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### CONSTRUCTION LAW

# Brownfield Program Should Benefit a Range of Projects



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Much has been written about the perceived deficiencies of New York State's Brownfield Cleanup Program (BCP) (ECL Article 27, Title 14), as well as the frustration felt by many in the way that the program has been administered by the Department of Environmental Conservation (DEC). The tax incentives contained in the BCP turned out to be far more expensive for the state than had been anticipated when the statute was enacted.

In response to this fiscal miscalculation, DEC implemented criteria that made it harder for properties to qualify for participation in the BCP; harder, many argued, than the Legislature intended. As a result, many properties that appeared to meet the statutory definition of a brownfield, even some that seemed to epitomize the type of property that the BCP was designed to benefit, were excluded from participation, and, therefore, excluded from the substantial benefits, incentives and protections offered by the program. BCP amendments enacted in 2008 mitigated the state's financial exposure, but did nothing to resolve the debate over program eligibility.

On Feb. 18, 2010, the New York Court of Appeals issued its decision in *Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, \_\_\_N.E.2d\_\_\_, 2010 WL 546058 (N.Y.), 2010 N.Y. Slip Op. 01377, resolving, at least in part, more than five years of controversy over the definition of a "brownfield" as used in BCP. The Court held that part of the criteria employed by the DEC in determining whether a particular property is eligible to participate in the BCP is inconsistent with the clear language of the enabling statute.

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**Lighthouse Pointe, slated to go on this land in Irondequoit outside Rochester, is a \$250 million residential-commercial development to be built atop a former municipal dump.**

Specifically, the BCP defines brownfield as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant." ECL §27-1405(2). DEC denied the petitioner's application to participate in the BCP on the basis of DEC's interpretation of the word "complicates," as used in the BCP. The Court found that DEC's interpretation is overly restrictive and imposes a condition on BCP participation that is not supported by the language or the intent of the statute and, therefore, the Court ordered DEC to admit the petitioner to the BCP.<sup>1</sup>

The *Lighthouse Pointe* decision marks the first time that the Court of Appeals has ruled on the propriety of the criteria established by DEC to determine eligibility to participate in the BCP. While the Court's holding

specifically resolves one issue with respect to DEC's authority to restrict participation in the BCP, it raises larger questions concerning the continued viability of DEC's eligibility criteria.

Aside from the definition of a brownfield contained in ECL §27-1405(2), 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.

Accordingly, DEC, charged with the responsibility of implementing the BCP, began the process of establishing guidance criteria for determining whether a particular piece of property is eligible to participate in the program. In March 2005, DEC added an amended §2 entitled Eligibility (eligibility guidance") to its Brownfield Cleanup Program Guide (BCP Guide).<sup>2</sup> The guidance gave DEC considerable

discretion in making BCP eligibility determinations. For example, in deciding whether the redevelopment of a particular site has been complicated by the presence of contaminants, DEC may consider, among other factors, “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.” BCP Guide §2.2(3)(D). DEC also added a catch all that allows DEC to reject a site “even if the real property meets the definition of ‘brownfield site,’ upon a determination that the public interest would not be served by granting such request.” BCP Guide §2.3(1).

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 exclusively by contamination originating from off-site sources. 6 NYCRR 375-3.3(a)(2).<sup>3</sup>

DEC’s eligibility criteria were immediately criticized as unduly restrictive, and giving DEC too much discretion to reject applicants on the basis of subjective criteria.

Participation in the BCP was an attractive, and to some the only, option available to prospective developers of contaminated property. The BCP contained significant incentives available to all participants. 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. Moreover, following the enactment of the BCP, DEC began to phase out the BCP’s predecessor program, the Voluntary Cleanup Program (VCP) and the BCP became, ultimately, the only program available in New York State to obtain regulatory closure for properties impacted by contaminants other than petroleum.<sup>4</sup>

Furthermore, the Legislature’s use of qualifying language such as “may complicate” and “potential presence” appeared to indicate the Legislature’s intent to establish a low threshold for admission into the BCP for contaminated properties.

Using its own eligibility criteria, however, DEC denied participation in the BCP to many applicants who believed that their properties met the statutory definition of a brownfield. Some of the aggrieved parties, who were denied the benefits and protections offered by the BCP, commenced litigation to challenge the DEC’s determinations.

### Eligibility

The first two cases were *Jopal Enterprises LLC v. Sheehan*, Index No. 00803-06 (Sup. Ct., Suffolk Cty., July 31, 2006) and *377 Greenwich LLC v. New*

*York State Department of Environmental Conservation*, 827 N.Y.S. 2d 608 (Sup. Ct. N.Y. Cty. 2006). Both involved Article 78 proceedings brought to overturn determinations by the DEC to deny participation in the BCP. In each case, the court found that DEC acted rationally in determining that the contamination on the respective property was so minimal that it would not complicate redevelopment.<sup>5</sup> In *377 Greenwich*, the New York County Supreme Court specifically defended DEC’s eligibility guidance criteria, writing that it did not believe that “the factual criteria utilized by the DEC in determining the [petitioner’s] application, which is the same criteria set out in the [Eligibility Determination Guidance], are inconsistent with or more restrictive than the enabling language in the BCPA.”

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Then came the Monroe County Supreme Court’s decision in *Lighthouse Pointe*. Lighthouse Pointe Property Associates, LLC had plans to develop 47 acres of property on Lake Ontario in the City of Rochester, which included the former City of Rochester Landfill and a former wastewater treatment facility.

Along with its application to participate in the BCP, Lighthouse Associates included historical data from the proposed development site that showed widespread soil contamination, elevated methane from degrading landfill materials and groundwater contamination. Dozens of soil samples contained contaminants in excess of their respective Soil Cleanup Objectives (SCOs).

Although DEC conceded that contamination existed at the project site, DEC denied Lighthouse Associates’ application to participate in the BCP on the grounds that the contamination at the property is so minimal that it would not complicate redevelopment.

In response to Lighthouse Associates’ Article 78 petition, 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.” 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.”

DEC also argued that the fact that lenders may be reluctant to finance development on the project site should not be considered a “complication” to redevelopment in making a determination as to whether the property qualifies for participation in the BCP. The court also rejected that argument, noting that “an investor’s recalcitrance towards investment in the absence of BCP approval would have to be seen as a possible complication to development.”

Ultimately, the court held that DEC was required, in its eligibility determination, to articulate its rationale for concluding that the contamination at the site did not “complicate” redevelopment. By failing to include the rationale for its determination, DEC “failed to demonstrate that their actions were anything but arbitrary and capricious.”

Following the Monroe County Supreme Court’s decision in *Lighthouse Pointe*, three other supreme court decisions overturned DEC determinations to exclude properties from participation in the BCP. See *HLP Properties LLC v. N.Y.S. Dept. of Environmental Conservation*, No. 115969/2007 (Sup. Ct., N.Y. County, Sept. 12, 2008) aff’d \_\_\_N.Y.S. 2d, 2010 WL 455321, 2010 N.Y. Slip. Op. 01059 (1st Dep’t 2010); *Matter of East River Realty Co. LLC v. N.Y.S. Dept. Of Environmental Conservation*, 866 N.Y.S. 2d 537 (Sup. Ct. N.Y. Cty. 2008), aff’d 891 N.Y.S. 2d 359 (1st Dep’t 2009) and *Destiny USA Development, LLC v. DEC*, 867 N.Y.S. 2d 16 (Sup. Ct. Onondaga Cty. 2008), aff’d 879 N.Y.S.2d 865 (4th Dept. 2009). In each of the foregoing cases, the courts held that DEC denied participation in the BCP on the basis of conditions or criteria not authorized by the statute.

### Appellate Division

*HLP, East River* and *DestiNY* were all affirmed on appeal. *Lighthouse Pointe*, however, was not.

In its brief to the Fourth Department in *Lighthouse Pointe*, DEC argued, for the first time, that its decision to deny petitioner entry to the BCP was based upon DEC’s interpretation of the word “complicates,” to mean that the property requires remediation.<sup>6</sup> The Fourth Department reversed the decision of the Monroe County Supreme Court and reinstated DEC’s denial of petitioner’s entry to the BCP. In the majority opinion, the court wrote that:

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. Inasmuch as it is not the province

of the courts to second-guess a reasoned agency determination or to invade the process by which such a conclusion is reached, the petition should have been dismissed. The DEC's well-reasoned analysis of the BCP applications of petitioner, coupled with the mandate that we must not substitute our judgment for that of the DEC, compels the conclusion that the court erred in granting the petition and directing the DEC to accept petitioner into the BCP."

*Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, 872 N.Y.S.2d 766, 770 (4th Dep't 2009).

The Fourth Department decided *DestiNY* only five months after its decision in *Lighthouse Pointe*. While the court appeared to reach opposing conclusions in the two cases, it made no direct attempt to distinguish *DestiNY* from *Lighthouse Pointe*. The distinction between the two decisions appears to be that in *Lighthouse Pointe*, the appellate court found that DEC's in-eligibility determination was based upon a reasoned factual determination (requiring DEC's expertise) whereas in *DestiNY* the court found that the ineligibility determination was based upon a "categorical application by the DEC of its 'guidance' and 'guide factors'" that "both conflicts with the intent of the Legislature and constitutes an impermissible attempt to legislate." 879 N.Y.S.2d at 865.

### Court of Appeals

The Court of Appeals rejected the Fourth Department's conclusion that the Court should defer to DEC's interpretation of the BCP. The Court pointed out that deference to the agency responsible for administering a statute is only necessary where the interpretation requires the agency's particular expertise. Interpretation of the meaning of the word brownfield, however, involved basic principles of statutory construction and did not require the competence and expertise of the regulatory agency.

The Court noted that the statutory definition of brownfield consists of two elements: (1) the presence or potential presence of a contaminant; and (2) redevelopment of the property must be complicated by the presence or potential presence of the contaminant. *Lighthouse Pointe*, 2010 WL 546058 (N.Y. 2010). The word present, the Court wrote, has a plain meaning in common usage and that "a contaminant is present or potentially present on real property when it does or may exist or be found within the property limits; the statutory definition does not, on its face, mandate the presence of any particular level or degree of contamination."

The Court then turned its attention to the

definition of the word complicate. DEC argued that in the definition of brownfield, as used in the BCP, the term may be complicated can be interpreted reasonably "to mean that redevelopment or reuse of the property may be complicated by the need for remediation." Respondent's Brief, 2009 WL 5852273 (N.Y. Sept. 15, 2009) at 17. In other words, additional complications to development, such as difficulty in obtaining financing, the developer's potential liability, added costs and increased time, are not considered "complications" for the purposes a BCP eligibility determination.

The Court rejected DEC's argument, observing that the word complicate also has a common meaning, which is "to make complex, involved or difficult." The Court found, therefore, that "real property qualifies as a 'brownfield site' for purposes of acceptance into the BCP so long as the presence or potential presence of a contaminant within its boundaries makes redevelopment or reuse more complex, involved, or difficult in some way."

In determining whether redevelopment of site has been complicated by the presence of contaminants, DEC cannot limit its consideration to whether the contaminants require remediation. DEC must consider other factors, such as difficulty in obtaining financing, limitations on use of the property and the developer's exposure to potential liability.

It is important to note that the Court's holding in *Lighthouse Pointe* does not specifically invalidate any part of DEC's BCP eligibility criteria. Instead, it was DEC's application of the criteria, specifically DEC's interpretation of the word "complicates," that the Court found to be at odds with the BCP statute. However, the Court's articulated definition of a brownfield clearly calls into question other grounds upon which the DEC has denied participation in the BCP. For example, according to the Court's definition, contamination emanating or originating from an off-site source is still present on the affected property. Accordingly, in making its eligibility determinations DEC would have no authority to ignore contamination originating from off-site sources, which makes the BCP available to the vast number of properties previously excluded on that basis.

Even more broadly, the *Lighthouse Pointe* decision makes it clear that DEC cannot establish standards for participation in the BCP, whether as written or as applied, that cannot be found either in the clear language of the statute or in a fair reading of the legislative history behind the statute. The lower court decisions in *East River Realty*, *HLP Properties* and *DestiNY USA*, where DEC was found to have been improperly legislating by adding conditions to eligibility not found in the BCP statute, are not at

all inconsistent with the Court of Appeals' decision in *Lighthouse Pointe*.

### Conclusion

The Court of Appeals' decision in *Lighthouse Pointe* has broad implications for BCP eligibility. The specific holding of the Court is that in determining whether a particular property meets the statutory definition of a brownfield, DEC must consider all possible complications to redevelopment caused by the presence of contaminants. The Court also makes it clear that DEC's discretion in making eligibility determinations is limited to areas where DEC's specific experience and expertise is required, and then only where discretion is permitted by the language of the statute. Exclusionary conditions and subjective criteria not authorized by the statute cannot be the basis for denial of participation in the BCP. The Court's articulated definition of a brownfield, however, also appears to invalidate DEC's practice of considering only contamination from on-site sources, thereby broadly expanding the availability of the BCP to sites such as those contaminated by historic fill.

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1. The Court of Appeals reinstated the decision of the Monroe County Supreme Court which found that, as a matter of law, the petitioner's property met the definition of a brownfield.

2. <http://www.dec.ny.gov/chemical/8450.html>.

3. DEC considers contamination contained in historic fill to be 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.

4. Regulatory closure can be obtained for petroleum spills reported to and closed to the satisfaction of DEC or, in certain counties, the county department of health.

5. 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.

6. In its reply brief to the Court of Appeals, DEC argued that it was not a new argument, but a clarification of basis contained in its eligibility determination.