

## New York Court Overturns Agency's Decision, Ruling Proposed Resort Eligible for Benefits

**A**LBANY, N.Y.—A New York State Supreme Court has struck down a decision by the state Department of Environmental Conservation (DEC), ruling that land to be used for the proposed Destiny USA mall and resort in Syracuse should be eligible for benefits under the state's brownfield cleanup program (*Destiny USA Development v. New York State Department of Environmental Conservation*, N.Y. Sup. Ct., No 08-1015, 6/10/08).

The court ruled June 10 that the DEC was arbitrary and capricious in denying Destiny USA's application to be included in the brownfield program. In addition, it said the DEC violated the Equal Protection Clause of the state Constitution and the Fourteenth Amendment of the U.S. Constitution in denying the application.

The court struck down the guidance factors used by DEC to determine if the Destiny USA property and other properties should be eligible for the brownfield program.

"The DEC's use of the promulgated 'guidance' or 'guide factors' and all such other determination 'factors' in this case 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," Judge John C. Cherundolo said in his decision.

"This court finds that the application of the 'guidance factors' in this case has acted to thoroughly frustrate the very purpose of the statute that the DEC was obligated by law to faithfully support."

The ruling strikes down an October 2007 decision by DEC that a number of parcels of land near Onondaga Lake in Syracuse are not eligible for the brownfield cleanup program. Destiny USA plans to develop the land into a resort that incorporates commercial, entertainment, recreation, retail and other uses.

The state program provides financial and technical assistance to municipalities and community-based organizations. Funding can be used to complete revitalization plans and implementation strategies for areas affected by the presence of brownfield sites, as well as site assessments for strategic sites, according to the DEC.

**Decision Called 'Incredibly Important.'** Lawrence Schnapf, an attorney with the New York City firm of Schulte, Roth & Zabel, told BNA that the decision was "incredibly important."

"It . . . creates important precedent, not only because it has ruled that the criteria that DEC has been using for the past three years for determining what sites are eligible is unlawful, but also prohibits DEC from using the eligibility criteria on any future application decisions," said Schnapf, who is co-chairman of the New York State Bar Association's Brownfields/Superfund Reform Task Force and chairman of the Brownfield Committee of the Environmental Business Association of New York State.

"The decision confirms that the decision by current and past administrations to narrowly define eligibility criteria to minimize the financial impact of the brownfields program has been unlawful and a violation of the separation of powers."

Yancey Roy, a spokesman for DEC, told BNA that "we believe that denying brownfields tax credits in this case was the right decision, given that the contamination is not interfering with the project, that the project was planned and is moving forward without the tax credits, and that the developer itself is responsible for keeping the contamination on site."

Roy said the decision points to the need for legislation to amend the state's brownfield cleanup law.

By GERALD B. SILVERMAN