

# **CONTROVERSY BREWING: The Brownfield Cleanup Program Eligibility Criteria**

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# STATUTORY ELIGIBILITY CRITERIA:

## ECL §27-1405(2)

“ 'Brownfield site' . . . shall mean any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.”

# REGULATORY ELIGIBILITY CRITERIA:

## 6 NYCRR §375-3:3

"(a) Eligible sites. Any real property that meets the requirements of a brownfield site as defined in ECL article 27, title 14.

# REGULATORY ELIGIBILITY CRITERIA:

## 6 NYCRR §375-3:3 (cont'd)

- A brownfield site has two elements:
  1. 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
  2. there must be a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development, use or re-use of the property."

# REGULATORY ELIGIBILITY CRITERIA:

## 6 NYCRR §375-3:3 (cont'd)

Also:

- only contamination from on-site sources.
- no contamination from structures located at the site due to the stored materials, etc.
- NYSDEC may consider contiguous parcels or only a portion of the site as eligible for the BCP.

# BROWNFIELD CLEANUP PROGRAM ELIGIBILITY GUIDANCE (MARCH 2005)

Two elements reiterated.

When determining whether contamination is present or reasonably likely to present, NYSDEC will consider:

- Nature and extent of contamination and whether it exceeds standards, criteria or guidance.
- Whether contamination is historic fill materials or exceeds background levels.
- Prior industrial/commercial operations.
- Whether the site has previously been subject to cleanup activities.

# BROWNFIELD CLEANUP PROGRAM ELIGIBILITY GUIDANCE (MARCH 2005)

When determining whether contamination is complicating development, use or re-use, NYSDEC will consider:

- is proposed site idle, abandoned or underutilized?
- does presence or perception of contamination make redevelopment unattractive?
- do properties in vicinity have high vacancy rates, low property values?
- is estimated cost of remediation significant in comparison to anticipated value of proposed site as redeveloped?

# BROWNFIELD CLEANUP PROGRAM ELIGIBILITY GUIDANCE (MARCH 2005)

Also - site may be approved in part, rejected in part.

- NYSDEC may reject otherwise eligible site if public interest not served by granting the request.

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

NYSDEC wins first two challenges:

- Jopal Enterprises, LLC v. NYSDEC,  
(Sup. Ct. NY Co. 2006);
- 377 Greenwich, LLC v. NYSDEC,  
(Sup. Ct. NY Co. 2006)

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

## NYSDEC Wins (cont'd)

- Soil and groundwater contamination at both site in excess of cleanup standards (but decided before Part 375-6 SCOs promulgated).
- Both challenges showed that contamination complicated redevelopment.
- In both cases, courts deferred to NYSDEC determination and held that NYSDEC could rely on guidance.
- In 377 Greenwich, court observed that plaintiff could have filed writ of mandamus when NYSDEC did not make 45-day "best efforts" deadline.

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

NYSDEC loses next three challenges:

- Lighthouse Pointe Property Assoc., LLC v. NYSDEC  
(Sup. Ct. Monroe Co. 2007)
- Destiny USA Development, LLC v. NYSDEC  
(Sup. Ct. Onondaga Co. June 10, 2008)
- HLP Properties, LLC v. NYSDEC  
(Sup. Ct. NY Co. Sept. 12, 2008)

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

## Lighthouse Pointe:

- 13 contaminants in soil, groundwater and soil vapor in excess of SCOs. Court determines that SCOs are benchmarks in determining whether site is contaminated, although minor exceedences may be OK.
- financing for project difficult without admission in BCP & project had strong local support.
- Court found that NYSDEC failed to show how it determined that the levels of contaminants would not complicate the project.

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

## Destiny USA Development:

- Contamination not at issue -- site highly contaminated.
- Destiny USA claims that its first phase will add more than \$600 million annually in economic activity, 1,000s of jobs. Remediation costs were estimated at \$50-80 million.

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

## Destiny USA Development: (cont'd)

- Project is to be built on 152 acres as an expansion of the Carousel Center Shopping Mall including adjacent/nearby parcels:
  - "Destiny USA is being designed to serve as a living laboratory and showcase for development and implementation of state-of-the-art technology in the areas of renewable, energy resources, sustainable design, homeland security, information systems, retail and other sales, among other things."

## Destiny USA Development: (cont'd)

NYSDEC (using Eligibility Criteria Guidance) rejects most of the project parcels from eligibility in the BCP, 19 months after application submitted:

- Carousel Mall property not abandoned and had been (partially) remediated.
- Destiny USA project in planning for many years before BCP enacted; construction began while BCP application pending.
- Remedial activities minimal in relation to overall costs of the project.
- The properties were going to be redeveloped regardless of the presence of the contamination.
- Some of the parcels excluded due to ongoing state enforcement actions.

## Destiny USA Development: (cont'd)

### Court strongly rejects NYSDEC positions:

- Court rules that use of the guidance factors was "arbitrary, capricious, unlawful, not rational and based on unsound reasoning, erroneous and in violation of law."
- "The guidance that has been drafted and used by DEC profoundly limits and blunts the . . . statute in a myriad of ways and at the same time, vests unlimited authority and unfettered discretion with DEC personnel . . ."

## Destiny USA Development: (cont'd)

### Court strongly rejects NYSDEC positions:

- "Clearly, . . . the DEC has opted to make itself a fiscal watchdog without legislative authority. Moreover, by adopting the so-called guidance factors, the DEC has chosen to rewrite the statute that was clearly written by the legislature, the effect of which is not only to dull, but to emasculate the clear intent of the statute by administrative agency fiat."
- NYSDEC's cost of development vs. remediation criteria puts itself in the local development area -- "Local and urban planners must invite DEC to the design table when courting developers." The cost of development vs. remediation criteria gives NYSDEC "unbridled discretion" over eligibility of projects into the program.

## Destiny USA Development: (cont'd)

### Court strongly rejects NYSDEC positions:

- The Court also held that stipulations and consent orders governing some of the parcels were nothing more than "voluntary agreements" and were not state enforcement actions.

# CASES CHALLENGING NYSDEC DETERMINATION OF INELIGIBILITY INTO BCP

## HLP Properties:

- 1.75 acre parcel at 17th - 18th Streets, 10th - 11th Avenues in Manhattan (former ConEd MGP site).
- Again, contamination not at issue.
- In 2002 VCA issued to ConEd; in 2004 HLP submits a BCP application for the Site. Withdrawn in late 2006.
- In 2007 ConEd and HLP submit concurrent, separate BCP applications. Both applications denied.

## HLP Properties: (cont'd)

### NYSDEC determined:

- the Parcel was neither unattractive for redevelopment or reuse due to the contamination.
- the Parcel has had nearly continuous uses -- today it is a parking lot.
- adjacent properties show no economic distress -- other properties being developed.
- ConEd has not terminated its VCA, so remediation will occur.

## HLP Properties: (cont'd)

### The Court rejects NYSDEC's rejection of eligibility:

- Guidance requirements are an improper legislative function, since they are not authorized by the statute -- and have been criticized from multiple entities, including the NYS Bar Association Environmental Law Section.
- The guidance factors are also missing from the Part 375 regulations.
- The Court concludes: "The DEC's use of 'guidance factors' . . . denying petitioner's BCP application is erroneous in that it constitutes an impermissible attempt to legislate, and is inconsistent with the Legislature's intent to encourage remediation."
- Note: The Court also holds that existence of ConEd VCA<sub>21</sub> for the parcel does not prevent approval of BCA.

## Where are we?

- If Destiny USA and HLP Properties decisions are upheld on appeal, then Eligibility Criteria Guidance, in its current form, is dead.
- The only effective way of restricting eligibility will be additional legislation.

# Where are we?

- If Eligibility Criteria Guidance lives, then be prepared to show:
  - contamination significantly in excess of SCOs
  - financing and project not likely to proceed without BCA
  - property at issue is vacant or under used and has been so for a long time
- But after recent caps put on the tax credits available in the BCP, does it really matter?
- Finally: BCP needs predictability and hard time lines if it is to fully succeed.

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