

PA 09-235—sHB 6097

Commerce Committee

Planning and Development Committee

Appropriations Committee

Judiciary Committee

AN ACT CONCERNING BROWNFIELDS DEVELOPMENT PROJECTS

SUMMARY: This act makes many changes affecting the regulatory framework for identifying, investigating, remediating, and developing contaminated property (brownfields). It expands the protections from liability for municipalities when entering and inspecting brownfields and acquiring and conveying them to other parties. It also expands the circumstances under which municipalities are exempted from the Transfer Act when acquiring and conveying a potentially contaminated property (i. e. , an establishment).

The act changes some of the rules under which parties may convey brownfields. Under the Transfer Act, the party conveying an establishment cannot do so until it assesses its condition and, if contaminated, identifies who will remediate it. The party is liable for damages if it transfers the property without complying with the Transfer Act. The act sets deadlines for remediating the property after transfer. It also sets conditions under which a party could transfer the property while the groundwater is still undergoing long-term monitoring and remediation.

The act establishes a program protecting brownfield developers from liability for contamination that escapes from a brownfield before they acquired it. It also allows any party, rather than just the owner or a municipality, to assess the property's environmental condition based on state criteria.

Lastly, the act reduces the regulatory criteria state agencies must meet when developing contaminated mill sites in floodplains. It also requires state agencies and quasi-public agencies to provide for the use of green remediation technologies when soliciting bids, requesting proposals, or negotiating contracts for remediating brownfields.

EFFECTIVE DATE: October 1, 2009, except for the floodplains, municipal Transfer Act exemptions, and municipal inspection provisions, which are effective upon passage, and the developers' liability protections and innocent third party status, which are effective July 1, 2009.

§§ 8, 9, & 10— REMEDIATING PROPERTY UNDER THE TRANSFER ACT

The act imposes a deadline for remediating certain establishments under the Transfer Act, which requires the parties involved in the transfer of certain property to assess its environmental condition and remediate it if necessary. The parties must do this if the establishment was used for dry cleaning, furniture stripping, or vehicle repair or generated at least 100 kilograms of hazardous waste per month. They must also comply with the act if hazardous waste generated at another site was recycled, reclaimed, reused, stored, handled, treated, transported, or disposed of at the property.

By law, the parties must notify the Department of Environmental Protection (DEP) commissioner about the transaction and their knowledge of the establishment by submitting a “Form III. ” The form must also identify the party responsible for investigating and remediating the property (i. e. , certifying party). The commissioner must notify them if the form is complete. Parties must submit a “Form IV” when any preexisting contamination is remediated. They must also agree to monitor the remediation, investigate any signs of

contamination, and record an environmental land use restriction.

Prior law required a certifying party to submit a schedule for investigating and remediating an establishment after submitting a Form III or Form IV. It imposed this requirement on a party submitting a Form IV even though it signifies that the establishment was investigated and remediated. The party submitted the schedule after the commissioner notified it that the relevant form was complete. Prior law also required a party submitting either form to finish investigating the establishment within two years after receiving the commissioner's notice and begin remediating it within three years of that date. The act limits these requirements to only parties submitting a Form III.

The act requires certifying parties to a Form III or IV to finish remediating the establishment or record an environmental land use restriction within eight years of the commissioner's notice, unless she specified a later date. These requirements apply to certifying parties submitting a Form III or a Form IV on or after October 1, 2009. Prior law imposed no deadlines for completing remediation.

The act also requires certifying parties to a Form IV to submit a schedule for monitoring the groundwater for contamination and recording an environmental land use restriction, as applicable.

By law, the remediation must meet DEP standards. The certifying party or a licensed environmental professional (LEP) acting on its behalf must verify the remediation by submitting a final verification report to the commissioner. The act creates an alternative remediation procedure for Forms III and IV submitted after October 1, 2009. It allows a LEP to certify that the soil has been remediated and that the groundwater is being remediated under a long-term remedy (i. e. , interim verification).

To meet this standard, an LEP must submit a written opinion to the commissioner stating that:

1. the investigation was performed according to current standards and guidelines;
2. the property, except for the groundwater, was remediated according to DEP standards;
3. a long-term remedy for remediating the groundwater is being implemented; and
4. there is no pathway by which the polluted groundwater can escape.

The written opinion must also identify the remedy and how long it is expected to take. It must describe what needs to be done to operate and maintain the remedy.

The certifying party must operate and maintain the remedy according to the remedial action plan, the interim verification report, and any approvals by the commissioner. It must also prevent exposure of the groundwater plume and submit annual status reports to the commissioner. A party submitting a Form IV must also submit a schedule for monitoring the groundwater and recording an environmental land use restriction, as applicable.

The certifying party must achieve the standards for interim verification within eight years of the commissioner's notice, unless she specified a later date in writing. The requirement applies to Form III and Form IVs submitted on or after October 1, 2009.

§§ 2, 3, 4, & 6 — MUNICIPAL DEVELOPMENT ORGANIZATIONS

Existing law grants various powers and protections to municipalities and, in some cases, municipal economic development agencies involved in different aspects of brownfield remediation. The act extends these powers and protections to other municipal development agencies and private organizations acting on a municipality's behalf (i. e. , municipal development organizations (MDOs)).

MDOs are (1) redevelopment, municipal development, and implementing agencies and (2) nonprofit economic development corporations and nonstock or limited liability companies (LLCs). A nonprofit economic development corporation qualifies as a MDO if it was formed to promote the municipality's common good, general welfare, and economic development and receives funds or in-kind services from the municipality. A nonstock corporation or LLC qualifies if it was established by the municipality or its economic development, redevelopment, or municipal development agencies and operates under their control.

§ 5 — RECOVERING DAMAGES UNDER THE TRANSFER ACT

As explained above, the Transfer Act requires the party transferring a contaminated property (transferor) to assess its condition and identify who will clean it up before transferring it to another party (transferee). The law holds the transferor strictly liable for all cleanup costs and direct and indirect damages for failing to comply with the Transfer Act's requirements. It also allows the transferee to sue, or recover from, the transferor any damages the transferee suffers because the transferor failed to comply with the Transfer Act.

The act imposes deadlines for starting this recovery action. It requires the transferee to do so within six years after the later of:

1. the due date for filing the appropriate Transfer Act form or
2. the date the transferee filed the form.

The act implicitly applies these deadlines to actions to recover investigation and remediation costs by applying them to any recovery action except those that are closed and no longer appealable on or before October 1, 2009.

Existing law imposes a two-year deadline on parties exposed to a hazardous substance to seek recovery for personal injury or property damage (CGS § 52-577c).

§ 6 — MUNICIPAL INSPECTION POWERS

Inspecting Agencies

The law sets conditions under which municipalities (or LEPs acting on their behalf) can enter and inspect contaminated property without liability. The act specifically extends this authorization to municipal economic development agencies and MDOs.

Ground for Appealing Municipal Entry and Inspection

The act also changes the grounds under which an owner may appeal a municipality's decision to enter and inspect his or her property. By law, the municipality must notify the owner before it or the LEP can enter the property.

In bringing the appeal under prior law, the owner had to represent that he or she was diligently investigating the property in a timely manner and would pay all delinquent property taxes. Under the act, the owner must show that access is not necessary and prove that he or she:

1. has completed or is completing a comprehensive environmental site assessment or investigation report;
2. gave a copy of the report to the party intending to enter the property (i. e. , the municipality, MDO, or LEP) or plans to do so within 30 days after the owner received a copy of the assessment report; and
3. paid any back taxes on the property.

Liability

The act changes the extent to which municipalities and LEPs are liable for their actions when entering and inspecting a property. Under prior law, they could enter and inspect a property without liability to anyone except the DEP commissioner. The act allows them, including economic development agencies and MDO, to do so without any liability.

The act also broadens their protection from liability when entering and inspecting property. Under prior law, a municipality was not liable for any preexisting contamination or pollution unless it caused the contamination or pollution to spread by negligently or recklessly inspecting the property. But the municipality received this protection only when it acted under orders the DEP commissioner issued to address a potential pollution source.

The act extends the protection to more types of corrective orders the commissioner issues to address preexisting conditions. Besides orders to address potential pollution sources, the act extends the protection to (1) orders to a property's owner to correct actual or potential pollution sources when another party is responsible for the pollution and (2) recovery actions initiated by the commissioner and other parties. The municipality is not liable to the property owner or third party for preexisting conditions under these orders if it:

1. did not cause or contribute to the contamination or pollution,
2. did not negligently or recklessly exacerbate it, and
3. complies by reporting pollution on or emanating from the property to the commissioner as the law requires.

If the municipality negligently or recklessly caused the contamination to spread, it must address only the contamination resulting from its activities.

MUNICIPALLY ACQUIRED AND CONVEYED BROWNFIELDS

§ 2 — Transfer Act Exemptions

The act broadens the circumstances under which municipalities are exempt from the Transfer Act when acquiring and conveying establishments. Existing law broadly exempts government and quasi-government agencies from the Transfer Act when acquiring an establishment (CGS § 22a-134 (1) (U)). It also exempts conveyances to specific MDOs and the Connecticut Development Authority or its subsidiaries (CGS § 22a-134 (1) (P)).

Existing law also exempts municipalities from the Transfer Act when acquiring a property by foreclosing on a tax lien or through a tax warrant sale. The act extends this exemption to establishments they purchase under a legislative body resolution authorizing them to take them by eminent domain. It also extends the exemption to establishments they take by eminent domain under the redevelopment, municipal development community development, or the Manufacturing Assistance Act statutes. In doing so, the act exempts the redevelopment agencies and other MDOs that take and convey property under those statutes.

The act also exempts the municipality from the Transfer Act when it conveys the condemned property. It does so if:

1. the municipality or the party to whom it conveyed the property began remediating it under DEP's voluntary clean-up program before the municipality conveyed it and
2. the party is neither responsible for the contamination nor affiliated with the party that is.

The exemption applies when the municipality, an economic development agency, or an MDO transfers the property among themselves.

Prior law limited this exemption to property a municipality acquired by foreclosure and that was being remediated under the Department of Economic and Community Development's (DECD) Brownfield Remediation Pilot Program, under which selected municipalities receive funds and technical assistance for investigating and remediating property according to DEP standards.

The act exempts the conveyance of foreclosed property regardless of whether it is being remediated under the pilot program. It also exempts the conveyance of any property being remediated under that program, regardless of whether the municipality acquired it through foreclosure. But in both cases, the property must meet the same conditions that apply to the conveyance of condemned property.

§ 3 — Liability Protections for Developers Acquiring Remediated Property

The law protects developers from liability when acquiring brownfields remediated under DECD's Brownfield Remediation Pilot Program. Under prior law, they enjoyed this protection only if a municipality or its economic development agency remediated the property. The act extends the protection to developers acquiring a property that was remediated by an MDO on a municipality's behalf. It also appears to extend the exemption when they acquire the property directly from the MDO.

In doing so, the act extends an additional benefit to these developers. By law, DEP must enter into a covenant not to sue with a developer who acquires a property from the municipality or its economic development agency after remediating it according to DEP standards. DEP must do so without charging the statutory fee, which equals 3% of the property's value. The covenant protects the developer from future DEP orders to investigate and remediate pollution on the site. The act appears to extend this benefit under the same conditions to developers who acquire remediated property from MDOs.

The act also extends a benefit to MDOs that was previously limited to the municipalities and their economic development agencies. It allows them to keep 20% of the sale proceeds for economic development capital improvements. (The remaining 80% must go to DECD's Brownfield Office for deposit in the General Fund.)

§ 4 — Innocent Third Party Status

The act specifies the circumstances under which municipalities qualify as “innocent third parties,” a designation that, under specific conditions protects them from liability to DEP for cleanup costs. Prior law limited this designation to municipalities and municipal economic development agencies that received Brownfield Remediation Pilot Program funds for investigating and remediating contamination. The designation applied only if the parties did not cause, contribute to, or exacerbate the contamination and complied with DEP's reporting requirements.

The act specifically extends the status to MDOs that receive brownfield investigation and remediation grants under any DECD program. But it also tightens the designation criteria by applying it only if these entities did not establish, as well as cause, contribute to, or exacerbate the contamination and comply with DEP's reporting requirements.

The act also specifies the circumstances under which an entity is liable for cleanup costs. It does so by:

1. specifying that the innocent third status applies only to conditions that existed or exist on the property when an entity acquired or took control of the property as long as it did not establish, cause, contribute to, or exacerbate the pollution and
2. requiring the entity to address any contamination it exacerbated by negligent or reckless action.

§ 7 — ABANDONED BROWNFIELD CLEANUP PROGRAM

Benefit

The act establishes a program protecting developers from liability for investigating and remediating pollution that emanated from a property before they acquired it. The DECD commissioner must establish the program in consultation with the DEP commissioner.

Application Requirements

A developer must apply to the DECD commissioner for the program's benefit on forms she provides. The commissioner has up to 60 days after receiving the application to determine if it is complete and notify the developer. The commissioner has 90 days after determining the application is complete to decide whether to award the program's benefit.

The act specifies that the commissioner's approval does not disqualify the developer or the property from funding under other brownfield remediation programs administered by DEP, the Connecticut Development Authority, or DECD.

Eligible Criteria

The property and the developer must meet the act's criteria to qualify for the program. The property must have been unused or significantly underused since October 1, 1999 and its redevelopment must benefit the municipality and the region.

The property must also meet the statutory definition of brownfield. Under that definition, a property is a brownfield if it has not been redeveloped or reused because it is contaminated or potentially contaminated. The contamination could be in the groundwater, soil, or buildings. It must be investigated, assessed, and cleaned up while the property is being restored, redeveloped, or reused or before these activities can occur. Lastly, the property must meet any other criteria the DECD commissioner establishes.

The developer qualifies for the program if the person or organization responsible for polluting the property cannot be identified, no longer exists, or cannot remediate the property. In addition, the developer qualifies if he or she:

1. intends to acquire title to the property so that it can be redeveloped;
2. did not establish or create a facility or condition at or on the property that could reasonably be expected to pollute water;
3. is unaffiliated with the party responsible for the pollution or its source through any direct or indirect familial, contractual, corporate, or financial relationship other than the one through which the property is conveyed or financed; and
4. is not required by law, a stipulated judgment, or an order or DEP consent order to remediate the pollution on or emanating from the property.

The commissioner may approve the developer for the program if he or she meets the above criteria and takes title to the property. If she does, the developer must:

1. remediate the property under DEP's voluntary remediation program as long as the developer is not also responsible for certifying the property's remediation under the Transfer Act,

2. investigate the property according to current standards and guidelines and remediate it according to state standards, and
3. eliminate any pollution that emanated or migrated from the property before the party took title.

In addition, someone other than the developer must certify the property's remediation when it is transferred.

§ 1 — REDEVELOPING MILLIS IN FLOODPLAINS

The act makes it easier for state agencies to use or allow others to use mills on contaminated floodplain sites. By law, an agency cannot implement or assist any type of project in a floodplain without first certifying to the DEP commissioner that the project meets specific criteria and that the agency will do things to mitigate or prevent increased flooding. Among other things, the agency must certify that the project promotes long-term nonintensive uses and does not encourage new development in the floodplain by constructing or extending utilities needed to support that development.

The act exempts the agency from having to certify that the proposed use meets this condition if it can show that:

1. the use complies with DEP remediation standards,
2. the use is limited to the site of the mill's historic use,
3. residential dwellings or other critical activities are above the 500-year flood elevation (i. e. , the elevation that has a 1: 500 chance of being flooded in any given year), and
4. the use complies with the National Flood Insurance Program.

If the agency cannot show that the project meets these criteria, it may, as under existing law apply to the commissioner for an exemption from the certification requirement.

BACKGROUND

Related Acts

PA 09-141 makes identical changes to the floodplain law.

OLR Tracking: JR: KM: SS: ts