

September 17, 2020

COMMERCE AND ENVIRONMENT COMMITTEES

Listening Session Regarding the Transfer Act and the Transition to a Released-Based Property
Remediation Program

Testimony of Elizabeth C. Barton, Day Pitney LLP

**Bill No. , LCO No. 3962 – An Act Concerning Various Revisions to the Property Transfer Law
and Spill-Based Remediation of Certain Hazardous Waste**

Thank you for the opportunity to testify today on a proposed bill, which I understand is now referred to as LCO No. 3962.

I am an environmental attorney with Day Pitney LLP, resident in our Hartford office. I have been practicing environmental law in Connecticut for over 35 years. My environmental practice encompasses representation of buyers and sellers, owners and operators, and lenders and investors, as well as individuals and municipal and quasi-municipal entities, assisting with environmental matters relating to properties and businesses. I am a member of the Connecticut Bar Association's Environmental Section, the Board of Directors of the New England Council, and also the advisory board of the Brownfields Coalition of the Northeast (BCONE). BCONE focuses on the promotion of the successful disposition and utilization of brownfield properties, particularly in Connecticut, New York, New Jersey, and Pennsylvania. I am testifying today because, when it comes to meeting environmental challenges, I have a continuing commitment to action that will facilitate, and not frustrate or needlessly complicate, the environmentally and economically sound management, disposition and use of Connecticut properties and businesses.

I have had the honor of serving on a number of legislatively created working groups and task forces, including most recently the Transfer Act Working Group created by Public Act 19-75. In addition, during my career, I have participated in many informal stakeholder efforts to review, improve and clarify Connecticut's environmental regulatory schemes, including the multiple regulatory programs to address investigation and, as needed, remediation of the impacts of environmental releases. This participation included working with DEEP and others on the revisions to the Transfer Act, which are in Sections 1 through 14 of the today's bill.

I was a member of the Transfer Act Working Group convened as directed by Public Act 19-75 to develop recommendations for revisions to the Transfer Act. I served as the co-chair of the Working Group's subcommittee looking closely at what constitutes a "transfer" under the Transfer Act, an act which has been part of Connecticut's law since the mid-1980's. All meetings of the Working Group and its subcommittees were open to and attended by many

members of the public in addition to those appointed to serve on the Working Group. Over a six-month period, which included 19 meetings of the Working Group, the subcommittee I co-chaired with Franca DeRosa of Brown Rudnick undertook an in-depth review of the statutory exceptions to, and exclusions from, the definition of “transfer” triggering the Transfer Act. This was an intensive, comprehensive and collaborative process, involving the significant and much appreciated commitment of DEEP throughout. The Transfer Act Working Group Report, dated February 25, 2020, recommends specific revisions to the Transfer Act, which are intended to clarify and make the Transfer Act - for however long it is the law - more workable. While I received LCO No. 3962 this morning and haven’t had the opportunity to review it in detail, I believe these consensus revisions are found in Sections 1 through 14 of the proposed bill. I support the passage of these Sections.

By design and explicit legislative charge, during the six months of its existence, the Working Group did not address or even consider a complete overhaul of Connecticut’s current and multi-faceted regulatory framework for the reporting, investigation and, as needed, remediation of environmental releases. LCO No. 3962 is actually a tale of two separate bills, very different from one another in goal, purpose, scope, and consequences.

The remaining Sections of LCO No. 3962, which are numbered 501 through 509, are not simply a replacement for, or a mechanism to sunset, the Transfer Act as some have been suggesting. These Sections comprise a fundamental and foundational change to and expansion of likely the entirety of Connecticut’s current regulatory process for the reporting, investigation and remediation of releases. Per the current language, releases addressed include those that may have occurred, at any point in time, at any Connecticut property – commercial or residential, publicly or privately held. Covered releases also include releases that may have occurred as part of or during the course of any Connecticut business operation, past or present, small or large, publicly or privately held. While I thank and commend DEEP in particular for its significant efforts over the past two weeks to respond to concerns with the language of these Sections as these concerns have been raised, and I believe these Sections are much improved over where they were two weeks ago, this fundamental and foundational change to Connecticut’s regulatory landscape, with the potential to impact every person, business and property in Connecticut, has not received, and could not receive, even the equivalent of the attention given to the vetting and crafting of the narrowly focused consensus changes to the Transfer Act in Sections 1 through 14.

Importantly, the concerns I, and I believe many others, have with moving ahead now with Sections 501 through 509 as proposed are not because of an issue with moving forward with the framing, development and implementation of a release-based clean-up program in Connecticut. However, in legislating what DEEP has rightly referred to as a “sea change” in Connecticut, I respectfully submit the legislature needs to take head on, and with clarity of language, how this foundational change affects the many existing initiatives and programs, thoughtfully and deliberately put in place by the legislature over the past three decades. These

legislative initiatives include, for example, (1) the statutorily-created Brownfield Remediation and Revitalization Program; (2) the Abandoned Brownfield program; (3) the Municipal Brownfield Liability Relief program; (4) the multiple statutes limiting the liability of municipalities when they access or otherwise make use of properties they didn't contaminate; (4) the lender liability statute; (5) the innocent landowner statute; (6) the bona fide prospective purchaser statute; (7) Connecticut's voluntary remediation program; (8) Connecticut's existing statute governing spills; (9) Connecticut's Significant Environmental Hazards statute; (10) statutes addressing covenants not to sue; (11) the Brownfield Land Bank program; and (12) provisions of the Uniform Trust Code relating to fiduciary liability which went into effect on January 1, 2020. Sorting this out cannot and should not be left to regulations to be adopted by DEEP, particularly regulations which are, at best, a couple of years down the road. Is the message in the interim sufficiently clear?

CBIA's written testimony, while likely not exhaustive, identifies a number of aspects of Sections 501 through 509 in need of further review and collaboration. Among the fundamental concerns about Sections 501 to 509 that I respectfully would submit should be worked through before passage are the definition of "person", the definition of "release", and the definition of "hazardous waste". These terms are currently defined in the bill in a manner that differs from how they are defined in other related statutory programs, including, for example, the Transfer Act, the existing spill statute, the Significant Environmental Hazards statute, the statutes dealing with underground storage tanks, and the statutes addressing Environmental Land Use Restrictions. With respect to the definition of person, looking no further than Section 1 of today's bill, at line 377, the Transfer Act defines "person" with reference to Section 22a-2. For purposes of the release-based program, however, Section 22a-2 is not referenced and the definition of "person" is expanded beyond that in Section 22a-2 to extend to "any officer or governing or managing body of any partnership, association, firm or corporation or any member or manager of a limited liability company". Similarly, "hazardous waste" is defined differently in Section 1 at line 268 of this bill and in Section 501 at lines 1116 and 1117.

In CBIA's testimony and the comments on the bill by the Licensed Environmental Professionals, who are critical to the success of any transition program, there is a recommendation that the bill provide for a legislatively-created Working Group to address the implementing regulations to be adopted by DEEP. I support the addition of such a provision and further suggest that the legislature consider legislating the engagement of one or more experts to assist with the drafting of these unavoidably complex regulations. This path was followed in connection with the development of the recent Connecticut Water Plan.

I very much appreciate the opportunity to have been part of the dialog over the past two weeks about Sections 501 through 509. And I wish to emphasize that the concerns expressed have certainly not fallen on deaf ears. Commissioner Dykes and Commission Lehman as well as DEEP staff have taken these concerns seriously. However, I believe Sections 501 through 509 are not

yet ready for passage and would benefit from at least the level of review and collaboration that resulted in Sections 1 through 14 of this bill.

To repeat, my concern with Sections 501 through 509 is not reflective of opposition to Connecticut's move to a new release-based clean-up program, presumably eventually and ideally with a unified set of clean-up regulations. Rather this concern is borne out of trepidation about the consequences – many of them no doubt unintended and even not yet identified. These consequences will not further agreed-upon goals of more clean-ups in Connecticut and benefits to Connecticut's economic climate. When bills dealing with this topic have been before you over the years, you've heard repeatedly that clarity, predictability, and clear endpoints are essential to the simultaneous furthering of these goals. Much, but not all, of the undeniable complexity of this task will appropriately be dealt with in regulation. I believe the framework for, and the policy guiding, this regulation – particularly regulation that Connecticut won't have for two years or more – as well as the regulatory landscape in Connecticut in the interim are appropriate for legislation. Current Sections 501 and 509 can only benefit from more time than what I understand we currently have. Even before we get to the regulations, this is a very heavy lift, with many, many ripple effects. Further revisions to Sections 501 through 509 are essential.

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