



CONSTRUCTION LAW

Brownfields Cleanup

Case Law, Amendments May Modify Program

BY **KENNETH M. BLOCK**
AND **JOHN-PATRICK CURRAN**

One source of development property for new construction is the inventory of underutilized, contaminated properties known as brownfields. In New York, the Legislature passed the Brownfield Cleanup Program (“BCP”) in October 2003 in order to encourage the development of brownfields. In the four years since its passage, however, the BCP has not lived up to expectations. Among the chief criticisms of the BCP are that the statute’s tax incentive provisions are flawed and that the criteria used by the New York State Department of Environmental Conservation’s (the “DEC”) to determine whether an applicant may participate in the BCP are overly restrictive, thereby excluding participants that the statute was intended to benefit.

Although many practitioners and environmental advocates have for years criticized the DEC’s criteria for eligibility in the BCP as too restrictive and not reflective of the intent of the BCP statute, until recently, New York courts have defeated challenges to the DEC’s eligibility determinations. The Dec. 20, 2007 decision by the Monroe County Supreme Court in *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation, et al.*, Index No. 2007/9731 (Sup Ct., Monroe Cty., Dec. 20, 2007) was a departure. In



Kenneth M. Block *John-Patrick Curran*

Lighthouse Pointe, the court held that the DEC failed to demonstrate that the DEC’s denial of the petitioner’s application to enter the BCP was not arbitrary and capricious. *Lighthouse Pointe*, slip op. at 5.

In this article, we will discuss the BCP, the statute’s tax incentives, the DEC’s eligibility criteria, the impact of *Lighthouse Pointe*, and proposed amendments to the BCP.

The Program

The New York Legislature passed the BCP (ECL Title 14) in October 2003 in order to “encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment” (ECL §27-1403). The Legislature found that “there are thousands of abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden, and that these sites, known as brownfields, are also contributing to sprawl development and loss of open space” (ECL §27-1403). Among the incentives included in the BCP to encourage the development of brownfields are limitations on future liability, and perhaps more importantly, potentially lucrative tax

credits for all participants who achieve successful completion of remediation under the BCP.

Tax Credits

Under the BCP, all participants accepted into the program are eligible for tax credits, potentially amounting to as much as 22 percent of the total cost of development of the project on the brownfield site. Other states that have passed similar legislation to encourage the development of underutilized properties have tied the tax incentives to the cost of cleanup, rather than the entire cost of development.¹

The automatic nature of the tax credits offered under the BCP has been, perhaps, the greatest cause of controversy surrounding the BCP. For many large developments, the cleanup costs may represent a relatively small percentage of the total cost of the project, resulting in very large tax credits with a relatively small investment in the actual remediation of the brownfield. In the July 2007 issue of its online newsletter, Environment DEC, the DEC wrote that “[c]urrent law provides that a percentage of the total costs beyond remediation be paid to parties for development of brownfields sites. Thus, the cost of the program has significantly exceeded original projections.” Many have suggested that this unanticipated consequence of the tax credit incentives caused the DEC to restrict eligibility to the BCP further than the Legislature intended when it enacted the statute.

Eligibility

The statute defines brownfield currently as “any real property, the redevelopment or reuse of which may be complicated

Kenneth M. Block and **John-Patrick Curran** are members of Tannenbaum Helpern Syracuse & Hirschtritt. **Hilary Semel**, an associate of the firm, participated in the preparation of this article.

by the presence or potential presence of a contaminant,” ECL §27-1405(2). While the statute provides the basic framework for the BCP, the DEC was charged with implementing the program. Aside from the definition of a brownfield, the statute offers little guidance in determining eligibility, other than by enumerating specific persons and properties that are not eligible to participate in the BCP. A particular source of murkiness is the statute’s provision that the DEC “may reject [a] request for participation if the [DEC] determines that the public interest would not be served by granting such request,” ECL §27-1407(9).

In March 2005, the DEC published guidelines for determining eligibility to participate in the BCP. The Brownfield Cleanup Program Eligibility Determination Guidance, which was incorporated in the Brownfield Cleanup Program Guide, contains a two pronged test for determining whether a proposed site meets the definition of a brownfield: “(A) there must be confirmed contamination on the property or a reasonable basis to believe that contamination is likely to be present on the property; and (B) there must be a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development or re-use of the property.” In determining whether there is a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development of the proposed site, the DEC will consider, among other things, “whether the estimated cost of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.”

The BCP Regulations (6 NYCRR Subparts 375-1, 375-3 and 375-6), adopted by the DEC in December 2006, further limited eligibility by excluding from the BCP sites affected by contamination originating from off-site sources (6 NYCRR 375-3.3(a)(2)). It is important to note that the DEC considers contamination contained in historic fill as contamination originating from an offsite source. Accordingly, sites that face extraordinary costs to dispose of contaminated, historic fill would not qualify for the BCP even though such contaminated soils would certainly complicate the development or re-use of the property.

As a result of the DEC’s restrictions, there are many sites where remediation is required that have been excluded from the benefits of the BCP. Of particular concern to many groups is that the DEC’s eligibility criteria have excluded properties in urban areas where redevelopment is needed the most—where properties are small and contamination either is the result of historic filling operations or is so minimal as to be deemed by the DEC as not complicating redevelopment—so as to thwart the very intent of the statute.

In his comments on the draft BCP regulations, former Assemblyman and current State Comptroller Thomas P. DiNapoli, who co-authored the statute that created the BCP, argued that the exclusion of properties affected by contamination originating offsite is not consistent with the statute (See Assemblyman Thomas P. DiNapoli, Chair, New York State Assembly Committee on Environmental Conservation, Comments on the Draft Regulations for the State Superfund Program Environmental Restoration Program Brownfield Cleanup Program, March 27, 2006).

Conflicting Case Law

In *Jopal Enterprises LLC v. Sheehan*, Index No. 00803-06 (Sup. Ct., Suffolk Cty., July 31, 2006) and in *377 Greenwich LLC v. New York State Department of Environmental Conservation*, Index No. 101617/06 (Sup. Ct. N.Y. Cty. Nov. 27, 2006), the courts denied petitions under Article 78 challenging the application of the DEC’s eligibility guidelines to deny entry to the BCP. In *377 Greenwich*, the DEC denied the petitioner’s application despite the existence of soil contamination at the petitioner’s property exceeding the DEC’s own established Soil Cleanup Objectives (“SCOs”), which are set forth in 6 NYCRR 375-6. The petitioner argued that in determining that the property was not sufficiently contaminated to complicate redevelopment, the DEC had interpreted the BCP in a more restrictive manner than the enabling legislation allows. The court rejected that argument and found that, given the particular factors associated with the petitioner’s development,² it was perfectly rational for the DEC to determine that redevelopment was not “complicated” by the presence of contamination.

Accordingly, the court upheld the DEC’s decision to deny petitioner’s BCP application.³

Then came *Lighthouse Pointe*. As in *Jopal Enterprises* and *377 Greenwich*, the DEC in *Lighthouse Pointe* argued that the basis for its denial of the petitioner’s application was that the contamination on the property was so minimal that it would not complicate redevelopment.⁴ In *Lighthouse Pointe*, the petitioner’s data showed that soil samples collected at petitioner’s site exceeded SCOs for thirteen different contaminants. The DEC argued that the SCOs are “standards set by the state to determine if a Brownfield site has been satisfactorily cleaned up, not whether it is contaminated in the first place.” *Lighthouse Pointe*, slip op. at 4. The court rejected that argument as illogical, since it would result in a ruling that the SCOs “should have no bearing whatsoever in determining whether a site is initially admitted into the BCP, yet these same standards should be the ultimate factor in determining whether an applicant receives a liability release

after completion of remediation.” Id.

The court also noted that the Legislature’s use of qualifying language such as “may complicate” and “potential presence” indicated the legislature’s intent to establish a low threshold for admission into the BCP for contaminated properties. *Lighthouse Pointe*, slip op. at 4. Applying standard rules of statutory construction, the Court found that the controlling word in the statute is ‘may,’ and that the petitioner was correct that “the question is not whether the Petitioner has proven the hazardous wastes at the site actually pose a significant threat to the environment, but rather whether there might be hazardous wastes that may complicate the development.” Id.

The court’s determination in *Lighthouse Pointe*, that the statutory definition of brownfield was meant by the legislature to set a low threshold for eligibility in the BCP, opens the door for an argument that the DEC’s Eligibility Guidance criteria are not consistent with the statute.⁵

Proposed Amendments

In the first ever State of Upstate Address on Jan. 16, Governor Spitzer said that “we must...face the hard reality that New York’s Brownfields cleanup program is failing.... Therefore, this year, we will submit new and improved legislation to reform our Brownfields program so it can fulfill its original purpose of creating development-ready sites where they are needed most, while also protecting our environment.” Governor Eliot Spitzer, Address at Buffalo State College (Jan. 16). Governor Spitzer’s January budget bill proposes amendments to the BCP in two stages—fiscal, or interim amendments, that will expire upon the enactment of permanent amendments.

The interim amendments would limit the amount of tax incentives available under the BCP and would exclude from the BCP sites that would likely be developed without the tax credits. The permanent amendments would also limit the amount of tax credits, but the tax credits would be de-linked from eligibility to participate in the program. Under the proposed permanent amendments, if a site does not qualify for tax credits (because, for example, the DEC determines that the development would likely occur without the tax credits) the applicant may nevertheless choose to participate in the BCP and receive the benefits of DEC oversight and a transferable release and covenant not to sue.

Participants who are already in the BCP before July 1, 2007 will not be subject to the limitations contained in the proposed amendments.

Conclusion

The end result of *Lighthouse Pointe*, and the proposed amendments to the BCP, should be more access to the BCP for owners of brown-

field sites and, an economically sustainable tax credit structure that still rewards owners appropriately for redeveloping brownfield properties in the State of New York.

Until the proposed amendments are acted upon, BCP eligibility remains a moving target. The proposed amendments will make the BCP available to all owners of brownfield properties, however, the availability of tax credits will no longer be guaranteed. Developers who are considering the possible availability of tax credits for the development of their contaminated proper-

ties must assess carefully, and early on, the relationship between the potential costs of remediation and the anticipated value of the development once completed.



1. See, e.g., New Jersey Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10 B-1 at seq.

2. The petitioner in *377 Greenwich* had already obtained financing, had performed substantial remediation and had taken other steps in furtherance of its hotel development prior to the submission of and during the consideration of its BCP application.

3. The decisions in *Jopal Enterprises* and *377 Greenwich* were viewed by the DEC as specific af-

firmations of the DEC's use and application of its March 2005 Brownfield Cleanup Eligibility Determination Guidance (See DEC's Web site at www.dec.ny.gov/chemical/8450.html).

4. The court noted that the DEC also argued that the petitioner's difficulty in obtaining financing for its development should not be considered in determining whether development is complicated by the presence of contaminants. The court also rejected that argument and found that "an investor's recalcitrance towards investment in the absence of BCP approval would have to be seen as a possible complication to development." *Lighthouse Pointe*, slip op. at 2.

5. In the wake of the uncertainty created by *Lighthouse Pointe*, the DEC has stopped processing BCP applications.