



## Ninth Circuit Opinion Highlights Vapor Intrusion Risks and Challenges Faced by Brownfields Developers and Their Lenders

Jeffrey B. Kirschenbaum, Esq.

A recent ruling by the United States Court of Appeals for the Ninth Circuit illustrates the challenges faced by developers of contaminated properties and their lenders, as well as the extraordinary risks associated with sites impacted by dry cleaning solvents and other volatile chemicals that emit vapors that are capable of contaminating indoor air spaces.

*Voggenthaler v. Maryland Square LLC*, 2013 U.S. App. LEXIS 15307 (9th Cir. 7/26/13), arose from the seepage of dry cleaning solvents at a Las Vegas shopping center. The PCE contamination was first reported to the Nevada Division of Environmental Protection (NDEP) in 2000. In 2005, the shopping center was purchased for redevelopment by Maryland Square LLC, which bought the property with knowledge of the ongoing investigation. In 2006, Maryland Square demolished the buildings to prepare the site for redevelopment.

By 2007, the NDEP had determined that PCE-contaminated groundwater was migrating into a residential neighborhood, and that there was a potential for PCE vapor intrusion into the homes at concentrations that constituted a cancer risk. The NDEP removed contaminated soil, remediated the groundwater plume, and installed sub-slab ventilation systems in some homes to protect the occupants from PCE vapors. The NDEP then sued the current and former owners of the shopping center, and the historical operators of the dry cleaners, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Nevada state law. Peter Voggenthaler, and other homeowners, also sued the past and present owners of the center under the Resource Conservation and Recovery Act (RCRA), seeking an injunction forcing the defendants to clean up the contamination.

The district court granted summary judgment for Voggenthaler and his neighbors in 2010. In 2012, the

district court granted summary judgment in favor of the NDEP on all of its claims. Several related appeals by various defendants followed. On July 26, 2013, the Ninth Circuit affirmed the judgments in part, reversed them in part, and vacated them in part, in a long published opinion.

The court's ruling on the appeal by the current owner, Maryland Square LLC, is the portion of the opinion that is most interesting to brownfields developers, real estate and construction lenders, and their counsel.

Although Maryland Square unsuccessfully argued on appeal that application of CERCLA to localized contamination violated the Commerce Clause, its only plausible defense to the CERCLA claim was that it qualified for the "bona fide prospective purchaser" exemption under Section 107(r) of CERCLA. This exemption, enacted in 2002 as part of the Brownfields Revitalization Act, was intended by Congress to encourage investment in blighted properties by protecting new owners from CERCLA liability.

The district court held that the NDEP met its burden on summary judgment, but the judge disregarded an affidavit that Maryland Square submitted in opposition to the NDEP's motion, because it was not notarized. The Ninth Circuit found that, even if it was notarized, the affidavit did not establish that Maryland Square met the statutory and regulatory requirements to qualify as a bona fide prospective purchaser; but the Ninth Circuit vacated the district court's grant of summary judgment to give Maryland Square an opportunity to cure the deficiencies.

The Ninth Circuit's discussion of the requirements that Maryland Square must satisfy on remand should give pause to developers of properties affected by historical contamination, who are relying on the bona fide prospective purchaser exemption, as well as their lenders.



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The Ninth Circuit held that Maryland Square must meet “eight separate criteria” to qualify, including that it made “all appropriate inquiries” before purchasing the property. The “all appropriate inquiries” criteria has multiple sub-parts: an investigation must be performed by an “environmental professional, as defined in 40 C.F.R. § 312.10; particular kinds of information about the property, its history, and its value must be collected; past owners and operators must be interviewed; lien searches must be conducted; government records must be reviewed; the property must be inspected; and the owner must have obtained a declaration by the environmental professional who performed this work no more than 180 days before the purchase date.

Also troubling to brownfields developers is the Ninth Circuit’s discussion of the requirement that Maryland Square establish that it prevented or limited further human or environmental exposure to previously released hazardous substances, as required by Section 101(40)(D)(iii) of CERCLA. Here, the court focused on Maryland Square’s failure to identify the steps that it took to limit the spread of PCE at the time that it demolished the building that once housed the dry cleaner. Thus, while Maryland Square did succeed in getting a second chance to submit evidence in opposition to NDEP’s summary judgment motion, there is little reason to think that Maryland Square can meet the litany of tests spelled out by the Ninth Circuit on remand.

The Ninth Circuit also gave Maryland Square another chance to address the homeowners’ cleanup injunction; but, again, Maryland Square faces what probably is an insurmountable burden on remand. After the district court issued the RCRA injunction against all defendants, Maryland Square moved for rehearing, contending that it was in a different position from the prior owners, because it acquired the property after the dry cleaning facility had closed down. The homeowners opposed the motion on the ground that even though Maryland Square did not own the shopping center when the spills occurred, Maryland Square’s demolition of the buildings in 2006 exacerbated the problem, making Maryland Square a “contributor” under 42 U.S.C. § 6972(a)(1)(B).

The district court did not resolve the question of whether disturbing the site by demolishing the buildings made Maryland Square a contributor, because it erroneously held that an earlier appeal of a different issue by another party divested the district court of jurisdiction. So, Maryland Square will have an opportunity to respond to the homeowners’ contention on remand. But, what this means, is that seven years after the buildings were demolished, Maryland Square has the affirmative burden of proving that the demolition work did not exacerbate the PCE contamination problem.

For brownfields developers, the *Voggenthaler* case demonstrates the weakness of the bona fide prospective purchaser exemption as protection from CERCLA liability. Maryland Square will be jointly and severally liable for significant response costs, unless it can prove (using admissible evidence) that it satisfies a dense eight-part test. Additionally, Maryland Square must prove that site work did not exacerbate the pre-existing problem, in its order to utilize the bona fide prospective purchaser exemption and shield itself from the homeowners’ RCRA injunction. Contemporaneous records will be essential to proving what occurred; but, unless Maryland Square had the foresight to require its demolition contractor to scrupulously document its activities, these records will not exist.

For lenders, the lessons of the *Voggenthaler* case are more subtle. When underwriting a loan secured by contaminated property, it is essential to understand the remedial action plan, and the anticipated cost of implementation. The lender also needs to know who is expected to pay for the work, and who will pay if that party fails to respond, so it can evaluate the borrower’s ability to repay and the risk of environmental “super” liens. If the borrower’s ability to repay is dependent on its being exempt from liability under CERCLA because it is a bona fide prospective purchaser, the lender must confirm that the borrower’s pre-acquisition due diligence satisfies the “all appropriate inquiries” standard, the loan documents must require the borrower to perform the continuing obligations required to satisfy the exemption, and the lender must enforce these covenants on an ongoing basis.



Here, the developer, Maryland Square, took title with knowledge of the contamination; but the magnitude of the problem was still under investigation at that time. So, any remedial plan was, by definition, incomplete. If a lender financed Maryland Square's acquisition and development of the center, it did so without the information it needed to effectively underwrite and mitigate a known environmental risk.



**Jeffrey B. Kirschenbaum** is a Shareholder in the firm's Litigation Practice Group in San Francisco. His practice focuses on real property litigation, disputes involving financial institutions and environmental law. He can be reached at 415.227.3517 or [jkirschenbaum@buchalter.com](mailto:jkirschenbaum@buchalter.com)