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TO: The Government Administration & Elections Committee
RE: Bill 1196, AAC THE CONVEYANCE OF CERTAIN PARCELS OF
STATE LAND

DATE: March 21, 2011 **Amplification of Testimony**

Dear Sen. Slossberg, Rep. Morin, and Members of the Committee:

In my oral testimony today I gave the citation for the Connecticut Land Transfer Act, which I believe is the more appropriate instrument for handling the "Haddam land swap." I attach that statute at the end of this letter. (I did not give the citation in written testimony.)

In my written testimony, I did not make a clear distinction between the amendments to the Connecticut Environmental Policy Act and amendments to the Land Transfer Act. The CEPA Work Group negotiated both items of legislation, and we had the same goals for both, but they are somewhat different.

On the other hand, there is reason to suppose that CEPA may in fact apply in the Haddam case. Litigation and negotiation on whether CEPA should apply in state land transfers arose in connection with the transfer of the Norwich Hospital property. I attach a letter from Attorney General Blumenthal to Jeffrey Beckham at OPM, which addresses this question.

Finally, the DEP has a policy applicable to land swaps. And I attach that, too, for your attention. Our worry about using the Conveyance Act for the Haddam transfer is that it eliminates the possibility of redress under other statutes and policies if matters go wrong. It also puts considerable pressure on your committee to frame conditions that will make sense in an uncertain future.

In oral testimony, I mentioned several factors that raise the appropriate level of scrutiny in this case. The land swap breaks a conservation agreement between seller and the state; it is a transfer into private hands; it involves contaminated property that needs a clean-up; DEP has designated the property as having a special ecological value.

Margaret Miner, Executive Director

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RICHARD KLUMENHAI
ATTORNEY GENERAL



Hartford
March 21, 2006

Mr. Jeffrey Beckham
Managing Attorney, Legal Services Division
Department of Public Works
165 Capitol Avenue
Hartford CT 06106

RE: Seaside Regional Center

Dear Mr. Beckham:

Recently you asked for our opinion as to whether the provisions of the Connecticut Environmental Policy Act ("CEPA") apply to the potential sale of the State's property known as Seaside Regional Center ("Seaside") to Seaside in Waterford, LLC ("Developer") if the town of Waterford chooses not to exercise its statutory right of first refusal. Based on the facts presented to us by the Department of Public Works ("DPW"), if the State sells Seaside to the Developer for the purpose of developing a master planned community for elderly persons, we conclude that CEPA does apply.

By way of background, Seaside was at one time a State owned hospital for patients with tuberculosis and was later used as a residential facility for the mentally disabled until it closed in 1997. The entire property is listed on the National Register of Historic Places, as well as the State Register of Historic Places. The property was declared surplus, and offered first in 1999 to the Town of Waterford, which declined to purchase the property. Subsequently, the Office of Policy and Management ("OPM") published a Request for Qualifications ("RFQ"), for which responses were due in May 1999, followed by a Request for Proposals ("RFP"), for which responses were due in September 1999. In response to the RFQ and RFP, the State entered into negotiations with the Developer for the sale of the property; those negotiations broke down sometime in 2001.

Both the RFQ and RFP state that the sale of the property will be for a master planned community for the elderly and will include independent living, assisted living, specialized healthcare and related services that provide a continuum of care. There are also other development obligations, including but not limited to the construction of a public gazebo and a parking lot on the property. You ask whether CEPA is applicable to the sale of Seaside in light of the specific requirements in the RFQ and RFP for the proposed development of this property.

CEPA places affirmative obligations upon State agencies when they are recommending or initiating an action that may significantly affect the environment. Conn. Gen. Stat. Section 22a-1b(c) reads, in relevant part:

Each state department, institution or agency responsible for the primary recommendation or initiation of actions which may significantly affect the environment shall in the case of each such proposed action make a detailed written evaluation of its environmental impact before deciding whether to undertake or approve such action. (Emphasis supplied.)

Since in this instance the State is clearly initiating an action -- the sale of the property -- the issue is whether or not the sale of Seaside to the Developer with certain specific development requirements constitutes an action that may significantly affect the environment. Section 22a-1c defines "actions which may significantly affect the environment" as:

(1) individual activities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state, which could have a major impact on the state's land, water, air, historic structures and landmarks, as defined in section 10-410, existing housing, or other environmental resources, or could serve short term to the disadvantage of long term environmental goals. Such actions shall include but not be limited to new projects and programs of state agencies and new projects supported by state contracts and grants, but shall not include (1) emergency measures undertaken in response to an immediate threat to public health or safety; or (2) activities in which state agency participation is ministerial in nature, involving no exercise of discretion on the part of the state department, institution or agency.

In correspondence dated January 23, 2006, OPM advised DPW of its opinion that CEPA is not applicable to this sale. In support of its position, OPM states that the development agreement between the State and the Developer "does not require any one particular use by said Purchaser; without such information, an EIS (Environmental Impact Evaluation) cannot be performed." This reasoning ignores the language in both the RFQ and RFP requiring development of elderly housing.

Based on this language, there is no question that the sale of Seaside is contingent upon the development of elderly housing and that this requirement is a specific use. The RFQ is entitled "Elderly Housing Development Opportunity." It states that the State and Town of Waterford "hope to achieve several redevelopment objectives at Seaside," directs that each proposer should factor "desired redevelopment objectives" into their proposals and includes as one of the objectives "Elderly Housing." The Purchase and Sale Agreement is replete with references to elderly housing. Paragraph 14 for example, states: "The Purchaser shall construct

... age-restricted housing." Also see paragraph 44 - ("The Purchaser agrees that its purchase of the Property and its other undertakings in this Agreement are and will be used for the purpose of development of the property.").

In further support of its position, OPM advises that "the only State action is going to be the State offering to the town of Waterford the right to buy the site or selling the site to a private party." You have advised us, however, that the Town of Waterford has declined to exercise its statutory right of first refusal, and clearly the State is not merely "selling the site to a private party," but rather requiring that the Developer carry out specific development plans.

Unlike the transaction between the State and the Towns of Norwich and Preston, which involved the simple transfer of the Norwich State Hospital in an "as is condition," without any provisions as to its future use, it appears that in this matter the State is initiating the development of Seaside for specific uses -- housing for the elderly and the development of a public beach, parking lot and gazebo. In our opinion State action requiring specific development triggers the application of CEPA.

Based upon all of the information contained in the RFO, RFP, and the proposed Purchase and Sale Agreement, as well as the information which you provided to this office, the State is obligating the Developer to undertake certain specific and defined activities in order to be eligible to purchase Seaside. Therefore, CEPA does apply and the State must conduct an environmental impact evaluation ("EIE") before proceeding with the sale of this property to the Developer.

Very truly yours,


RICHARD BLUMENTHAL

cc: Gareth D. Bya, Director of Legal Affairs, OPM
Secretary Robert L. Genuario, OPM
David LeVasseur, Undersecretary
Richard Nucio



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Sec. 4b-47. Sale or transfer of state land or interest in state land by state agency. Notice. Publication. Comment period. Duties of Commissioner of Environmental Protection. Exceptions. (a) Prior to the sale or transfer of state land or any interest in state land by a state agency, department or institution, such agency, department or institution shall provide notice of such sale or transfer to the Council on Environmental Quality, the Secretary of the Office of Policy and Management and the Commissioner of Environmental Protection on a form approved by the Council on Environmental Quality. Such notice shall be published in the Environmental Monitor and shall provide for a written public comment period of thirty days following publication of such notice, during which the public and state agencies may submit comments to the Secretary of the Office of Policy and Management. Such comments may include, but shall not be limited to, significant natural and recreational resources on such land and recommend means to preserve such natural or recreational resources. The Secretary of the Office of Policy and Management, in consultation with the Commissioner of Environmental Protection, shall (1) respond to any written comments received during such thirty-day comment period, and (2) publish such written comments along with the Office of Policy and Management's response to such written comments in the Environmental Monitor for a period of not less than fifteen days prior to the sale or transfer of the land.

(b) The Commissioner of Environmental Protection shall develop a policy for reviewing notices received from a state agency, department or institution, as described in subsection (a) of this section, and making a draft recommendation to the Secretary of the Office of Policy and Management as to whether all or a portion of the land or land interest referenced in such notice should be preserved by (1) transferring the land or land interest or granting a conservation easement therein to the Department of Environmental Protection, (2) imposing restrictions or conditions upon the transfer of the land or land interest, or (3) transferring all or a portion of the land or land interest, or granting a conservation easement interest therein, to an appropriate third party. Any such recommendations shall be accompanied by a report explaining the basis of the recommendations and shall include, where appropriate, a natural resource inventory. Such recommendations and report shall be published in the Environmental Monitor and shall provide for a written public comment period of thirty days following publication of such notice. The Commissioner of Environmental Protection shall (A) respond to any written comments received during such thirty-day comment period, (B) make a final recommendation to the Secretary of the Office of Policy and Management, and

(C) publish such written comments along with the Department of Environmental Protection's response to such written comments including the department's final recommendation to the secretary in the Environmental Monitor. Following receipt of the final recommendation of the Commissioner of Environmental Protection, the Secretary of the Office of Policy and Management shall make the final determination as to the ultimate disposition of the land or interest. Such determination shall be published in the Environmental Monitor for a period of not less than fifteen days prior to the sale or transfer of such land or interest.

(c) Nothing in this section shall be construed to:

(1) Limit the applicability of sections 22a-1a to 22a-1i, inclusive, with respect to the sale or transfer of state land or any interest in state land, except that if an environmental impact evaluation was prepared pursuant to sections 22a-1b and 22a-1c or an environmental statement was prepared for such state land or interest in state land pursuant to any other state or federal law or regulation, as specified in section 22a-1f, such state agency, department or institution shall be exempt from the notice and public comment requirements set forth in subsections (a) and (b) of this section;

(2) Affect any purchase and sale agreement entered into between the state and any second party that was in effect prior to October 1, 2007, or any subsequent sale, transfer, easement, lease or other such agreement made pursuant to any such purchase and sale agreement;

(3) Apply to the conveyance of any parcel of state land or any interest in state land pursuant to an act of the General Assembly;

(4) Apply to the sale or transfer of state lands between state agencies;

(5) Apply to any easement that is granted to a municipality or a regulated utility or utilities that (A) primarily benefits the state or an agency or institution of the state, (B) is ordered as the result of a state or federal regulatory process or proceeding, or (C) is necessary as a result of the construction or reconstruction of any Department of Transportation highway or facility;

(6) Apply to the sale or transfer of state land or an interest in state land that was designated as surplus, pursuant to subsections (b) and (c) of section 4b-21 prior to October 1, 2007, provided the provisions of this section were complied with at the time of such designation;

(7) Apply to the transfer of ten acres or less by the Department of Transportation or the Department of Education;

(8) Limit state agency or public comments to a particular subject matter area;

(9) Limit the publication of any public notifications, comments or reports that are required under this section solely to the Environmental Monitor; or

(10) Limit the solicitation of public comment solely to the Environmental Monitor.

(P.A. 07-213, S. 7.) Content Last Modified on 8/5/2009 3:00:55 PM

Department of
Environmental Protection

DIRECTIVE

SUBJECT: Exchanges of Land or Interests in Land

PURPOSE: To establish the policy and procedures to be followed for exchanging land or interests in land under the custody or control of the Department of Environmental Protection ("the Department" or "DEP"). This Directive supersedes the November 21, 1990, "Land Exchange Policy" signed by Commissioner Carothers.

POLICY: In general, land or interests in land under the custody and control of the Department has been obtained to permanently protect such property for its conservation, recreation, natural resource or other value. In addition, such land or interests in land has been obtained for the benefit of the public, including future generations. Accordingly, such land or interests in land shall not be exchanged, except in extenuating circumstances and only when all of the following criteria are met:

- (a) The exchange is not contrary to the terms or conditions under which the acquisition, gift, or bequest of such land or interest in land was accepted;
- (b) The land or interest in land has been evaluated by Department personnel and determined not to be integral or significant to the resource management programs of the Department;
- (c) Appraisals have determined that the fair market value of the land or interest in land to be received by the Department is equal to or greater than the fair market value of the land or interests in land being conveyed out by the Department;
- (d) The land or interests in land to be received by the Department provides substantially greater utility to the resource management programs of the Department than the land or interests in land being conveyed out by the Department;
- (e) The Commissioner has determined that any proposed use of the land or interests in land to be exchanged, if known at the time of the exchange, is consistent with the State Conservation and Development Policies Plan; and
- (f) Except in extraordinary circumstances, the land or interest in land being conveyed out by the Department will be conveyed subject to: 1) a conservation or other easement or similar encumbrance in favor of the state ensuring that any restriction on such land or interest in land that was in effect immediately prior to the exchange remains in effect after the exchange; and 2) a reverter clause stipulating that the land or interest in land will revert back to the DEP if the easement or similar encumbrance is violated or not upheld. Any

finding of extraordinary circumstances shall not apply to land subject to Conn. Gen. Stat. § 23-8a.

SCOPE: With the exception noted herein, this Directive shall apply to the exchange of land or interests in land that are under the custody or control of the Department. This Directive does not apply to the exchange of land or interests in land of a half acre or less, where the sole purpose of the exchange is to facilitate a boundary line agreement to be entered into between the Department and an adjacent property owner. All exchanges of land or interests in land covered by this Directive are subject to the requirements of Conn. Gen. Stat § 4b-47, unless exempted by that statute.

PROCEDURE:

1. Proposed exchanges shall be presented to the Supervisor of the Land Acquisition and Management Unit ("Supervisor") or the Supervisor's staff for consideration. If the Supervisor believes that a proposed exchange does not meet the criteria of this Directive, the Supervisor may respond to a proposed exchange. For purposes of this Directive, the term "Supervisor" shall mean the Supervisor in charge of overseeing the staff of the Land Acquisition and Management Unit.

2. The Supervisor shall prepare a listing – or review package - of the proposals that the Supervisor believes may meet the criteria of this Directive. In preparing this listing/review package, the Supervisor shall indicate whether the proposed use of land or interests in land to be exchanged, if known at the time of the exchange, requires compliance with the Connecticut Environmental Policy Act, Conn. Gen. Stat. § 22a-1 et. seq. The Supervisor shall provide this listing/review package to the Department's Property Management Review Team ("PMRT") and to the Bureau Chief for the Bureau of Outdoor Recreation ("Bureau Chief").¹ The PMRT shall review any proposed exchange based upon the criteria of this Directive and the utility of the land or interests in land relative to the resource management programs of the Department or to other state agencies that may be involved.

3. A proposed exchange deemed worth pursuing shall be presented to the appropriate managers of the Supervisor of the Land Acquisition and Management Unit, in writing, and shall include the matters noted in this Directive as well as any additional information to be considered. If an exchange is deemed worth pursuing, it shall be presented to the Commissioner. If the Commissioner makes an initial determination that a proposed exchange is worth pursuing, the Commissioner may also decide whether or not to seek input from the chief executive officer of each municipality in which the land proposed for exchange or interests therein is located or from the public. Subject to paragraph 7 below, the Commissioner may seek such input at any time, however, the decision whether or not to seek such input is a matter wholly within the Commissioner's discretion.

4. The Commissioner shall determine whether to proceed with the proposed exchange. In making this determination, the Commissioner shall consider: (a) whether the criteria noted above in this Directive have been satisfied; (b) whether such exchange is beneficial to the state; (c) the views of the Supervisor, the Supervisor's managers, the Bureau Chief, the PMRT, and, if applicable, the chief executive officer and interested members of the public; and (d) the Departmental resources required to consummate the exchange.

5. If the Commissioner decides to proceed with an exchange, the Department's Land Acquisition and Management Unit ("LAMU") will negotiate the proposed exchange. Unless the Department initiated the exchange or the Commissioner determines that payment of the

costs of the exchange is in the best interests of the state, as part of the negotiations, the LAMU will notify the party or parties involved that the Department shall not be responsible for any costs associated with the exchange, and that all such costs, including appraisal fees, surveying costs, administrative fees, and if applicable, studies and other costs associated with complying with Conn. Gen. Stat. § 22a 1 et seq., shall be borne by the party or parties requesting the exchange. The LAMU shall select the appraiser to be paid by the other party or parties and shall also notify the party or parties involved that the exchange may be subject to the requirements of Conn. Gen. Stat. § 4b 47, including public notice and comment. Written appraisals of the fair market value of the land or interests in land to be exchanged must be received by the LAMU before any agreement can be reached.

6. If the LAMU is able to successfully negotiate the terms and conditions of the exchange, and the land or interests in land are exempt from Conn. Gen. Stat. § 4b-47, the LAMU shall initiate any required legal proceedings to consummate the exchange, including, where necessary, approval by the Governor.

7. If the LAMU is able to successfully negotiate the terms and conditions of the exchange and the land or interests in land are not exempt from Conn. Gen. Stat. § 4b-47, the LAMU shall coordinate with the Council on Environmental Quality and the Secretary of the Office of Policy and Management, as needed and shall provide any needed assistance regarding compliance with Conn. Gen. Stat. § 4b-47. In addition, when providing notice to the Council on Environmental Quality and the Secretary of the Office of Policy and Management, pursuant to Conn. Gen. Stat. § 4b-47, if notice has not already been provided earlier, the Commissioner shall provide notice of the proposed exchange to the chief executive officer of each municipality in which the land proposed for exchange or interests therein is located. Such notification to municipal officials may be provided using informal means, such as an e-mail or a telephone conversation and need not be provided using formal means such as publication in a newspaper or elsewhere. If after the requirements of Conn. Gen. Stat. § 4b-47 have been satisfied, the Commissioner decides to proceed with the proposed exchange, the LAMU shall initiate any required legal proceedings to consummate the exchange, including, where necessary, approval by the Governor.

8. After any exchange has been completed, the LAMU will work with the Department's Bureau of Financial and Support Services to report to the Comptroller or other state agency as necessary, any changes regarding the inventory of property under the custody and control of the Department.

¹ The Property Review Management Team may be comprised of representatives from the different divisions of the Department, including Parks, Forestry, Marine Fisheries, Inland Fisheries, Wildlife, Coastal Resources, Water Resources, Boating and Support Services. In appropriate cases, the PMRT may also include a representative from other entities of the state, such as the Department of Public Health.

Issued by: /S/ Commissioner Gina McCarthy

Date: June 10, 2008