



**Strategies for Tenants to Avoid Environmental
Issues Lurking Under Leased NY Property**

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**Your Client wants to Lease a Site
that looks like this...**





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or is part of an even larger complex of old Industrial Buildings – How Should you advise a Tenant as their Counsel?



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March 2018 BUILD Act Changed the Law

- Congress recently passed the Brownfields Utilization, Investment, and Local Development Act (BUILD Act), which amended the federal Superfund or CERCLA Law that previously made all owners and operators (i.e. tenants) at the time of a release or disposal of hazardous substances at a facility strictly liable.
- The Bona Fide Prospective Purchaser defense was amended in the BUILD Act to include language related to those who have tenancy or leasehold interests in a facility.



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Bona Fide Prospective Purchaser Defense Did not Previously Help Prospective Tenants

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §§101(40) & 107(r) allowed purchasers after 1/11/02 to avoid liability for contaminated property provided they:
 - Conducted “all appropriate inquiries” within 6 months prior to acquisition (i.e. perform Phase I Due Diligence Investigation pursuant to ASTM Standard E1527-13, or the regulatory standard at 40 C.F.R. Part 312)
 - The Phase I stated disposal of hazardous substances occurred prior to acquisition; established no PRP affiliation
 - And the Purchaser satisfies any ongoing obligations and cooperates with any government response actions.
- Therefore, purchaser can have knowledge of contamination, but if government performs cleanup there can still be a “windfall lien”.



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BUILD Amendments Added Tenants to the Bone Fide Defense

- Tenants who perform an All Appropriate Inquiry within 6 Months Prior to Site occupancy, which states that the property is likely contaminated or is contaminated based on review of historic records, can avoid liability.
- Take Away – Have tenants perform an ASTM Phase I investigation through a reputable consulting firm!
- Cost is approximately \$3,000-\$5,000
- Particularly important if the tenant intends to use the same or similar hazardous substances at the facility.
- Also ask for any existing environmental reports. If Phase I already exists, it must be certified to the actual tenant. *Ridge Seneca Plaza LLC v. BP Products North America Inc.*, 2013 U.S. App. LEXIS 21999 (2d Cir. 2013).



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If a Tenant Wants to Lease a Superfund Site EPA will enter into a “Prospective Lessee Agreement” or “Comfort Letters”

- EPA has indicated that it will enter into an Agreement or provide a Comfort Letter with a prospective tenant to resolve liability up front if they are brave enough to lease a federal Superfund or enforcement site.
- <https://www.epa.gov/enforcement/guidance-treatment-tenants-under-cerclas-bona-fide-prospective-purchaser-bfpp-provision>
- There are approximately 115 NYS Superfund Sites, and while there are many more RCRA and enforcement sites, this is really only helpful on a small number of properties EPA is involved in.



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Caveats – Nothing is Perfect in Environmental Law!

- Anyone who acquires a leasehold after 1/11/2002 must “establish by a preponderance of the evidence that the leasehold interest in not designed to avoid liability”
 - Example: A large company, which caused the contamination creates a LLC subsidiary and tries to lease their own contaminated site to their subsidiary to avoid liability.
 - Include Contract Provisions that establish this evidence by warranting that tenant has no affiliation with the owner/RP.
- Not yet a similar *Bona Fide* defense for tenants under state law. Unclear if the State will amend its laws this year to match federal law.

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There is a Third Party Defense Under Federal and State Law

CERCLA §107(b)(3) -“an act or omission of a third party other... than one whose act or omission occurs in connection with a contractual relationship” including “land contracts, deeds, easements, leases, or other instruments transferring title or possession,” if:

- “exercised due care with respect to the hazardous substance concerned” and
- “took precautions against foreseeable acts or omissions of any such third party and the [foreseeable] consequences...”

Also ECL §27-1323(4), Navigation Law §181(4)(a)

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Tenants in NY Who Perform Due Diligence & Due Care Can Still Allege Third Party Defense

- Tenants who perform due diligence and due or “appropriate” care can still claim a third party caused the contamination
- NYSDEC can only sue parties in federal court, therefore, it is still important in NY to satisfy federal due diligence requirements
- In addition, “appropriate care” is required with respect to contamination found at the facility by taking reasonable steps to prevent the spread of contamination
- Maintain any site controls and not leave the site worse than when tenant arrived or else all defenses can be lost.



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NYS Brownfield Cleanup Program is Also Still available for Tenants who want to Acquire the Property

- Voluntary investigation and cleanup of sites under the supervision of NYSDEC
- Citizen participation requirements, which have effectively caused DEC to review more quickly
- Volunteer Applicant is rewarded with a liability limitation, no off-site remedial responsibility, Certificate of Completion and refundable tax credits
- Participant (Responsible Party) Applicant gets SAME benefits but has to pay DEC oversight costs and perform off-Site work
- Tax credits are still very lucrative when applicable



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Site Preparation Tax Credits

- 22% to 50% of Site Preparation Costs
- Site Preparation costs are those necessary to implement a site's investigation, remediation, or qualification for a Certificate of Completion, including excavation, demolition, DOL/DOH supervised asbestos, lead or PCB work, environmental consulting, engineering, legal costs....
- No cap on site preparation tax credits - 22%-50% of costs
- Some eligible costs have been cut (e.g. only foundation costs needed for cover system; no piles)
- Now no related party service fees, and must be based on costs actually incurred

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Site Preparation Tax Credits

SITE PREPARATION COMPONENT & ON-SITE GROUNDWATER REMEDIATION COMPONENT – 22%-50% of Site Preparation Costs; No Cap				
Use	Unrestricted Use; Protection of Groundwater or Ecological Resources	Restricted Residential (environmental easement enables residential use)	Commercial	Industrial
Track 1	50%	N/A	N/A	N/A
Tracks 2 and 3	N/A	40%	33%	27%
Track 4	N/A	28%	25%	22%

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Tangible Property Tax Credits

- Based on capital costs for new building or renovation of existing building
- Two Formulas of which the **LOWER #** applies up to the applicable cap –
 - 10%-24% of capital costs (5% bump ups above 10% are based BOA sites, En-Zone sites, Affordable Housing or Manufacturing Projects or Track 1 cleanups)
- OR**
- 3x Site Preparation Costs (6x for manufacturing)
- UP TO**
- Cap of \$35 million or \$45 million for manufacturing
- Balance of foundation costs not eligible for site preparation costs are considered tangible property costs

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Tax Credit Example

- \$2M site prep costs for a Track 1 Unrestricted Affordable Housing Cleanup on En Zone Site (Asbestos, Lead Paint, Demo and Remediation)
- \$40M capital improvement project
- Site Prep Tax Credits – Track 1 50% of \$2M = \$1M
- Tangible Property Tax Credits –
 - 10% + 5% bump up for affordable housing + 5% En Zone Site - 20% x \$40M = \$8M OR
 - 3x \$2M site prep costs = \$6M (LOWER # APPLIES)
- TOTAL \$1M + \$6M = \$7M COMBINED TAX CREDIT

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New York City Exception for the Tangible Property Tax Credits

- For all parts of the State other than NYC, both tax credits apply; therefore, the new BCP Law is still very lucrative and only a more detailed Phase II investigation will be required to document contamination above standards that require remediation to meet brownfield site definition

For NYC, site preparation tax credits are still available, and if site/project meets these eligibility “gates”, the tangible property tax credits are also available:

- Environmental Zone Site
- Affordable housing project
- Upside down
- Underutilized (Complex Test and project must be commercial or industrial)



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Thank you! Questions?

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