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Ohio Bona Fide Prospective Purchaser Defense is Here

Amended House Bill 168 was recently enacted, which amends Revised Code Sections 3746.02 and 3746.05 and enacts Revised Code Section 3746.122. The Bill establishes a *bona fide prospective purchaser* (“BFPP”) affirmative defense against liability to the State of Ohio for investigational and remedial activities.

The federal BFPP defense to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) has become familiar to most commercial and industrial property purchasers and developers since its enactment in 2002. The BFPP defense allows parties to purchase property with knowledge of contamination, provided they perform All Appropriate Inquiries (“AAI”) and comply with a number of specific conditions. AAI has become the commercially reasonable standard for performing environmental due diligence and is also required by most lenders.

The new Ohio law incorporates the federal definition of “BFPP,” which requires:

- Performing All Appropriate Inquiries prior to the purchase or lease of the property;
- Providing all legally required notices with respect to the discovery or release of any hazardous substances at the facility;
- Exercising appropriate care and taking reasonable steps with respect to any continuing, past, or threatened releases;
- Cooperating with authorities performing response actions and responding to any requests for information or subpoenas;
- Complying with land use and institutional controls; and
- Having no affiliation with a potentially liable party.

The burden is on the person claiming to be a BFPP to demonstrate that all of the conditions of the defense are met. The promulgation of a state BFPP defense helps reduce potential uncertainty and

concerns regarding environmental risks in purchasing and developing brownfield properties and brings Ohio in line with other states that have already adopted similar laws. These amendments are important to encourage and facilitate the redevelopment of blighted and contaminated properties in Ohio.

For more information please contact [Chris Kim Kahn](#), [Suzanne Fisher-Edwards](#), [Kevin N. McMurray](#), or any attorney in Frost Brown Todd's [Environmental Practice Group](#).

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