicely with Pennsylvania law. The HSCA does not grant a clear bona fide prospective purchaser defense. Certainly, no such defense exists to responsibility under older Pennsylvania laws, such as the Clean Streams Law or Solid Waste Management Act. However, the Land Recycling and Environmental Remediation Standards Act (Act 2), provides a way for a charity taking contaminated property to obtain a self-executing release of state law environmental liability by conducting remediation to background, published statewide standards, or site-specific standards.

CERCLA treats a cleanup under a state voluntary response program, like Act 2, as at least a partial shield to federal liability. Pennsylvania and the EPA have entered into the "one cleanup memorandum of agreement" to similar effect.

A good argument exists therefore that compliance with a state voluntary cleanup program like Act 2 constitutes the exercise of "appropriate care" for purposes of the CERCLA bona fide prospective purchaser defense. It may also be enough independently under Section 9628(b).

What we do not know is whether anything less than compliance with a state voluntary cleanup program would suffice. A charity, then, must consider whether it is prepared to comply with a state voluntary cleanup program like Act 2 when taking possibly contaminated property. It may want to do that in any event because that sort of cleanup would be necessary to meet the charity's purpose. One generally does not want to build a park whose soil contains toxic levels of contaminants.

In sum, charities taking donations of land are just like purchasers. If they wish to avoid contamination liability, they must investigate beforehand and exercise appropriate care with respect to any contamination they find. •

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