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# New Law Offers Major Opportunities for Brownfield Revitalization

By Gary B. O'Connor and Jean Perry Phillips



This year's legislative session will be remembered for the passage of tax increases and major program cuts made as part of the effort to address Connecticut's record budget deficit. One bright moment occurred, however, when the General Assembly unanimously approved legislation which, at no direct taxpayers' expense, will help spur economic development, clean up our brownfields, promote the conservation of natural resources, and restore Connecticut's position as one of the leaders in brownfield redevelopment. Public Act 11-141, An Act Concerning Brownfield Remediation and Development as an Economic Driver (the Act), which was supported and recently signed by Governor Dannel Malloy, creates an entirely new program to facilitate the revitalization of brownfields, expands the scope and benefits of existing brownfield programs, and fine tunes existing laws and programs dealing with environmental investigation and remediation. Brownfield developers, municipalities, financial institutions, and other stakeholders all will benefit from this legislation.

Brownfields are defined (in the Act) as abandoned or underutilized sites where redevelopment, reuse, or expansion has not occurred due to the presence or potential presence of pollution in the buildings, soil, or groundwater that requires investigation or remediation before or in conjunction with the restoration, redevelopment, reuse, and expansion of the property. Most commentators agree that brownfields are,

in part, the unintended consequence of the many federal and state laws crafted in the 1970s and 1980s to address legitimate public health concerns and pervasive environmental problems. Unfortunately, the rather broad scope of these laws made it economically infeasible for many companies to expand or even continue operations on certain contaminated sites and incentivized others to abandon or mothball their properties in order to escape—or at least defer—the required investigation and remediation.

Although much progress has been made in stemming the contamination of additional sites and identifying and remediating others, brownfield properties have continued to remain a blight in our communities. This is largely due to uncertainties associated with investigation, remediation, and time related to the development of these sites as well as potential liability to third parties. As a result, private developers and the financial community have, for the most part, avoided brownfields in favor of undeveloped sites. Many states, including Connecticut, have recognized the vital importance of remediating and redeveloping brownfield sites and have passed laws and created new programs in order to provide more certainty and incentives to the development community. To date, these laws and programs have had limited success.

Brownfield revitalization is critical to Connecticut, which has thousands of brownfields. These sites, where manufacturers

once produced goods for the world, are now abandoned or underutilized, pose potential threats to human health and the environment, and threaten the viability of many of our municipalities. Every city and town in Connecticut has at least one brownfield. Moreover, brownfields are a major impediment to urban redevelopment and sustainable growth within the state.

Looked at from a different perspective, however, brownfield sites offer enormous opportunities. When a brownfield is developed, it often means that a “greenfield” or open space is spared and infrastructure development leading to sprawl can be avoided. When a brownfield is returned to sustained productive use, it often means that properties are added to the grand list, jobs are created, existing infrastructure is utilized, neighborhoods are revitalized, and blight reduced if not eliminated.

The Connecticut General Assembly, in recognition of the many potential benefits of developing brownfields at this critical economic juncture, took bold and decisive action in passing the Act. Support was widespread, vocal, and crossed party lines. The Act accomplishes so much at minimal expense by taking a practical approach to those brownfields that have proven intractable under our current regulatory scheme. Eligible properties are not the celebrity brownfields found on the National Priorities List (Superfund sites) which possess a myriad of complex environmental con-

cerns; rather, they are specifically targeted brownfield sites with manageable environmental issues and considered important to the revitalization of communities within Connecticut.

The Act sends a clear signal to developers, municipalities, lenders, businesses, and others in the economic development community that Connecticut is willing to provide the necessary incentives to encourage the revitalization of our brownfields. At the same time, the Act recognizes the absolute import of adequate investigation and remediation to appropriate and consistent standards.

### **A New Brownfield Remediation and Revitalization Program**

The centerpiece of the new legislation is the creation of a new Brownfield Remediation and Revitalization Program (Section 17 of the Act). The program limits the scope of investigation and remediation to the eligible site, expedites the timetable for investigation and remediation of sites and the audit of same by the Connecticut Department of Energy and Environmental Protection (DEEP), and limits program participants' liability to the state and third parties.

The program is limited to 32 properties each year and will be administered by the Department of Economic and Community Development (DECD) in conjunction with DEEP. DECD is in the process of formulating an application form and will be looking to accept applications by October 1st of this year. The application process will include a threshold determination of eligibility based on the following factors:

- the applicant is a bona fide prospective purchaser, innocent land owner, or contiguous property owner
- the property is a brownfield and the subject to a release
- the applicant is not responsible for pollution to the waters of the state and is not responsible pursuant to any other provision of the general statutes for any pollution on the property
- the applicant is not affiliated with any person responsible for the pollution, and
- the property is not currently subject to any enforcement action, on the national or state priorities lists or subject to RCRA corrective action

In order to assure a diversity of project types and locations, DECD will also consider the following factors in selecting eligible applicants:

- potential for job creation and retention
- sustainability
- readiness to proceed
- geographic distribution of projects
- population of the municipality where the property is located
- project size
- project complexity
- duration and degree to which the property has been underused
- projected increase to the municipal grand list
- consistency of the property as remediated and developed with municipal or regional planning objectives
- development plan's support for and furtherance of principles of smart growth or transit-oriented development, and
- other factors as may be determined by the Commissioner of Economic and Community Development

Applicants will also need to provide a title search, a Phase I environmental site assessment done to specified national and state standards, a current property inspection, and other items as determined by DECD necessary to the process.

Inclusion in the program will not affect eligibility for other brownfields grant and loan programs. If selected, applicants will be required to pay a fee equal to 5 percent of the assessed land value of the brownfield site as of the municipality's most recently completed grand list. Fee waivers are possible. This fee will be substantially reduced if certain investigatory and remedial benchmarks are achieved within specified timelines. Municipalities are not required to pay a fee except upon transfer of the property.

Upon acceptance into the program, the selected applicant must investigate and remediate the property in accordance with prevailing guidelines and standards under the supervision of a Licensed Environmental Professional (LEP). However, the duty to investigate and remediate is limited to the boundaries of the property. This change removes a major impediment to brownfield redevelopment. For years, developers have

been unwilling to redevelop certain brownfield sites because of the uncertainties of cost, time, and liability associated with having to investigate and remediate off-site any potential contamination originating from the brownfield property.

Moreover, the new brownfields remediation and revitalization program will expedite the investigation and remediation of eligible brownfield sites by requiring program participants to adhere to an aggressive timetable. A selected applicant must provide an investigation plan, and schedule, prepared by an LEP, within 180 days of application approval. The investigation must be completed within two years of the application approval date, and the remediation started within three years of that date and completed within eight years of that date. The remediation completion date may be extended by DEEP if reasonable progress has been made but forces beyond the participant's control have delayed completion.

As a tradeoff for the expedited timeline requirements placed on program participants, DEEP is subject to specific audit deadlines. DEEP must notify any participant within 60 days of receiving a remedial action report and verification of DEEP's intent to conduct an audit of the participant's remedial activities. DEEP must conduct the audit within 180 days. There are some limited exceptions to the audit deadline (i.e., participant's submission of inaccurate information or the existence of a substantial threat to public health or the environment); nevertheless, the audit deadlines provide additional certainty to developers that DEEP cannot, except under extraordinary circumstances, cause additional time delays or require additional investigation or remediation once the audit deadlines have passed.

Another major incentive contained in Section 17 involves additional liability protection for program participants, namely immunity from liability to the state or any third party for costs relating to releases from the brownfields' addressed on-site and any historical off-site impacts. This relief is not available with regard to certain PCB and UST responsibilities; the Act specifies that any obligations under the PCB and UST regulations are not affected.



These liability protections can be extended to eligible subsequent owners upon the payment of an additional \$10,000 fee.

A transfer of the property that occurs prior to the conclusion of the audit process will not destroy the immunity of a participant if the program requirements are ultimately fulfilled. Interestingly, the immediate prior owner is similarly released from liability regardless of such owner's eligibility for the program after the program requirements have been fulfilled, but only if the owner has fulfilled its legal obligations regarding the investigation and remediation of releases at and from the property. This grant of immunity to the former owner does not extend to releases beyond the boundary of the eligible property. The former owner also remains liable for penalties and fines relating to releases at or from the property and for any obligations as a certifying party under the Transfer Act.

Section 17 exempts program participants and their transferees who have qualified for the program from filing as an establishment under the Transfer Act, although any existing obligations of any participant as a certifying party under the Transfer Act at the time such participant enters the program shall remain. Finally, Section 17 clearly states that any new releases must be fully investigated and remediated.

The new Brownfield Remediation and Redevelopment Program is a decisive step forward and should have the desired effect in helping to spur the revitalization of Connecticut's brownfields. However, the program will only be successful if the agencies charged with its administration, DECD and DEEP, make it a priority and allocate the appropriate resources to its implementation. The program was effective July 1st of this year and DECD should be looking to accept applications by October 1st at the latest. Potential applicants should be evaluating brownfield sites and preparing for the application process now.

### **Enhancement of Abandoned Brownfield Cleanup Program**

Although Section 17 of the Act has received most of the attention, the provisions of the Act relating to the existing Abandoned Brownfield Cleanup Program (ABC Program) may prove to have as significant an impact on brownfield revital-

ization, especially for municipalities and economic development agencies. Section 9 of the Act expands eligibility and provides critical enhancements to the ABC Program. Previously, eligibility was based on seven factors relating to the applicant or the property to be entered into the program. Under Section 9 municipalities, economic development agencies and their subsidiaries as well as certain nonprofit economic development corporations are now eligible. Likewise, two major impediments relating to eligible properties have been addressed. The time period in which an eligible property must be abandoned or underused has been changed from a period commencing October 1, 1999 to five years prior to the date of the application. The requirement limiting eligible properties to those where the party responsible for polluting the property is (1) no longer in existence, (2) indeterminable, or (3) unable to pay for any remediation has been revised to include properties where the party responsible for the pollution is required by law to remediate releases on and emanating from the property. This addition has the practical effect of expanding eligibility to a significant number of other brownfield sites.

Section 9 offers liability immunity to participants in the ABC Program. A participant will no longer be liable to the state or any third party for the release of any pollutants at or from the property prior to the participant taking title to the property. In addition, upon a participant's completion of the requirements of the ABC Program, DEEP will provide a covenant not to sue to such participant.

Section 9 also exempts an eligible participant from filing as an establishment under the Transfer Act.

### **Additional Refinements to Brownfield Laws and Remedial Programs**

In addition to the creation of the new Brownfield Remediation and Redevelopment Program and the enhancement of the ABC Program, the Act contains several common sense provisions that should facilitate the remediation of properties under other programs. These include:

- Limiting the responsibility of a certifying party to investigate or remediate under the Transfer Act to releases which occurred

before the later of (1) the completion of a Phase II investigation or (2) the date of filing of a Form III or Form IV. (This is a significant improvement that should facilitate the transfer of establishments that are now often impeded by efforts to meaningfully apportion responsibility for cleanup to pre- and post-transfer owners or operators. Before this change, the statute required the certifying party to be responsible for the investigation and remediation of any release up to verification. Given the substantial time it sometimes takes to investigate and remediate post closing, this was problematic at best and inherently unfair.)

- Allowing DEEP to reclassify surface and groundwater consistent with state and federal standards and requirements. Detailed procedures for this, including notice and public hearing requirements, are set.

- Exempting governmental agencies, private entities, and nonprofit organizations from paying certain DEEP fees if they receive funds from the state for investigating and remediating brownfields.

- Exempting municipalities and the bankruptcy court from Transfer Act obligations when transferring properties to nonprofit organizations.

- Allowing DEEP to waive some of the requirements for recording environmental land use restrictions (ELURs) and release certain parties from them. More importantly, DEEP is directed to waive the requirement that a subordination agreement be obtained for interests in a property that do not create the conditions that the use restriction prohibits. (ELURs are instruments recorded in the municipal land records that prohibit specific uses or activities at a property used as part of the remedial effort. As part of the ELUR process, the owner of the property is required to record agreements from all parties having an interest in the property subordinating their interest to the ELUR. This can be an insurmountable task since many of these property interests were created decades ago and the owners of those interests cannot be found; often the subordination of such property interests has no discernible benefit. DEEP now must waive this requirement if the interest, when acted upon, is not capable of creating a condition contrary to any purpose of such environmental use restriction.)

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## Brownfield

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- Requiring DEEP to undertake a comprehensive evaluation of the state's remediation programs and laws with an aggressive timeline which requires a report by December 15 of this year. DEEP has already demonstrated its commitment to this task by holding public visioning sessions and is now forming work groups open to stakeholders. The new commissioner of DEEP, Daniel Esty, is taking an active role in the comprehensive evaluation, as he did in helping to draft this year's brownfield legislation. His leadership will prove critical to producing a meaningful set of recommendations in such a short timeframe.

Finally, existing brownfield programs are considerably strengthened, as well:

- the Office of Brownfield Remediation and Development's powers and duties are updated
- the municipal brownfield pilot program is made permanent, and

- more brownfields are made eligible for state funds

### Moving Forward

While recognizing the progress made in this Act, we must also acknowledge that there is much room for further improvement. For instance, the timelines contained in the Section 17 program should be made universal to all verification and RAP submittals to DEEP. There should be a reevaluation of the site characterization guidance document and its implicit presumption of a release. The institutionalization of presumptive remedies must be seriously considered and a mechanism whereby investigatory and remedial options can be vetted with a regulator on a timely basis should be implemented. For now though, every stakeholder, every taxpayer, and every citizen should applaud the hard work undertaken by the legislature and look forward to the results we are sure to see.

With the full array of brownfields remediation and redevelopment programs now in place when combined with the authorization of \$25 million for brownfield remediation in each of the two fiscal years of

the current state budget, Connecticut sends a strong message to the business and development community that brownfields revitalization is a priority. Careful planning and consideration of the many programs and incentives should reap substantial benefits for brownfield developers. Just as importantly, all of us will benefit from the remediation of these properties and their return to productive use. It is a win-win opportunity, increasingly rare in these tough economic times. Our state leaders should be commended for recognizing the enormous benefits brownfields revitalization will have on the economic well-being of the state. **CL**

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