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MEMORANDUM

To: Chairman Hutton and Members of the House Committee on Commerce,
Labor and Economic Development

From: Charles Reimer, Assistant Revisor of Statutes

Date: 3-14-2016

Subject: 2016 SB 365

This bill is brought to you by the Kansas Department of Health and Environment with the intent to facilitate economic development of environmentally contaminated property or “brownfields”. The bill provides a means for the purchaser of such property to avoid liability for certain state cleanup costs. A purchaser may apply for a “certificate of environmental liability release” or “CELR” from the department which releases the purchaser from liability for contamination existing on the property at the time of issuance with respect to cleanup actions taken by the department’s bureau of environmental remediation under Kansas law. The bill also sets up a fund to assist municipalities with grants or loans to address contamination on such properties. Only property acquired after July 1, 2016 is eligible. (Sec. 3(e).) A CELR is not transferable. (Sec. 6(b).) The bill specifies that the department shall not acquire any liability by virtue of the act. (Sec. 6(c).

The amendments to the bill made by the Senate Committee on Commerce are in bold type and were requested by the Kansas Department of Health and Environment.

Section 2 is the definition section for the bill. Note the provisions of Kansas law for which a CELR provides liability protection is specified in the definition for CELR: remediation costs under K.S.A. 65-159, 65-161 through 65-171z, 65-3401 et seq., 65-3430 et seq. and 65-3452a et seq. A CELR does not release the purchaser from requirements or duties of an applicable environmental use control agreement or risk management plan. (Sec. 4(c).) “Purchaser” has a broad definition which includes

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individuals, business entities, trusts, and state government, but does not include a person who acquires property through gifts, bequests or inheritance.

Sections 3 and 4 (Pgs. 2-3) set out eligibility and guidelines for the application of a CELR by a purchaser and the issuance of a CELR by the department. With respect to the nature of the contamination or the property:

- (1) The contamination must not be radon, lead-based paint or asbestos.
- (2) The contamination must not be subject to regulation under the federal nuclear energy development and radiation control act, or listed or be proposed for listing on the list of superfund sites under the federal comprehensive environmental response, compensation and liability act.
- (3) If the property is the source of the contamination and is eligible for cleanup under the Kansas storage tank act or the Kansas drycleaner environmental response act, the site must be enrolled into the appropriate cleanup program under the appropriate act.

With respect to the purchaser:

- (1) The purchaser may not be responsible for or have foreseen or failed to try to prevent the contamination, and the department must find the purchaser has not exacerbated and will not exacerbate the contamination on the property.
- (2) The purchaser may not have a familial or business relationship with the owner or party responsible for the contamination.
- (3) The purchaser must not have provided indemnification or a release of environmental liability with respect to the contamination to another party.
- (4) The purchaser must not have entered into or be the subject of any agreements or orders for investigation or remediation of the contamination.
- (5) The purchaser must agree to disclose the CELR to subsequent purchasers, permit reasonable access for environmental investigation and remediation and notification to the department of any transfer or sale of the property.

As part of the application, the purchaser must provide documentation to the department including:

- (1) Phase 1 or Phase II environmental reports completed within industry standards.
- (2) Other reports requested by the department.

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The department must make a decision on whether to grant an application within 15 business days of receiving all required information and has authority to consider additional factors in making its decision that the department deems relevant including the current and potential future use of the property.

Section 5 (Pg. 3) requires a CELR application fee. The department has discretion to determine the amount of the fee by regulation based on size and difficulty of the site but the fee may not exceed \$2000. If a CELR is not granted, the fee is refunded to the applicant, less the department's review and processing costs.

Section 6 (Pg. 6) permits a person to request that the department modify the CELR. The person must provide documentation as requested by the department to justify the request. The department must issue a decision within 30 business days.

Section 7 pertains to administrative and oversight powers granted to the department with respect to a CELR. A determination by the department of fraud in the obtaining of a CELR empowers the department to take such actions as necessary to protect health or the environment including an order directing the purchaser to take emergency action, revoking the CELR, requiring the purchaser to clean up the site or assessing administrative penalties. Basis for revocation of a CELR includes failure of a purchaser to grant reasonable access or any other failure to comply with the act, exacerbation of the contamination or interference with a department-approved remedy. The CELR becomes null and void if a property owner with a CELR acquires liability for the contamination through contract, law or other mechanism.

Section 8 established the contaminated property redevelopment fund in the state treasury, to be administered by the secretary of health and environment. The fund is funded by CELR application fees, the federal brownfields program, money from any source intended for the purposes of the fund, penalties, repayment of loans and interest from investment of moneys in the fund. Expenditures are to be made for the review and approval of CELR applications, oversight and modifications of CELRs, development and

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operation of a CELR tracking system, loans and grants to municipalities for assessment and cleanup actions and administration and enforcement of the act.

Section 9 grants the secretary of health and environment authority to adopt rules and regulations to implement the act.

Section 10 provides that persons adversely affected by a decision of the secretary may make a written request for a hearing within 15 days of service of the order. The hearing shall be conducted pursuant to the Kansas administrative procedure act.

Section 11 provides the act will go into effect on July 1, 2016.