

State's Top Court Invalidates Restrictive Approach to Eligibility For New York's Brownfield Program

This article examines the eligibility of brownfield sites in New York in light of a recent decision by the state's highest court in Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation. The authors say the court's ruling has changed the landscape of site eligibility for the program, and parties with sites in the Brownfield Cleanup Program, those considering applying, and those whose sites previously have been rejected based on eligibility determinations must think carefully about the implications for them and their sites in light of this very significant decision.

231.2221 Introduction*

The New York Court of Appeals has, at least potentially, breathed new life into the state's Brownfield Cleanup Program (BCP) by its unanimous Feb. 18, 2010, decision in *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*.¹ The court's ruling sweepingly rejected the narrow eligibility criteria the New York State Department of Environmental Conservation (NYSDEC) had been using for admission into the BCP. The decision calls into question the way NYSDEC had run the BCP practically from its inception and therefore has significant implications for other brownfield sites in New York state and the future of the state's Brownfield Cleanup Program.

(a) *The Brownfield Cleanup Act*

The Brownfield Cleanup Act, enacted in October 2003,² established a comprehensive program, the BCP, to encourage the cleanup, redevelopment, and reuse of the state's estimated 4,000 to 10,000 "brownfields." Brownfields are defined by the act as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant." Among the features of the act is the establishment of prescribed procedures for enrolling sites in the BCP, investigating and cleaning up those sites under the supervision of NYSDEC, and NYSDEC's issuance of a certificate of completion and liability release upon the successful completion of site remediation. The act also provides significant tax credits for costs attributable to cleanup and redevelopment.

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¹ 2010 NY Slip Op. 1377; 2010 N.Y. LEXIS 35.

² N.Y. Env'tl Conserv. Law Sections 27-1404 to 27-1433.

At first, the program was very successful. However, it soon became apparent the generosity of the program's tax credits had the potential to yield windfalls to developers who build expensive projects on relatively lightly contaminated properties. As a result, NYSDEC moved to restrict entry into the BCP by erecting barriers to site eligibility. It promulgated an Eligibility Guidance,³ a principal feature of which was to set forth a list of factors NYSDEC would consider in determining whether a site qualified as a "brownfield" under the act.

The NYSDEC eligibility criteria modified the statutory definition by providing that the definition of a brownfield site has two elements: (1) there must be *confirmed contamination* on the property or a *reasonable basis to believe* contamination is likely to be present on the property; and (2) there must be a *reasonable basis to believe* contamination or potential presence of contamination may be complicating the development or reuse of the property. For each element, NYSDEC identified a number of factors it would take into consideration to determine whether a particular site meets the agency's qualified definition of a brownfield.

In determining if there is confirmed contamination or a reasonable basis to believe contamination is likely to be present on the property, NYSDEC indicated it would consider the following factors:

- the nature and extent of known or suspected contamination;
- whether contaminants are present at levels that exceed standards, criteria, or guidance;
- whether contamination on the proposed site is historic fill material or exceeds background levels;
- whether there are or were industrial or commercial operations at the proposed site that may have resulted in environmental contamination; and

³ The guidance is available on the Web at http://www.dec.ny.gov/docs/remediation_hudson_pdf/bcp_eligibility.pdf.

[§231.2221(a)]

- whether the proposed site previously has been subject to closure, a removal action, an interim or final remedial action, or corrective action or any other cleanup activities performed by or under the oversight of the state or federal government.

The most troublesome criteria for potential brown-field applicants are the third and fourth factors. Many urban properties throughout New York have contaminated fill material that was placed on the property and has to be managed as a hazardous waste because it exhibits a hazardous characteristic for metals. Under NYSDEC's interpretation, unless a developer can show the historic fill material was contaminated from an onsite source, the site would not be eligible for the BCP even though the developer will incur additional costs to dispose of the hazardous fill materials offsite.

In determining if there is a reasonable basis to believe contamination or the potential presence of contamination may be complicating the redevelopment or reuse of the property, NYSDEC indicated it would look at the following factors:

- whether the proposed site is idled, abandoned, or underutilized;
- whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination;
- whether properties in the immediate vicinity of the proposed site show indicators of economic distress, such a high commercial vacancy rates or depressed property values; and
- whether the estimated cost of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.

Even if an applicant surmounted these hurdles, the BCP eligibility criteria provided that NYSDEC could redefine the "brownfield site" so only a portion of a proposed site may be enrolled in the program. Thus, if the improvements were to be constructed on the portion of the property NYSDEC determined was not a "brownfield site," the developer would not be able to claim BCP tax credits for the improvements even though the building was part of the entire project. As a result, applicants not only had to demonstrate to NYSDEC there was contamination or a reasonable belief contamination is present but also that the prior onsite sources of the contamination likely were located in the proposed footprint of the improvements to be constructed. Thus, so-called "plume sites," where contaminated groundwater was

migrating onto the site from an offsite source, were not eligible for the BCP even though the presence of the groundwater contamination could result in increased project costs and delays.

Lighthouse Pointe was the first case challenging NYSDEC's eligibility determination procedures to reach the state's highest court.

(b) The Facts of the Case

The sites in question are located along the Genesee River in Rochester, N.Y. Most of the so-called "Inland Site" is a former landfill that for a time was listed on the New York State Registry of Inactive Hazardous Waste Disposal Sites. It subsequently was delisted and instead included on the state's database of hazardous substance sites. The so-called "Riverfront Site" has a history of prior rail yard and marina usage but now mostly is vacant. The applicant plans to redevelop the site with condominiums, town houses, a marina, restaurants, retail stores, and a hotel.

An investigation performed by the developer's environmental consultant indicated 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 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 was undertaken.

NYSDEC rejected the applications for admission to the BCP, stating the SCO and groundwater exceedances were not significant in the overall context of the sites and the sampling results did not indicate the need for remediation. To the extent cleanup is required, NYSDEC noted, it is because of the Inland Site's prior use as a landfill containing solid waste, which under the Eligibility Guidance is not the type of contamination that qualifies a site for admission to the BCP. The developer appealed NYSDEC's denial of its applications.

(c) The Decisions Below

In December 2007, the New York Supreme Court ruled NYSDEC had no rational basis to determine the sites' contamination was minimal.⁴ It noted that

⁴ *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, No. 2007/9731 (Sup. Ct. Monroe Co., Dec. 20, 2007).

[§231.2221(c)]

once NYSDEC set SCOs as the level a cleanup must achieve to receive a certificate of completion, the agency could not rationally claim exceedances of SCOs were not relevant in determining site eligibility. The court acknowledged there may be sites whose contamination is so minimal it does not “complicate” reuse or redevelopment, but it noted NYSDEC failed to explain why that was the case here. The court ordered the sites admitted to the BCP.

In February 2009, the New York Supreme Court, Appellate Division reversed, holding that NYSDEC is the agency charged with determining whether a cleanup is required, and courts should not substitute their own views for the expertise of the NYSDEC in this complex area.⁵

(d) The Court of Appeals Decision

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

Turning first to the plain language of the statute, the court noted the only relevant considerations were (a) whether contamination actually was present or potentially present, and (b) this presence or potential presence must complicate reuse or redevelopment. Analyzing the first component of the test, the court noted the term “present” was not defined in the statute but recited its common English usage as set forth in *Webster’s Third New International Dictionary* as “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 the statutory definition did not on its face mandate the presence of any particular level or degree of contamination. Regarding the meaning of “complicate,” the court said *Webster’s* definition was “to make complex, involved, or difficult.” Combining these two key terms, 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 characterized this two-part test as setting a “low threshold for eligibility.” It also pointed out that a low eligibility threshold was 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 “lenders were reluctant to finance development on property historically used for industrial or commercial purposes.” The court went on to say the BCP was intended to alleviate these concerns and improve upon the success of NYSDEC’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 turned to the specific facts of the case to conclude there was indeed contamination that complicated the reuse of the sites. It found there was no doubt the properties were in fact contaminated, pointing to the presence of multiple contaminants that often exceed the SCOs and other environmental standards or criteria as well as the fact the Inland Site for years has been included in NYSDEC’s database of hazardous substance waste disposal sites.

The court noted the applicant had produced undisputed evidence demonstrating 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 NYSDEC-sanctioned remedial measures.
- The project financing was expressly contingent upon NYSDEC’s approval of Lighthouse’s proposed investigatory and remedial measures and a release of liability.

NYSDEC had argued it did not believe the sites required remediation, but the court observed 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

[§231.2221(d)]

⁵ *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, 2009 NY Slip Op. 878, 2009 N.Y. App. Div. LEXIS 992 (N.Y. App. Div. 2009).

ment or reuse if NYSDEC backed up its assurances no cleanup would be required with a release of liability. However, the court observed such a result was unlikely because NYSDEC had told the court it could not do so under its current remedial programs. Given the factual record on these issues, the court saw no need to remand the matter to NYSDEC and instead simply reinstated the judgment of the supreme court.

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

Remarkably, the decision also made no reference to NYSDEC's Eligibility Guidance, whose standards figured prominently in NYSDEC's denial of these applications. Evidently, the court gave no weight whatsoever to the provisions in the guidance in determining whether the sites met the statutory definition of "brownfields."

(e) Implications for the Future

In overturning NYSDEC's decisionmaking in such a fundamental manner, *Lighthouse Pointe* dramatically changed the landscape of 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 NYSDEC now apply in determining site eligibility? The *Lighthouse Pointe* sites had widespread and significant contamination. Where will NYSDEC and, ultimately, the courts draw the line on BCP eligibility at sites where the contamination is not as severe and/or the potential complications for development is less self-evident?
- What is the status of NYSDEC's eligibility criteria? It appears the court implicitly invalidated at least some of the criteria NYSDEC has used to determine if there is a "reasonable basis" to consider a site contaminated. The first and last criteria (extent of contamination and relative cost) would seem to be part of the com-

plication analysis, while the need for exceedances, exclusion of fill material, and the on-site source requirement no longer seem to be valid criteria.

- How about the agency's practice of limiting brownfield sites to areas where there is contamination rather than the entire footprint of the project? The decision would seem to cast significant doubt on the validity of that practice. The complication 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 the contamination—no matter where it is located on the site—complicates the proposed project. It may be NYSDEC no longer can admit only portions of a proposed building or isolated hot spots at a redevelopment site.

- Similarly, what is the continued viability of NYSDEC's policy of excluding sites where there is no onsite source of contamination? It would seem NYSDEC no longer will be able to exclude sites with historic fill, pesticides from former agricultural use, or sites that have been impacted by depositions of air pollutants or contaminated groundwater migrating from an off-site source.

- What about the alternative of relieving the "complication" factor by offering a non-BCP release of liability? The opinion seemed to suggest that if NYSDEC had been able or willing to issue a release of liability, the court might have found the contamination did not complicate the reuse of the properties. Thus, it is possible if NYSDEC resurrects its voluntary cleanup program, the option of obtaining liability relief might enable NYSDEC to continue to restrict admission to the BCP.⁶ Of course, any liability relief offered by such a program would not be from the state of New York but just NYSDEC, which could be a significant obstacle for petro-

⁶ Another option NYSDEC could employ 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*, 596 F3d 112, 70 ERC 1001 (2d Cir. 2010), where the court allowed a contribution action to proceed because the plaintiff had resolved its liability under a state order on consent where NYSDEC supervised the cleanup.

leum-contaminated sites where the attorney general and the Oil Spill Fund 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 developers must achieve to attract investors.

- Can applicants that previously have been denied admission to the BCP 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 NYSDEC will respond to the *Lighthouse Pointe* decision. Once the true costs of the BCP became apparent, three successive gubernatorial administrations asked NYSDEC to rein in the costs of the program by limiting eligibility. The fact the court unanimously rejected NYSDEC's interpretation of the act shows what an unreasonably narrow and unnatural reading of the statute NYSDEC made to accommodate the wishes of those administrations. Now that NYSDEC's solution has been rejected soundly by the court of appeals, the agency should administer the law as written. If there are concerns about the costs of the program, they should be addressed by the Legislature.

Nonetheless, *Lighthouse Pointe* does not necessarily mean applicants to the BCP will not still face significant hurdles. Consider, for example, the case of *29 Flatbush Assocs. LLC. v. NYSDEC*.⁷ The site in question had been denied admission to the BCP despite exceedences of SCOs and an alleged inability to

obtain financing. The court reversed NYSDEC's termination as arbitrary and capricious but remanded the case to the agency for further proceedings instead of simply ordering the site admitted into the program. Moreover, the petitioner was required by the court to undertake further testing of the site and document its efforts to obtain financing. In a way, the petitioner won the battle but lost the war. At a site that concededly already met the statutory threshold, it will have to undergo yet more costs, delays, and uncertainties in seeking admission of the site to the BCP.

In the immediate future, potential applicants should pay close attention to the factors the *Lighthouse Pointe* court used to conclude the redevelopment was complicated. Applicants should 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 Pointe* made effective use of affidavits from seasoned real estate developers and local officials in establishing the evidentiary record of complication. In addition, if the *29 Flatbush Assocs.* decision is a harbinger of things to come, applicants would do well to document carefully not only the site's SCO exceedences but also attempts to obtain financing, insurance, permits, and other elements necessary for a successful development.

Whether *Lighthouse Pointe* revives the BCP will depend, at least in part, on whether market conditions improve sufficiently to make brownfield projects as economically attractive as they were several years ago. However, in the interim, the court's ruling certainly has changed the landscape of site eligibility for the program.

⁷ 2010 N.Y. Slip Op. 50778 (Sup. Ct. Kings Co., May 3, 2010).

