Connecticut Law Tribune
APRIL 11, 2011
VOL. 37 • NO. 15
An ALM Publication
CTLAWTRIBUNE.COM

With Changes, Bill Would Help Environment, Economy

Comprehensive brownfields measure could spur development, attract jobs

By BARRY TRILLING

No one appears to disagree that contaminated properties that lie boarded up, idle, or under-utilized burden the state of Connecticut. Further, public resources to clean up these sites are increasingly scarce and, if not cleaned up and redeveloped, these sites threaten public health and the environment. Remediation and redevelopment of these sites would result in job creation and enlarged tax bases.

Connecticut's brownfield "problem" demands a brownfield "solution." Our historical piecemeal and disjointed legislative efforts lag sadly behind other states in returning brownfields — large and small — to productive reuse. We need a comprehensive one-stop program specifically designed to encourage, attract, and incentivize innocent owners and developers, to commit and attract private resources to purchase, investigate, and to clean up and redevelop these sites Such a program appears as Section 17 of Raised Bill 6526, introduced in early March.

This one-stop comprehensive program provides clarity, predictability, simplicity, certainty, and efficiency, all geared to attract redevelopment and jobs in tough economic times with scarce public resources. The bill also aims to shift the expenditure of funds for cleanup of brownfield sites from public to private sources. With the exception noted below (which the legislature should change before enactment), Section 17 provides needed reforms for resolving risk and liability issues for innocent parties in a manner that will attract redevelopment and jobs while preserving environmental goals.

Section 17 uses many of the same procedures as the current Voluntary Remediation Programs found in sections 22a-133 et seq. of the Connecticut General Statutes and is consistent with all the state's requirements for site-wide cleanup. Yet, it provides a more streamlined and faster process.

Key points:

- Only innocent persons or entities that did not cause the contamination at an eligible property and who do not have any relationship or association with any person who is or may be responsible for contamination at the eligible property may apply to participate in this program.
- Upon approval of an application to the program, in exchange for protection from liability for the contamination which it did not cause, the participant agrees to conduct a comprehensive investigation of the property and to clean up the contamination within the property boundaries. This participant must report to the state any significant environmental hazards found to be migrating off-site, as currently required under state law.
- Before initiating remediation of the property, the participant must submit a remedial plan for Department of Environmental Protection approval, provide the same public notice required for all current site cleanup programs, and then remediate the site to meet the same State cleanup standards (the Remediation Standard Regulations) required for all current cleanup programs.

Barry Trilling

- Program participants will receive expedited permitting and reliable approval timeframes to avoid costly and unreasonable delays in site remediation, thereby avoiding delays in site redevelopment.
- Upon completion of remediation, the participating party must submit a final cleanup report for DEP approval. The DEP may audit and review the cleanup plan as it now does for all current site cleanup programs.
- Most important, upon approval of the remediation, the DEP shall issue a Notice of Completion of Remedy and No Further Action Letter, a necessary and definite end point for the innocent redeveloper.

Barry J. Trilling is the partner who leads the Climate Change and Sustainable Development group at Wiggin and Dana LLP. He assists clients on a variety of matters with regard to the environment, "green" business and real estate issues, including site remediation and brownfields matters. This article is based on an analysis of Section 17 of Raised Bill 6526 on which the author worked with Wiggin and Dana associate Anika Singh Lemar and attorney Nancy Mendel of New Haven's Caplan, Hecht & Mendel.

THIS ARTICLE IS REPRINTED WITH PERMISSION FROM THE APRIL 11, 2011 ISSUE OF THE CONNECTICUT LAW TRIBUNE. © COPYRIGHT 2011. ALM MEDIA PROPERTIES, LLC ALL RIGHTS RESERVED. DUPLICATION WITHOUT PERMISSION IS PROHIBITED. ALL RIGHTS RESERVED.

LAND USE & ENVIRONMENTAL LAW

Viewed as a whole, the bill moves significantly toward spurring private development of brownfield sites without the use of public funds. However, the bill as proposed includes two *unnecessary and devastating* impediments which, if not removed, will frustrate the goal of providing a certain, clear, and safe pathway to encourage innocent eligible parties to redevelop these contaminated sites.

First, the bill puts a limit on the number of eligible properties to "no more than twenty properties at a time." The state should encourage as many eligible parties and sites as possible to enter this program, resulting in the greatest number of sites being remediated with private funds and maximum economic development and job creation.

Any concern regarding agency staffing and administrative costs involved in reviewing more than 20 applications could be addressed by adding provisions that impose application fees and reimbursement of costs for agency administrative expenses, similar to systems in other states.

Second, the eligibility criteria are based on economic planning, job creation, and other non-environmental discretionary factors. This program provides no public funding and as such, eligibility should be limited *only* to whether a party meets the test of an innocent party with respect to site-contamination and the site itself meets the statutory definition of a brownfield.

The various non-environmental "public policy" elements in Section 17 as introduced may be appropriate for considering how to allocate scant public funds. Imposing socio-economic political factors for eligibility determinations, however, will discourage use of the program for all but the largest projects while hundreds, if not thousands, of smaller sites that desperately need remediation will never attract the attention of an interested developer.

Putting discretion over eligibility for liability relief in the hands of appointed government officials will require developers to devote limited funds to political "beauty pageants" in which they will have to risk their money on the comparative sexiness of their projects. Cleanup of a contaminated property should not depend upon a "Miss America" type selection process: contingent economic factors will surely prejudice certain communities and sites.

The requirements for application should be clear and equitable, which will require removing the numerical and subjective elements from Section 17.

Raised Bill 6526 comprises an innovative effort to attract private investment to redevelop and clean up our state's Brownfield sites for productive reuse and job creation. Once the limitations on the number of sites and the imposition of non-environmental criteria now proposed in HB 6526 are removed, and some other important details are ironed out, the bill will deserve the ardent support of those who seek to achieve both a clean environment and a strong economy. ■