

NEW YORK'S NEW (IMPROVED?) BROWNFIELD LAW

By Larry Schnapf

On June 23rd, Governor Paterson signed into law amendments to New York's Brownfield Cleanup Act (BCA).¹ Those amendments were the product of years of efforts by environmental activists, developers, community groups and others to amend the BCA, first enacted in 2003, to remedy its perceived flaws.

Does the new law represent an improvement over what preexisted? Does it solve the problems that its detractors found in the original Act? Could it possibly even be counterproductive in terms of stimulating the type of remediation and development that the Act was designed to promote?

The Act has four main provisions: (1) modification of the Act's tax credit provisions, to increase the percentage credit for remediation expenses and to cap the amount of credits available for development costs; (2) establishing data submission requirements on the part of applicants, and reporting requirements on the New York State Department of Environmental Conservation (NYSDEC) with respect to brownfield sites and tax credits; (3) transferring the responsibility for operating the Brownfield Opportunity Act (BOA) program from the Commissioner of NYSDEC to the Secretary of State; and (4) establishing a New York Brownfields Advisory Board.

Revision of Tax Credit Provisions

By far the most important, and controversial, aspect of the law is the revision of the tax credits established under the 2003 Act.

Under the prior law, a taxpayer who received a certificate of completion from NYSDEC certifying that the cleanup had been completed could claim a tax credit of 10% - 22% of site preparation costs² depending if the taxpayer was an individual vs. corporation, if the property was located in an en-zone³ or if the cleanup qualified as a track 1 (unrestricted residential) cleanup.⁴

Under the 2008 amendments, the applicant will now be able to claim up to 50% of its site preparation costs depending on the kind of cleanup that is performed.⁵ Applicants that implement a cleanup that allows for unrestricted use will be able to claim a tax credit for 50% of their site preparation costs. For projects that achieve the restricted residential soil cleanup objectives, the applicable percentage for the site prep costs will be 40% but will drop to 28% for track 4 cleanups.⁶ For projects that achieve the soil cleanup objectives for commercial uses, the applicable percentage will be 33% but will drop to 25% if the cleanup only achieves the Track 4 cleanup soil objective. For soil cleanups that achieve soil cleanup objectives for industrial end-use, the applicable percentage will be 27% but will drop to 22% of the cleanup only achieves the Track 4 soil cleanup objective. The site preparation cost percentage will be set forth in the COC issued by the NYSDEC.

The 2003 law also provided that an applicant was able to qualify for 10% to 22% of the value of the improvements constructed on the brownfield site (the "qualified tangible property tax credit"). Under the 2008 amendments, the tangible property credit component will be calculated

as under prior law, but subject to a limit that is the **lesser** of \$35 million or three times the amount of site preparation costs and the on-site groundwater remediation credit component.⁷ To help reverse the loss of manufacturing jobs in upstate and western New York as well as to attract investments in emerging technology, the legislation increases the qualified tangible property tax credit to the **lesser** of \$45 million or six times the amount of site preparation and on-site groundwater remediation credit components for sites that are used primarily for manufacturing activities.⁸

If the site is located in a BOA and the project is consistent with the BOA goals and priorities established by the municipality where the BOA is located, the applicable percentage for the qualified tangible property component will be increased by two percent. It appears that projects admitted into the BCP prior to the 2008 amendments that are located in a BOA will be able to claim the two percent BOA bonus so long as the buildings have not been placed into service prior to June 23, 2008 and the development is consistent with the BOA.

Effect on NYSDEC Eligibility Guidelines

The rationale for changes in the tax credit provisions was to reduce the generosity of the tax credits for development expenses on brownfield sites. It was the size of these expenses that drove NYSDEC to establish its eligibility guidelines. These guidelines, by purporting to define the term “brownfield” in the Act, were used by NYSDEC to prevent entry into the BCP of sites which it deemed insufficiently contaminated and thus undeserving of tax credits, or which would have been developed anyway and therefore did not need them.

These guidelines were the subject of critical commentary by the New York State Bar Association Environmental Law Section¹ and others and soon spawned a wave of litigation from disappointed applicants. Initially, courts appeared to be sympathetic to NYSDEC’s position and deferred to its expertise with respect to determining whether sites were eligible for the program². In more recent cases, courts have taken a more critical view, holding that NYSDEC was arbitrary capricious in denying entry to the sites. In the most recent case, the court harshly criticized NYSDEC’s reliance on the eligibility guidelines concluding that use of the eligibility guidelines was “in excess of its jurisdiction, null, void, and of no force and effect and that such ‘guidance’ or ‘guide factors’ and the use thereof was arbitrary, capricious, not authorized by statute or regulation, effected by error of law, and was in violation of lawful procedure in excess of the jurisdiction, and as a result, such ‘guidance’ and ‘guide factors’ be, the same hereby are, declared null, void, and of no force and effect...”³.

¹ Citation.

² See *377 Greenwich LLC v. NYSDEC*, 14 Misc. 3d 417 (Sup. Ct. N.Y. Co. 2006); and *Jopal Enterprises LLC, and Belmont Villas LLC v. NYSDEC*, unreported, Index No. 00803-06 (Sup. Court, N.Y. Co. 2006).

³ *Destiny USA Development, LLC and PYRAMID COMPANY OF ONONDAGA v. New York State Department of Environmental Conservation, and ALEXANDER B. GRANNIS, as Commissioner of the New York State Department of Environmental Conservation*, No.08-1015, 2008 N.Y. Misc. Lexis 3345 (Sup. Ct. June 10,2008) at 62.

A number of the competing proposals to reform the Act would have restored the concept of “brownfield” to that which we believe was originally intended, a broad term encompassing any site where contamination is more than de minimis. Governor Paterson’s Program Bill and bills sponsored by Assembly Environmental Conservation Committee Chair Sweeney (A.11107) and Senate Environmental Conservation Committee Chair Marcellino (S.8480) proposed reforms to expand the scope of contaminated property that would qualify for the BCP. The proposed bills expanded the universe of sites eligible for the BCP, by either including an alternative definition of a “brownfield site” that focused on levels of contamination that exceed applicable health-based or environmental standards, expanding the definition of “contaminant” to include historic fill, and/ or lifting the exclusion of certain sites listed as Class 2 sites on the registry of inactive hazardous waste disposal sites. Another focus of the proposed brownfield bills was the inclusions of a procedure to streamline the investigation, cleanup and sign-off by NYSDEC of sites that sought a Certificate of Completion, but do not tax credits. The Marcellino Bill specifically contemplated the administration of BCP programs at local levels, using designated municipalities as a means of lessening case-load burdens on NYSDEC and thus streamlining review periods. Finally, like the new brownfield law, the proposed bills sought to reform the tax credit structure of the BCP to tie the amount of credits issued to a specific project to the cost of remediation.

All of these bills would have had the effect of eliminating, at least to a large extent, NYSDEC’s rationale for excluding—and ability to exclude—sites from the program based on Eligibility Criteria.

However, this was not the approach taken in the bill ultimately passed by the legislature. It left intact the Act’s language regarding the definition of brownfield and simply reduced the extent of the tax credits available for development costs. Thus, even though the benefits of being in the program are in many cases much less than previously, the new law does nothing to impact NYSDEC’s ability to continue to use its Eligibility Guidance to exclude sites program. Thus, applicants arguably have the worst of both worlds: still having to run the gauntlet of the eligibility guidance, but with the benefits much reduced for successfully having done so.

Reporting Requirements

Another feature of the new law is reporting requirements for both applicants and NYSDEC.

As for applicants, the law requires the developer, or their lessee to submit information to NYSDEC regarding the amount of state and local taxes generated by the brownfield site (including employee income taxes) and the real property taxes paid with respect to that site. With respect to NYSDEC, it must report newly on the credits earned under the Act, including the name of each taxpayer claiming a credit, the amount of each credit earned, the project as to which the credit was earned, the number of credits statewide and by county and “any other statistical information that the commissioner deems to be useful in analyzing the affects of the program.”

These provisions are designed to provide some “sunshine” on the operation of the tax credit program and its impact on both the stimulation of brownfield development and the state’s treasury while arguably providing some useful information, there is the potential for release of

sensitive information on individual developers that may chill, to some extent, participation in the program. It will also likely be difficult to obtain the required information from the tenants.

NYSDEC must also provide, annually, a report on the BCP containing the number of requests for participation, the number of remedial investigations commenced and completed, the number of requests for participation which were withdrawn or terminated, the length and time between the request for a certificate of completion (COC) and the grant of the COC, the number of COCs issued. This report has the potential for providing some useful information as to the popularity of the program and the efficiency with which it is administered.

Administration of the BOA Program

Another feature of the new law is the change in jurisdiction for operation of the Brownfield Opportunity Act program from NYSDEC to the Secretary of State. That jurisdiction had previously been exercised in consultation with the Department of State, with the result that there were significant delays and confusion in the operation of the program. It also thrust NYSDEC squarely into the role of being a decision maker on economic development issues, a role to which NYSDEC was ill-suited and in which it was uncomfortable.

Whether this change and jurisdiction will revitalize the BOA program remains to be seen. However, the new arrangement is certainly likely to be a marked improvement from the shared authority under which the BOA program previously operated.

Brownfields Advisory Board

A fourth feature of the new law is the establishment of a brownfields advisory board. The board will consist of 15 members, including the commissioners of NYSDEC, Department of Health, Economic Development Taxation and Finance, Secretary of State or their designees and at-large members appointed by the Governor. The Governor's appointees are to include representatives of various constituencies, including the Senate Majority of Minority that, the House Majority and the Assembly Majority of Minority, the NGO Environmental Community, Public Health Community and the Real Estate Sector. The purpose is to serve as a working forum for the exchange of views, concerns, ideas, information and recommendations relating to the state's brownfield cleanup program. Starting in 2009, it must report annually as to its recommendations on its assessment of the implementation of the brownfield program and recommendations for improvement.

While there seems to have been no great call for the establishment of this board, it may nonetheless serve a useful purpose as a forum for a periodic review of how effectively the State Brownfields Program is operating.

Other Provisions

The legislation also makes an important clarification on the transferability of the tax credits to reflect modern real estate practice. The existing law provided that COCs may be transferred if the site was sold. However, sophisticated and complex real estate developments like brownfield projects usually involve an array of fractional ownership interests where individual sticks or even twigs of the infamous bundle of rights are conveyed. The new law confirms that burdens and

benefits of a COC run with the land and may be transferred or assigned where less than full title to a brownfield site is conveyed.

Conclusion

The conventional wisdom is that the Spitzer and Paterson Administrations wanted to limit the number of high rise condo projects that would be eligible for the BCP because the size of these projects generated enormous tax credits in proportion to the cleanup costs for the site. However, it appears that the 2008 will have a disproportionately harsh impact on smaller sites such as workforce housing. For these sites, the \$35 million cap will be largely illusory or irrelevant. The "3X" multiplier will typically set the limit.

A possible reaction from developers of smaller sites would be to try to maximize the amount of eligible site preparation costs. This is because the applicable percentage for site preparation costs has been increased and because the site prep costs would serve as the base from which the "3X" (or 6X) multiplier is applied. Under prior law, the applicable percentage was identical for all of the credit components, so the credit structure did not motivate taxpayers to re-characterize costs into one category or another. Now, taxpayers will have to identify costs that are remedial in nature and yet also result in the creation of a depreciable asset, and then determine whether those costs should be classified as site preparation costs (assuming they meet the statutory definition) or as costs capitalized into the tax basis of qualified tangible property. These "dual use" costs could include, for example, soil vapor mitigation equipment, excavation, retaining walls, shoring, sheeting, and other engineering controls and otherwise depreciable land improvements. We anticipate that tax counsel will be working alongside environmental counsel, consultants, and engineers in advising brownfield redevelopment clients as they plan their remedial actions.

¹ Ch 390

² The "site preparation" credit are costs that can be chargeable to a "capital account" but does not include site acquisition costs. N.Y. Tax Law § 21(b)(2)

³ En-zones are census tracts that have a poverty rate of 20 percent and an unemployment rate of at least 1.25 times the statewide unemployment rate or a poverty rate of at least double the rate for the county in which the tract is located

⁴ For sites in en-zones, the taxpayer could tack on an additional 8% to the applicable percentage and add another two percentage points for completing a track 1 cleanup.

⁵ § 2 ch. 390

⁶ A track four cleanup involves using clean fill for the top two feet of soil.

⁷ § 1 390

⁸ "Manufacturing activities" are defined as the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, as well as the activities of a "qualified emerging technology company" as defined by the Public Authorities Law section 3102-e. The generation or distribution of electricity and natural gas, or generate steam associated with the generation of electricity will not be considered "manufacturing activities" for the purpose of qualifying for the higher cap on the qualified property tax credit component.