

Brownfields

New York Proposes Brownfield Cleanup Rules; Language to Determine Tax Credit Eligibility

The New York State Department of Environmental Conservation June 10 proposed regulations in the New York State Register to implement recent changes in the state's brownfield cleanup law, including new definitions that will determine eligibility for the program's tax credits.

The **proposed regulations**, which will be subject to public comment until Aug. 5, include definitions of which properties are considered "underutilized" and "affordable housing."

Under a bill signed into law earlier this year, New York City projects are only eligible for the program's tangible property tax credits if they are located in an environmental zone or involve underutilized, affordable housing or upside-down properties (24 EDDG 39, 5/21/15).

The regulations also incorporate the statutory definition of a brownfield site, which was expanded under the 2015 brownfield law.

The DEC will hold a public hearing on the proposed regulations in New York City July 29. The development community was awaiting the regulations because the definitions will be critical in determining a project's eligibility for tangible property tax credits, one of two tax credits provided by the brownfield cleanup program (BCP). The 2015 law, which was enacted as part of the state's budget, scaled back the credit for New York City projects.

"The 2015 amendments to the BCP reflect an intent to reduce the amount of tangible property tax credits available to applicants for brownfield sites in high-value real estate markets, while further incentivizing development on brownfields where certain project criteria are met," the DEC said in a regulatory impact statement accompanying the regulations.

"Limiting the eligibility of New York City sites to specific affordable housing projects and underutilized properties through criteria established by regulation should help to target projects in New York City areas with the most need," it added.

The regulations generally define "underutilized" as property in which less than half of the floor space has been used for at least five years, the proposed development is solely for nonresidential use and the proposed development couldn't be done without substantial government assistance.

In addition, an underutilized property is defined as one in which property tax payments have been in arrears for at least five years, a building is condemned or has structural deficiencies that present a public health or safety hazard or the proposed use of the property is industrial.

Reaction to Proposal

Attorney Lawrence P. Schnapf of Schnapf LLC told Bloomberg BNA the definition of underutilized is "extremely narrow," making it difficult for developers to meet all the criteria. Moreover, since developers must obtain certain certifications from New York City before they qualify for the tax credits, Schnapf predicted the possibility of lawsuits against the city.

"I suspect there's going to be some effort to relax the underutilized definition," Schnapf said, referring to public comments.

"We fear the DEC's definition of 'underutilized' is too limiting because it excludes any projects with residencies," Darren Suarez, director of government affairs for the Business Council of New York State, told Bloomberg BNA in an e-mail. "Communities throughout New York City could benefit from a combination of mixed use, light industrial, commercial and residential redevelopment of brownfield sites. Unfortunately, as written, these regulations will limit the options for innovative redevelopment and prevent the City from building the housing it so desperately needs," Suarez said.

Affordable Housing Also Defined

The regulations define affordable housing as residential rental projects “subject to a federal, state, or local government housing agency’s affordable housing program, or a local government’s regulatory agreement or legally binding restriction, that defines a percentage of the residential rental units in the affordable housing project to be dedicated to tenants at a defined maximum percentage of the area median income based on the occupants’ households annual gross income.”

Schnapf said the affordable housing definition was “surprisingly broad” and was “good news for developers.”

The regulations define a brownfield as “any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated use of the property.