

OP. NO. 04-061

CONSERVATION: BROWNFIELD RESTORATION AND LAND RENEWAL ACT.

Purchase of environmentally contaminated property by Shenandoah County at delinquent tax sale may constitute involuntary transfer or acquisition, qualifying county for protection from liability, provided county meets statutory conditions prescribed for 'innocent land owner.' Liability protection afforded Shenandoah County, or third party with knowledge of contamination, as 'bona fide prospective purchaser,' provided county or third party meets statutory conditions prescribed for such purchaser.

Mr. Donald D. Litten
County Attorney for Shenandoah County
September 7, 2004

Issues Presented

You ask several questions regarding the sale of environmentally contaminated property for delinquent taxes and the potential liability of purchasers. Specifically, you ask (1) whether Shenandoah County's purchase of such property at its delinquent tax sale would constitute an involuntary transfer or acquisition, such that the county would be protected from liability under § 10.1-1234(C)(v)(b); (2) whether the county would be protected from liability under § 10.1-1234(B) as a "bona fide prospective purchaser" if the county purchases the property, regardless of whether the transfer is involuntary; and (3) whether a third party, who purchases the real estate, knowing the property's environmental conditions, would be protected from liability as a "bona fide prospective purchaser" under § 10.1-1234(B).

Response

It is my opinion that the purchase of environmentally contaminated property by Shenandoah County at its delinquent tax sale may constitute an involuntary transfer or acquisition and thereby qualify the county for protection from liability under § 10.1-1234(C), provided the county meets all conditions set forth in clauses (i) through (v) of that section and the site is not subject to the Resource Conservation and Recovery Act.¹ It is further my opinion

that § 10.1-1234(B) would provide liability protection to Shenandoah County, or a third party with knowledge of the contamination, as a "bona fide prospective purchaser," provided the county or third party meets the conditions described in clauses (i) through (iv) of that section, and the site is not subject to the Resource Conservation and Recovery Act.

Background

You present a scenario wherein Shenandoah County institutes a proper proceeding to sell real estate for the payment of delinquent real estate taxes. You relate that the property is environmentally contaminated with hazardous materials.² You do not provide any information regarding the types of activity that have taken place on the described property, nor is there any information as to the owner and/or operator of the property. You state that Shenandoah County not only seeks to sell the property for nonpayment of real estate taxes but also to purchase the contaminated property.

Applicable Law and Discussion

Article 4, Chapter 39 of Title 58.1, §§ 58.1-3965 through 58.1-3979, sets forth the procedure for selling land for delinquent taxes. Specifically, § 58.1-3965(A) provides:

When any taxes on any real estate in a county, city or town are delinquent on December 31 following the second anniversary of the date on which such taxes have become due, or, in the case of real property upon which is situated any structure that has been condemned by the local building official pursuant to applicable law or ordinance, the first anniversary of the date on which such taxes have become due, or, in the case of real estate which is deemed abandoned as provided herein, and the taxes on any real estate are delinquent on December 31 following the second anniversary of the date on which such taxes have become due, such real estate may be sold for the purpose of collecting all delinquent taxes on such property.

Section 58.1-3967 requires that proceedings for the sale of delinquent tax lands shall be by bill in equity filed in the circuit court of the county or city in which the real estate is located, "to subject the real estate to the lien for such delinquent taxes." Additionally, § 58.1-3970 allows a county to be "a purchaser at any sale [of land]

for the enforcement of tax liens." Shenandoah County clearly has authority to hold a sale of land for delinquent taxes and to purchase the property at the sale.

You ask whether Shenandoah County will incur any liability for cleanup of the environmentally contaminated property it purchases.

On December 11, 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980³ ("CERCLA"). "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites."⁴ CERCLA creates an excise tax on chemical and petroleum industries and provides broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.⁵ Among other things, CERCLA establishes prohibitions and requirements concerning closed and abandoned hazardous waste sites;⁶ provides for liability of persons responsible for releases of hazardous waste at these sites;⁷ and establishes a trust fund to provide for cleanup when a liable party cannot be identified.⁸

On January 11, 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act⁹ (the "Federal Act"), which amends CERCLA and adds the following definition of "brownfield site": "The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."¹⁰ Brownfields also are commonly known as "abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."¹¹ In addition to providing funds to assess and clean up brownfield sites and to enhance state response programs, the Federal Act clarifies the CERCLA liability provisions related to purchasers of contaminated properties.¹²

Chapter 12.1 of Title 10.1, §§ 10.1-1230 through 10.1-1237, comprises the Brownfield Restoration and Land Renewal Act (the "Virginia Act"). Section 10.1-1230 defines "brownfield" as "real property; the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." The Virginia Act is similar to, but is more limited in scope than, the Federal Act.¹³

Section 10.1-1231 states that "[i]t shall be the policy of the Commonwealth to encourage remediation and restoration of brownfields by removing barriers and providing incentives and assistance whenever possible." Section 10.1-1234 limits the liability of a "bona fide prospective purchaser,"¹⁴ an "innocent land owner,"¹⁵ and a contiguous property owner¹⁶ who may be responsible for containment or cleanup costs at a brownfield site, if the party meets the statutory elements for the exemption. Section 10.1-1234(B) provides that a "bona fide prospective purchaser"

shall not be held liable for a containment or cleanup that may be required at a brownfield site pursuant to the Virginia Waste Management Act (§ 10.1-1400 et seq.), the State Water Control Law (§ 62.1-44.2 et seq.), or the State Air Pollution Control Law (§ 10.1-1300 et seq.) if (i) the person did not cause, contribute, or consent to the release or threatened release, (ii) the person is not liable or potentially liable through any direct or indirect familial relationship or any contractual, corporate, or financial relationship or is not the result of a reorganization of a business entity that was potentially liable, (iii) the person exercises appropriate care with respect to hazardous substances found at the facility 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 any previously released hazardous substances, and (iv) the person does not impede the performance of any response action.

Section 10.1-1234(C) provides limitations on liability for an "innocent land owner who holds title, security interest or any other interest in a brownfield site." Section 10.1-1234(C) tracks the same language in § 10.1-1234(B) through clause (ii) pertaining to liability protection, and designates the language in clause (iii) of § 10.1-1234(B) as clause (iv) of § 10.1-1234(C). Both subsections state that the provisions of § 10.1-1234(B) and (C) "shall not apply to sites subject to the Resource Conservation and Recovery Act."¹⁷ Section 10.1-1234(C) further provides that an "innocent land owner" shall not be held liable if

(iii) the person made all appropriate inquiries into the previous uses of the facility in accordance with generally accepted good commercial and customary standards and practices, including those established

by federal law, ... and (v) the person does not impede the performance of any response action and if either (a) at the time the person acquired the interest, he did not know and had no reason to know that any hazardous substances had been or were likely to have been disposed of on, in, or at the site, or (b) the person is a government entity that acquired the site by escheat or through other involuntary transfer or acquisition.

You relate that the property is contaminated with hazardous materials. You do not specify the previous use of the property. For the purposes of this opinion, I assume that the real estate in question meets the statutory requirements for a brownfield site.

While the Virginia Act does not define that which constitutes an involuntary transfer or acquisition under § 10.1-1234(C)(v)(b), the Department of Environmental Quality has issued a manual that provides some guidance on the issue.¹⁸ Construction of a statute by an agency changed with administration of such statute is entitled to great weight.¹⁹ The manual discusses involuntary acquisitions of brownfield properties by governmental entities.²⁰ The manual notes that Virginia law provides liability protection as an "innocent landowner" to governmental entities that acquire brownfield properties through involuntary transfer or acquisition.²¹ The manual refers to three Environmental Protection Agency documents for clarification on the issue.²²

In particular, the Environmental Protection Agency published a fact sheet in 1995.²³ The fact sheet recognizes that units of government "sometimes involuntarily acquire contaminated property as a result of performing their governmental duties."²⁴ The fact sheet describes an "involuntary acquisition" as one where the government's interest in, and ownership of, the property exists "only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property."²⁵ The fact sheet cites as an example of involuntary acquisition the government's acquisition of property due to a citizen's tax delinquency.²⁶

As the Virginia Act closely follows the Federal Act, the involuntary acquisition analysis is the same. In order to be protected from liability under § 10.1-1234(C), however, a governmental entity must also demonstrate that it meets the elements delineated in clauses (i) through (v).

Applying the guidance found in the manual,²⁷ the fact sheet,²⁸ and other federal policies addressing involuntary acquisitions by governmental entities,²⁹ it is my opinion that if the statutory elements are met, the purchase by Shenandoah County at a sale of contaminated property for delinquent taxes may constitute an involuntary acquisition. As such, the county may be protected from liability as an "innocent land owner" under § 10.1-1234(C)(v)(b).

You next ask whether § 10.1-1234(B) would protect Shenandoah County from liability as a "bona fide prospective purchaser" if the county purchases the contaminated property at a sale for delinquent taxes, regardless of whether the transfer is involuntary. Section 10.1-1234(C)(v)(b) provides specific liability protection as an "innocent land owner" to a governmental entity that acquires brownfields through escheat or other involuntary transfers or acquisitions. Section 10.1-1234(B), however, is silent as to governmental entities. The term "bona fide prospective purchaser" in § 10.1-1234(B) refers to a "person" who acquires ownership of real property after the release of hazardous substances has occurred.³⁰ The term "person," as used in the Virginia Act, includes a "governmental body."³¹ Accordingly, § 10.1-1234(B) contemplates that a governmental body may be considered a person for purposes of the Virginia Act. Thus, a governmental body may qualify as a "bona fide prospective purchaser," provided it meets all the requirements of § 10.1-1234(B). To qualify for liability protection as a bona fide prospective purchaser, Shenandoah County must meet the statutory definition of a "bona fide prospective purchaser"³² who has complied with the requirements in § 10.1-1234(B)(i) through (iv).

In the alternative, § 10.1-1234(C)(v)(b) specifically provides liability protection as an "innocent land owner" for governmental entities that acquire property by involuntary transfer or acquisition, so the county need not demonstrate bona fide purchaser status if it is protected from liability as an "innocent land owner." It is my opinion that § 10.1-1234(C)(v)(b) clearly provides liability protection to Shenandoah County as an "innocent land owner."

Finally, you ask whether a third party having knowledge of the environmental conditions, who purchases the real estate at a delinquent tax sale, would be protected from liability as a "bona fide prospective purchaser" pursuant to § 10.1-1234(B). It is my opinion that a third party who meets the definition of "bona fide prospective purchaser"³³ may be protected from liability under § 10.1-1234(B).

Conclusion

Accordingly, It is my opinion that the purchase of environmentally contaminated property by Shenandoah County at its delinquent tax sale may constitute an involuntary transfer or acquisition and thereby qualify the county for protection from liability under § 10.1-1234(C), provided the county meets all conditions set forth in clauses (i) through (v) of that section and the site is not subject to the Resource Conservation and Recovery Act.³⁴ It is further my opinion that § 10.1-1234(B) would provide liability protection to Shenandoah County, or a third party with knowledge of the contamination, as a "bona fide prospective purchaser," provided the county or third party meets the conditions described in clauses (i) through (iv) of that section, and the site is not subject to the Resource Conservation and Recovery Act.

¹Your request does not specify any type of hazardous material that may be present on the subject real estate. For the purposes of this opinion, I assume that the site is not subject to the Resource Conservation and Recovery Act, as such sites are specifically excluded from the limitations on liability provided by § 10.1-1234(B) and (C). See Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat.) 2795, 2795-2841 (amending Solid Waste Disposal Act) (codified as amended at 42 U.S.C.A. §§ 6901 to 6908a, 6911 to 6917, 6921 to 6939e, 6941 to 6949a, 6951 to 6965, 6971 to 6979b, 6981 to 6987, 6991 to 6991i, 6992 to 7000 (West 2003))).

²Your request does not specify any type of hazardous material that may be present on the subject real estate. For the purposes of this opinion, I assume that the site is not subject to the Resource Conservation and Recovery Act.

³Pub. L. No. 96-510, 1980 U.S.C.C.A.N. (94 Stat.) 2767 (codified as amended at 42 U.S.C.A. §§ 9601 to 9628, 9651 to 9662, 9671 to 9675 (West 1995 & Supp. 2004)).

⁴Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994).

⁵See Comprehensive Environmental Response, Compensation and Liability Act of 1980 [hereinafter CERCLA], H.R. Rep. No. 96-1016, *reprinted in* 1980 U.S.C.C.A.N. 6119-38, 6151-60; Exxon Corp. v. Hunt, 475 U.S. 355, 358-59 (1986) (noting that Congress enacted CERCLA in response to hazardous substance release concerns, similar to New Jersey's Spill Act).

⁶Section 101 *passim*, 94 Stat. at 2767-2811 (codified as amended at 42 U.S.C.A. § 9601 *passim*).

⁷Section 107, 94 Stat. at 2781-85 (codified as amended at 42 U.S.C.A. § 9607 (West 1995 & Supp. 2004)). *But see* 42 U.S.C.A. § 9601(20)(D) (West Supp. 2004) (creating liability exception for state or local government that acquires ownership or control involuntarily through, among other circumstances, tax delinquency).

⁸Sections 111, 112(b)(2)(B), 94 Stat. at 2788-92; *see* 42 U.S.C.A. § 9611 (West 1995)).

⁹Pub. Law No. 107-118, 2001 U.S.C.C.A.N. (115 Stat.) 2356, 2360-81 (codified at 42 U.S.C.A. §§ 9601, 9604, 9605, 9607, 9622, 9628 (West Supp. 2004)).

¹⁰Section 211(a)(39)(A), 115 Stat. at 2361 (codified at 42 U.S.C.A. § 9601(39)(A) (West 2004)).

¹¹*See cite infra* note 23, at 1.

¹²Sections 222, 223, 115 Stat. at 2370-74 (defining "bona fide prospective purchaser," "innocent landowners") (codified at 42 U.S.C.A. §§ 9601(35), (40), 9607(q)-(r) (West Supp. 2004)).

¹³*Compare* 42 U.S.C.A. §§ 9601(40) *and* 9607(r) *with* Va. Code Ann. § 10.1-1234(B) (LexisNexis Supp. 2004) (pertaining to bona fide prospective purchasers); §§ 9601(35) *and* 9607(q) *with* § 10.1-1234(C) (pertaining to innocent landowners).

¹⁴Section 10.1-1234(B). "*Bona fide prospective purchaser*" means a person who acquires ownership, or proposes to acquire ownership of, real property after the release of hazardous substances occurred." Section 10.1-1230 (LexisNexis Supp. 2004).

¹⁵Section 10.1-1234(C). "*Innocent land owner*" means a person who holds any title, security interest or any other interest in a brownfield site and who acquired ownership of the real property after the release of hazardous substances occurred." Section 10.1-1230.

¹⁶Section 10.1-1234(D).

¹⁷*See cite supra* note 2.

¹⁸*See* Va. Dep't of Env'tl. Quality, Brownfields Manual (Mar. 12, 2004), *available at* <http://www.deq.virginia.gov/brownfieldweb/images/brfman.pdf>.

¹⁹ See *Dep't of Taxation v. Prog. Cmty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975); *Commonwealth v. Research Analysis Corp.*, 214 Va. 161, 198 S.E.2d 622 (1973); see also *Forst v. Rockingham Poultry Mktg. Coop.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981).

²⁰ See *id.* at 9.

²¹ *Id.*

²² See *id.*

²³ United States Env'tl. Prot. Agency, Office of Enforcement & Compliance Assurance, Quick Ref. Fact Sheet, "The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities" (Dec. 1995), available at <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/fs-involacqurtyrpt.pdf>.

²⁴ *Id.* at 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See cite *supra* note 18.

²⁸ See cite *supra* note 23.

²⁹ See, e.g., memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, United States Environmental Protection Agency, re: Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities (June 30, 1997); undated memorandum from Jerry Clifford, Director, Office of Site Remediation Enforcement, and Lawrence E. Starfield, Acting Associate General Counsel, Solid Waste Emergency Response Division, Office of General Counsel, re: Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action.

³⁰ Section 10.1-1230.

³¹ *Id.* Compare 42 U.S.C.A. § 9601(21) (West 1995) (defining "person" to include "United States Government, State, municipality, commission, political subdivision of a State, or any interstate body").

³²Section 10.1-1230.

³³*Id.*

³⁴*See supra* note 1.

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