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Haydock discusses the Connecticut Transfer Act passed as a "Buyer Beware" law 25 years ago

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The Connecticut Transfer Act is 25 years old. The statute was passed by the Connecticut Legislature as a "Buyer Beware" law in 1986 to help protect purchasers of properties with environmental liabilities due to releases of hazardous substances to soil and ground water, and as a means for the State of Connecticut to capture a responsible party for such releases. The Transfer Act requires the thorough investigation of all potential release areas or areas of concern at a property or business that meets the definition of an Establishment, as defined by the Act. It also requires the remediation of identified release areas with regulated compounds in soil and ground water at concentrations above the state action levels.

While written and passed with good intentions, the Transfer Act continues to be an impediment to economic development in Connecticut. As recently as last week, a client with a plan to create market rate apartments at a former industrial property adjacent to a downtown area with a train station, restaurants and shopping stated, "If the site is an Establishment and we have to go through the Transfer Act, then the deal is dead."

The Transfer Act need not be a deal killer. Transfer Act properties can be redeveloped in a cost-effective and timely manner, even if contaminated, with guidance from an experienced environmental consultant. However, this client's reaction is common and demonstrates the negative reality of the Act.

From the economic development perspective, the biggest concern related to the Transfer Act is uncertainty of the cost and time to take a property through the investigation and remediation process. There is good reason for this concern. For the first 11 years, all properties subject to the Act were at the mercy of an understaffed and unresponsive CTDEP. Lack of clear and consistent soil and ground water action levels, inconsistent statutory schedule and review requirements, and an insufficient number of CTDEP staff led to the abandonment of many, many properties throughout the state. Complaints over the Act were numerous and frequent, with frustrated parties including landowners, businesses, developers, municipalities, and the CTDEP.

In 1997, the first major revisions to the Transfer Act were enacted. These included the creation of the Remediation Standard Regulations (RSRs) and the Licensed Environmental Professional (LEP) program. The RSRs created definitive soil and ground water standards with the intent of eliminating uncertainty about clean-up goals and standards, while the LEP program was designed to allow qualified environmental professionals manage the investigation and remediation process in a prescribed manner and to achieve closure quicker and cheaper. While improvements in the process have been realized, time to site closure is still quite lengthy and financial uncertainty remains a significant factor for developers looking at potential development properties.

More recent changes and improvements to the Transfer Act include statutory milestones regarding

completion of the site investigation process and initiation and completion of remediation; automatic delegation of transferred Establishments to the LEPs; and improved liability relief for municipalities and developers who have no association with past releases at a property. However, one of the biggest obstacles to developing Transfer Act properties remains the uncertainty of the impact on cost and schedule early in the development process. Developers are willing to take risks, but only if the potential return on investment are real. Developers need to complete a proforma to establish the financial parameters for a successful development project early in the life cycle of a project. This is often complicated by the time and cost required to complete sufficient investigation in order to understand the cost and schedule to achieve closure under the Act. One of the biggest challenges that face LEPs is to provide the developer with an accurate cost to closure with limited investigation. This has been an area under the Transfer Act that remains problematic, as the level of effort required to fully investigate a property to comply with the CTDEP Site Characterization Guidance Document (the standard of care) is extensive. Even properties with no detected releases during initial investigation are required to complete subsequent rounds of investigation to prove that remediation is not required. Sometimes it is easier when the properties are contaminated. The uneven playing field created by the Transfer Act continues to slow the redevelopment of former commercial and industrial properties in Connecticut. Properties that are not subject to the Act continue to have an advantage over those subject to the Act, which leads to more sprawl and development of Greenfields. It is hopeful that the new Connecticut Department of Energy & Environmental Protection (CTDEEP) has a vision for leveling the playing field among all properties and for improved, streamlined clean-ups that are protective of human health and the environment while encouraging economic development.

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