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Brownfields

Litigation Predicted as New York Issues Brownfields Rules

BNA Snapshot

- Rules defining eligibility criteria for N.Y. brownfields program likely to face lengthy court challenge, lawyers say
- New definitions take effect Aug. 12



By John Herzfeld

July 29 — Rules will take effect Aug. 12 defining key terms in the statutory eligibility criteria for tangible property tax credits under the New York brownfields program, the state Department of Environmental Conservation announced July 29.

“The Brownfield Cleanup Program is an important tool to advance the restoration of blighted areas in communities across the state, and these revisions will encourage redevelopment on many underutilized properties,” department commissioner Basil Seggos said in a statement.

“The amendments, which were driven by recommendations of municipalities and other experts, will ensure a more equitable distribution of these vital property tax credits by incentivizing strategic investments in communities across the state.”

The rules, which represent a second attempt to define “underutilized” and other terms in 2015 amendments to the state brownfields program law after an earlier proposal was criticized as too narrow, will likely face a legal challenge that could take three or four years to run its course, an environmental lawyer told Bloomberg BNA.

Including only a slight change from a March draft that drew criticism from business and real estate groups, the rules provide “plenty of ammunition” for probable litigation, Lawrence P. Schnapf of Schnapf LLC in New York said in an interview.

Groups See Development Problems

In comments submitted in June, the business and real estate groups argued that the definition, even in its revised form, would hamper new development projects worth hundreds of millions of dollars.

The Department of Environmental Conservation responded in its assessment of public comment issued with the rules that it doesn't agree that the revised definition is “unduly restrictive” by not encompassing residential development.

The revised definition added commercial development to the industrial development already included in the rules, and residential projects still could meet criteria for “affordable housing” even if their sites aren't eligible to be considered underutilized, the department said.

City's Goal Cited

In rejecting criticism that the definition of underutilized relied on anticipated future uses, to the exclusion of existing uses, the department said such an approach “met the express desire” of New York City “to promote industrial and commercial future uses and underutilized sites.”

The department also said limiting the eligibility of New York City sites to specific affordable housing projects and underutilized properties “should help target funds and projects in New York City areas with the most need.”

Schnapf said the department's “narrow definition of underutilized flies in the face of its commonly understood plain meaning,”

and warned that it will have the effect of “excluding vast swaths of middle-class neighborhoods” in the city's outer boroughs.

Small contaminated land parcels such as sites of gasoline stations, auto body shops or dry cleaners “could never meet the criteria,” denying them access to tax credits that could make the difference in obtaining financing and drawing investors, Schnapf said.

The definition will “inject a lot more uncertainty into already complex projects” and, except for affordable housing, will undercut the program's goal of providing incentives for redevelopment of brownfields sites, Schnapf said.

Questions Rationale

David J. Freeman, director of the real property and environmental law practice at Gibbons P.C. in New York, said he believes the Department of Environmental Conservation's definition “still unduly restricts” eligibility for the tax credits for sites in New York City “in ways that go beyond the language and intent of the legislature, to the detriment of both the public interest and the environment.”

In an e-mail message to Bloomberg BNA, he acknowledged the department's position that its approach resulted from consultation with the city government, but added: “It is far from clear that, as a matter of statutory interpretation, the courts will allow a governmental agency to interpret a law in derogation of legislative intent simply because another agency has encouraged it to do so.”

Schnapf and Freeman drafted the rulemaking comments from the Environmental Law Section of the New York State Bar Association. Schnapf said the leadership of the bar group's Brownfield Task Force will meet the week of Aug. 1 to discuss possible next steps.

The Department of Environmental Conservation rules adopt amendments to the state Brownfield Cleanup Program at 6 NYCRR Part 375.

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For More Information

The rules and more information are available at <http://src.bna.com/hgu>.

The Department of Environmental Conservation's assessment of comments is available at <http://src.bna.com/hgv>.