

## New York Appellate Court Upholds State Denial of Brownfield Application

**A**LBANY, N.Y.—A New York appeals court on Feb. 6 upheld a decision by the state Department of Environmental Conservation (DEC) to deny a developer's applications to participate in the state's brownfield cleanup program, in a case involving the definition of what constitutes a brownfield site (*Lighthouse Pointe Property Associates v. New York State Department of Environmental Conservation*, N.Y. App. Div., No. CA 08-00835, 2/6/09).

The New York State Supreme Court Appellate Division, Fourth Department, in a 3-1 decision, ruled that the Department of Environmental Conservation acted reasonably when it denied two related applications by Lighthouse Pointe Property Associates to develop two contiguous Rochester properties under the brownfield program.

The agency, in denying the applications, said the sites failed to meet the statutory definition of brownfield because contamination at the site was not "complicating" the redevelopment or reuse of the property.

"It is beyond dispute that reasonable minds may differ in the interpretation and analysis of the data collected at the site, and it therefore cannot be said that the rejection by the DEC of petitioner's BCP [Brownfield Cleanup Program] applications was unsupported by the evidence, nor can it be said that the DEC acted in an arbitrary and capricious manner in rejecting those applications," Judge Eugene M. Fahey said in an opinion for the majority.

"The determination of the DEC was premised upon the results of a thoughtful analysis performed by an environmental engineer who considered and based his opinion on the testing conducted on behalf of the DEC, as well as the data submitted by petitioner."

The appeals court, which reversed a lower court ruling, said it did not have the authority to "second-guess a reasoned agency determination or to invade the process by which such a conclusion is reached."

At issue in the case is the Department of Environmental Conservation's decision to deny the Lighthouse applications because it said the contamination was limited, widely dispersed, and did not indicate a need for remediation. Moreover, the agency said most of the environmental costs for the site would involve the disposal of solid waste, rather than hazardous waste.

In dissent, Judge Nancy Smith said the agency's interpretation of the definition of a brownfield site was "unreasonably narrow."

"The DEC has improperly interpreted the enabling statutes for the BCP, resulting in the arbitrary exclusion of parcels containing contaminants that arise from solid waste despite the absence of any statutory basis for such an exclusion," Smith said.

"I further conclude that the DEC's failure to promulgate any viable regulation for evaluating applications for admission into the BCP is, of itself, arbitrary and capricious."

Alan J. Knauf, an attorney for the plaintiff with the Rochester firm Knauf Shaw, said the court ignored "the complication test."

"It was undisputed that the petitioner could not get permits because the county health department considered the contaminants a health threat (particularly the threat of vapor intrusion), and could not get financing because of liability concerns," Knauf told BNA in an e-mail message.

"Plus they had to spend \$4 [million] to \$8 million on remediation. They [the court] really read the statute wrong. It defines 'brownfield site' as a site where contaminants might complicate development, and in this case it has not only already complicated development, but it has prevented development."

"Also, the DEC's denial was based on its unwillingness to consider complications posed by solid waste, even though there is no exclusion in the law for hazardous substances contained within solid waste," Knauf said.

Lawrence Schnapf, co-chairman of the New York State Bar Association's Brownfield Task Force, told BNA that the court "afforded too much deference to the DEC."

"The key issue was whether the contamination complicated reuse, which is an economic development issue that is beyond the expertise of the DEC," Schnapf, who is with the New York City firm of Schulte, Roth & Zabel, said in comments e-mailed to BNA.

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