

New York Court of Appeals Rules on Brownfield Eligibility

By Larry Schnapf

On February 18, 2010, the New York State Court of Appeals handed down its long-awaited decision in *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*. The unanimous decision overturned the DEC's denial of two applications for admission into the state's Brownfield Cleanup Program (BCP). The ruling has implications not only for new applicants as well for applicants whose requests for acceptance into the BCP were previously denied.

The scope of the BCP and the application process are discussed in a separate article.

Facts of the Case

The case involved two sites: The Inland Site was a former landfill that had been for a time listed on the state superfund list which is formally known as the New York State Registry of Inactive Hazardous Waste Disposal Sites. It was subsequently delisted but included on the state's database of hazardous substance sites. The Riverfront Site was a former rail yard and marina but was mostly vacant at the time of the BCP application. The applicant planned to redevelop the sites with condominiums, town houses, a marina, restaurants, retail stores and a hotel.

An investigation performed by the applicants environmental consultant found widespread contamination of both the soil and groundwater with hazardous substances above the state's Soil Cleanup Objectives (SCOs) and groundwater cleanup standards. There was uncontradicted evidence in the record that the developer has not been able to finance the project because of liability concerns associated with these substances. Additionally, local officials opposed development unless a comprehensive cleanup of the sites were undertaken.

DEC rejected the applications for admission to the BCP, stating that the SCO and groundwater exceedances are not significant in the overall context of the sites and that the sampling results do not indicate the need for remediation. To the extent that cleanup was required at the former landfill, the DEC said the site was not eligible since the contamination was not a result of on-site industrial operations but from solid waste that was disposed at the site.

In December 2007, the state Supreme Court ruled that DEC had no rational basis to determine that the sites' contamination was minimal. It noted that once DEC set SCOs as the level that a cleanup must achieve to receive a Certificate of Completion, the agency could not rationally claim that exceedances of SCOs were not relevant in determining site eligibility. The Court acknowledged that there may be sites whose contamination is so minimal that it does not "complicate" reuse or redevelopment, but it noted that DEC failed to explain why that was the case here. The Court ordered the sites admitted to BCP.

The Appellate Division reversed, holding that DEC is the agency charged with determining whether a cleanup is required, and that courts should not substitute their own views for the expertise of the DEC in this complex area.

The Court of Appeals Decision

In a unanimous decision, the Court of Appeals reversed. It held that the issue is one not of agency expertise but of statutory interpretation. In its first key ruling, the Court ruled that the meaning of the term “brownfield site” was one of pure statutory interpretation and therefore the DEC’s interpretation was not entitled to deference.

Turning to the first plain language of the statute, the Court said the only relevant considerations was (a) whether contamination was actually present or potentially present, and (b) that this presence or potential presence must complicate reuse or redevelopment. Turning to the first component of the test, the Court noted that the term “present” was not defined in the statute but said its common English usage as set forth in the Webster Third New International Dictionary was "being in one place and not elsewhere: being within reach, sight, or call or within contemplated limits: being in view or at hand: being before, beside, with, or in the same place as someone or something. Thus, the court concluded, a contaminant is “present or potentially present on real property” when it does or may exist or be found within the property’s limits, and that the statutory definition did not on its face mandate the presence of any particular level or degree of contamination. With respect to the meaning of “complicate”, the court said Webster’s definition was "to make complex, involved, or difficult.” Putting these two key terms together, real property qualifies as a "brownfield site" for purposes of acceptance into the BCP so long as the presence or potential presence of a contaminant within its boundaries makes redevelopment or reuse more complex, involved, or difficult in some way.

The Court held characterized this two-part test as setting a “low threshold for eligibility”. The court also pointed out that a low eligibility threshold was supported buttressed by the Act’s legislative history where the legislature found even “marginally polluted property” had become virtually unmarketable” over concerns about unknown cleanup costs and that “lenders were reluctant to finance development on property historically used for industrial or commercial purposes. The court went on to say that the BCP was intended to alleviate these concerns and to improve upon the success of the DEC’s Voluntary Cleanup Program that was open to anyone willing to remediate a site.

With the scope of the statutory definition now established, the court then turned to the specific facts of the case to conclude that there was indeed contamination that complicated the reuse of the site. The court found there was no doubt that properties were in fact contaminated, pointing to the presence of multiple contaminants that often exceed the DEC soil cleanup objectives (SCOs) and other environmental standards or criteria as well as the fact that the Inland Site has for years been included in the DEC's database of hazardous substance waste disposal sites.

The Court also said the applicant had produced undisputed evidence demonstrating that the presence of contaminants at the properties has complicated redevelopment or reuse in several ways. These facts included:

- The contamination at the Inland Site prevented the owner of the largest portion of it from developing a residential project;

- The county public health department refused to approve any development at the Inland Site unless Lighthouse implemented DEC-sanctioned remedial measures; and
- The project financing was expressly contingent upon DEC's approval of Lighthouse's proposed investigatory and remedial measures and a release of liability.

The DEC had argued that it did not believe the site required remediation but the court said that this did not relieve the applicant's plight because without a release of liability neither "Lighthouse nor its prospective lender can be confident that regulatory views about the necessity for or the adequacy of any self-directed cleanup will not change sometime down the line." Interestingly, the Court said it might reach a different conclusion about whether the presence of contamination was complicating redevelopment or reuse if DEC backed up its assurances that no cleanup would be required with a release of liability. However, the Court said this was apparently impossible because DEC had told the Court that it could not do this under its current remedial programs. Given the factual record on these issues, the Court saw no need to remand the matter to the DEC and instead simply reinstated the judgment of the Supreme Court.

Although not expressly reflected in the decision, an underlying theme at oral argument was DEC's inability to articulate—despite persistent questioning from the Court—a clear standard for determining site eligibility. DEC's repeated invocation of DEC's "expertise" apparently gave the Court little comfort that such expertise was being applied in a transparent and non-arbitrary manner. Nor was there any explanation by DEC—or discussion by the Court, either at oral argument or in the decision—as to why the agency's technical expertise as to environmental contamination entitles it to deference in determining the financial or other business impact of that contamination on a given real estate project.

Remarkably, the decision also makes no reference to DEC's Eligibility Guidance, whose standards figured prominently in DEC's denial of these applications. The Court evidently gave no weight whatsoever to the provisions in the Guidance in determining whether the sites met the statutory definition of "brownfields".

Implications for the Future

In overturning DEC's decision-making in such a fundamental manner, Lighthouse Pointe dramatically changes the landscape for New York State's Brownfield Cleanup Program. Among the questions that will need to be answered over the coming months are the following:

- What standards will DEC now apply in determining site eligibility- The Lighthouse Pointe sites had widespread and significant contamination. Where will DEC and, ultimately, the courts draw the line as to BCP eligibility at sites where the contamination is not as severe, and/or the potential complications for development is less self-evident? It does appear that the Court implicitly invalidated DEC's Eligibility Criteria for determining if there is a "reasonable basis" for determining if a site was contaminated. The first and last criteria (extent of contamination and relative cost) would seem to be

part of the complication analysis while the need for exceedances, exclusion of fill material and requirement that there be an on-site source would no longer seem to be valid criteria.

- The decision would also seem to invalidate the agency's practice of limiting brownfield sites to areas where there was contamination as opposed to the footprint of the project. The complication that the court discussed was to the entire redevelopment and not just the area where the contamination existed. If the proposed project will include contaminated and uncontaminated lots, then the proper analysis following Lighthouse Pointe would seem to be how is the contamination no matter where it is located on the site complicating the proposed project. It appears that DEC can no longer admit only portions of a proposed building or isolated hot spots at a redevelopment site appear to be over.
- Likewise, it would seem that DEC will not be able to exclude sites with historic fill, pesticides from former agricultural use or that have been impacted by depositions of air pollutants or contaminated groundwater migrating from an off-site source on the basis that the site is no contaminated.
- In discussing the extent of the contamination, the court noted that the contaminants were "often" present at concentrations exceeding applicable standards. Thus, it would appear that the presence of contamination exceeding cleanup standards will not be necessary to establish that contamination is present or may be present. Instead, this issue now seems to be a question of how the contamination complicates the reuse.
- On the other hand, the issue of complication is for lack of another term still complex. The opinion seemed to suggest that if DEC had been able or willing to issue a release of liability, the Court may have found that the contamination did not complicate the reuse of the properties. Thus, it is possible that if DEC resurrects its voluntary cleanup program, the option of obtaining liability relief might enable DEC to continue to restrict admission to the BCP. Of course, any liability relief offered by such a program would not be from the State of New York but just the DEC which could be a significant obstacle for petroleum-contaminated sites where the Attorney General and the Oil Spill Fund that is administered by the State Comptroller have independent authority to pursue cost recovery. Moreover, any such voluntary program would not offer the generous BCP tax credits that defray cleanup costs and otherwise provide the kind of return that developers must achieve to attract investors.
- Another option that DEC could use is to use its inherent authority under the regulations implementing its Superfund program to issue some form of release for sites that are not listed on the Registry of Inactive Hazardous Waste Sites. This concept seems to have gained creditability with the recent decision of the United States Court of Appeals for the Second Circuit in Niagara Mohawk Power Corporation v Chevron where the court allowed a contribution action to proceed because the plaintiff had resolved its liability under a state order on consent where DEC supervised the cleanup.

In any event, potential applicants should pay close attention to the factors the Court used to conclude that the redevelopment was complicate and make sure they include a similar analysis in their applications so they can create an administrative record on how the presence or potential presence of contamination is complicating reuse. Lighthouse Point make effective use of affidavits from seasoned real estate developers and local officials in establishing the evidentiary record of complication.

- Another interesting issue is whether applications that have previously been denied admission to the BCP could now reapply and be reconsidered under the new standards articulated by the Court? Arguably, there has been a change in law that would seem to allow applicants to submit another application.

It is unclear how DEC will respond to the Lighthouse decision. Once the true costs of the BCP became apparent, three administrations asked the DEC to rein in the costs of the program by limiting eligibility. The fact that the Court unanimously rejected DEC's interpretation of the Ach shows what an unreasonably narrow and unnatural reading of the statute DEC made to accommodate the wished of three Governors. We have felt for a long time that DEC senior staff have essentially fallen on their swords and in doing so made it easy for the legislature to avoid making tough decisions what should be the scope of the BCP. Now that DEC's solution was soundly rejected by the Court of Appeals, the agency should administer the law as written and if there are concerns about the costs of the program this problem should be addressed by the legislature.

In the meantime those having sites in the BCP, those considering applying, and those who sites have been previously rejected based on eligibility determinations, will need to think carefully about the implications for them and their sites of this very significant decision.