

Brownfield Update: Tax Credits Scaled Back & New Opportunities Created

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Client Advisory

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Time is running out for developers to take advantage of tax credits under New York State's existing Brownfield Cleanup Program (BCP).^[1] Newly enacted restrictions will cut off many New York City sites from receiving the BCP's generous redevelopment tax credit. Developers whose sites are accepted into the BCP before the new law takes effect (which could be as soon as July 1, 2015), will be grandfathered and remain eligible to receive the redevelopment tax credit under the current law.

Changes to the tax credit structure are just one of several reforms to the BCP that were approved by Governor Cuomo and the Legislature as part of the State's 2015-2016 budget.^[2] This new legislation, which extends the BCP tax credits until 2025, also provides fast track liability protection for applicants who forego tax credits; changes the definition of a qualifying "Brownfield site"; improves incentives to redevelop sites in economically disadvantaged locations; and provides incentives to developers of affordable housing.

Streamlined Review and Liability Release

Developers of Brownfield sites who want a liability release from the State to obtain project financing will now have the option for streamlined review of their applications and cleanup plans so long as they waive receiving BCP tax credits. The Department of Environmental Conservation (DEC) will promulgate regulations detailing how it intends to implement this program, called the BCP-EZ Program, which may include elimination of the public comment periods on applications and remedial work plans. Depending on how DEC structures the review process, the BCP-EZ option may ultimately reduce the need for New York City to have its own local brownfield program. The BCP-EZ option will not be available for sites that pose a significant threat under the State's inactive hazardous waste disposal site program.

Definition of Brownfield Site

Under the new law, the definition of "Brownfield site" is 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" that are applicable based on the reasonably anticipated use of the property. Applications to DEC for admission into the program will now need to include a site investigation report demonstrating that the property exceeds these standards. The new law removes the ambiguities of the prior definition, which had vaguely defined a Brownfield site to be any property whose redevelopment was "complicated by the presence or potential presence of a contaminant." DEC's efforts to narrowly interpret when redevelopment was "complicated" by contamination had been thwarted by New York State's highest court.^[3]

Redevelopment Tax Credit

In response to concerns that BCP tax credits were being squandered on high value properties which could easily be redeveloped without them, the new law prohibits New York City sites from claiming the redevelopment tax credit unless they meet one of the following three criteria:

- a. at least half the site is within a designated "Environmental Zone";
- b. the site is otherwise "underutilized" (a term to be defined by DEC by October 1, 2015) and the cost to remediate the site is 75% or more of the appraised value of an uncontaminated property for the same proposed use; or
- c. the site is being redeveloped as part of an "affordable housing project" (to be defined by DEC by June 8, 2015). [4]

Under the new law, costs that can be included in calculating the redevelopment tax credit will need to be more closely tied to the long-term use of the property, such as property having a useful life of at least 15 years and "non-portable" equipment used exclusively on the site.[5] Ten percent of eligible redevelopment costs are counted toward the credit.[6] Up to an additional 5% can be added to the 10% baseline for sites located in an Environmental Zone (areas identified by the State as having high poverty and unemployment rates). Additional 5% increments are also available for manufacturing sites, affordable housing projects, sites that are cleaned up to unrestricted use standards, and developments that advance the goals of a designated Brownfield Opportunity Area. However, the percentage of redevelopment costs that can be used to calculate the tax credit cannot exceed 24% (no change from the prior law).

For manufacturing facilities, the amount of the credit continues to be capped at six times site preparation costs up to \$45 million. For all other facilities (including residential), the credit is capped at three times site preparation costs up to \$35 million.

Site Preparation Tax Credit

The new law cuts back on the types of costs that can be counted toward the BCP site preparation tax credit. Previously, developers could include foundation and other costs in calculating the site preparation credit. Under the new law, only costs necessary to implement the site's investigation and remediation will count toward the credit; foundation costs unrelated to remediation requirements can no longer be included. However, the new law allows the site preparation credit to include attorney and consultant fees associated with environmental remediation, as well as costs to remove lead-based, asbestos and PCBs from structures that will remain on the site.[7]

Hazardous Waste Sites

For the first time, Class 2 inactive hazardous waste sites and "interim status" hazardous waste treatment/storage/disposal facilities will be eligible to participate in the BCP, subject to three conditions: (1) the applicant/owner of the site acquired the site after the property was contaminated, (2) the current owner did not make the contamination worse, and (3) none of the prior owners who were responsible for the contamination are able to fund the cleanup.

Effective Date

The new law is not scheduled to take effect until DEC proposes a definition of the term "underutilized," which could occur as early as July 1, but must occur no later than October 1, 2015.

Other Changes

Other highlights in the Brownfield reform legislation include:

- Revised procedures to expedite designation of Brownfield Opportunity Areas and Environmental Zones.

- Authorizing DEC to charge participants a flat fee for oversight costs, and to eliminate oversight fees for volunteers who have no responsibility for site contamination.
- Authorizing funding for the State's Inactive Hazardous Waste Disposal Site Program and Environmental Restoration Program (up to \$100 million annually for 10 years).

Conclusion

The Brownfield reform legislation promises to focus tax credits on the cleanup of contaminated sites in distressed areas, while streamlining cleanups and Brownfield redevelopment throughout the State. New York City developers who act quickly to obtain acceptance into the BCP program can preserve eligibility for generous tax credits before the new law reigns in the benefits now available to high value building sites.

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Endnotes

[1]Environmental Conservation Law, Article 27, Title 14; Tax Law §§ 21-23.

[2]Chapter 56 of the Laws of 2015, Part BB – S.2006/A3006-B.

[3]See *Lighthouse Point Property Associates LLC v. DEC*, 14 N.Y.3d 161 (2010).

[4]A Brownfield site in New York City that does not meet at least one of these three criteria will still be eligible for the BCP program, but is not eligible for the redevelopment tax credit.

[5]Developer fees (i.e. "related party service fees") are eligible costs when they are paid, but they cannot be claimed in calculating the site preparation credit.

[6]Under the prior law, the baseline credit percentage for corporate taxpayers was 12%.

[7]The amount of the site preparation credit can be up to 50% of site preparation costs when a site is cleaned up to unrestricted use standards. Lower percentages apply where use restrictions or institutional controls on the site are required.

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