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THE NEW N.Y. BROWNFIELD LAW: TAKING ADVANTAGE OF THE OPPORTUNITIES

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On October 9, 2003, New York finally enacted a "brownfield" law. In doing so, New York joined many other states seeking to reclaim and reuse "contaminated" properties (and thereby reserve as many "greenfields" as possible). The Brownfield Cleanup Program ("BCP") provides economic incentives and liability protections to real estate professionals willing to develop contaminated sites.

An Overview of the Program

Generally, a brownfield is any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous waste, petroleum, pollutant or contaminant. Current and prospective owners of the property who are willing to clean up the contamination may apply for inclusion in the BCP.

All applicants are required to characterize fully the nature and extent of the contamination at and emanating from the brownfield site, including a work plan for a site investigation or a final investigation report.

If accepted into the BCP, the applicant must enter into a Brownfield Site Cleanup Agreement with the DEC. The Cleanup Agreement must provide, among other things, for the preparation and implementation of a citizen participation plan, investigation and remediation activities pursuant to work plans approved by the DEC, recovery of state oversight costs and any other conditions considered necessary by the DEC for the effective implementation of the program.

Remedial Program Requirements

The BCP establishes a multi-track approach for the remediation of contamination. The tracks range from Track 1, which requires that a remedial program achieve a level of cleanup that will allow the site to be used for any purpose without restriction and without reliance on long term engineering controls, to Track 4, which requires that a remedial program achieve a level of cleanup that will allow the site to be used for its current, intended or reasonably anticipated residential, commercial or industrial use with restrictions and with reliance on long-term engineering controls. Depending on the

prospective future use of the property, developers should consider the differing levels of remediation acceptable to the DEC, and the attendant costs of each of the alternatives.

Citizen Participation Plan

The BCP emphasizes early community involvement and participation relating to the cleanup of a brownfield site. The BCP allows the public to comment at any time during the remedial program and establishes specific times during which public comment is invited; for example, there is a 30-day public comment period following publication of notice of applicant's request to participate in the BCP and a 45-day public comment period prior to finalization of a remediation program. Parties seeking the benefits of the brownfield law must reach out to potential community opposition early in the process in order to avoid being bogged down in the public involvement process.

Limitations on Liability

Upon completion of the remediation program, the applicant must submit to the DEC a final engineering report containing, among other things, a description of the remedial work undertaken and a description of institutional controls employed at the site for future monitoring. Once the DEC is satisfied that the remediation requirements have been achieved, the DEC will issue a written certificate of completion ("COC"). A COC may be modified or revoked under certain circumstances, such as failure to comply with the Cleanup Agreement, misrepresentation of a material fact regarding cleanup levels or other good cause.

Once a certificate of completion is issued, the applicant is no longer liable to New York State for claims arising out of the presence of any hazardous waste in, at or emanating from the site prior to the Cleanup Agreement. Exceptions to this limitation on liability include fraud, non-compliance with the Cleanup Agreement, a change in use of the site and/or a finding by the DEC that a change in an environmental standard, factor or criteria upon which the remedial work plan was based renders the program implemented at the site no longer protective of the public health and the environment.



Of key significance to real estate investors and developers is that the limitation on liability extends to successors and assigns through acquisition of title to the site. However, the limitation on liability does not extend to a civil action brought by a party other than the State.

Tax Credits and Other Benefits

Owners can take advantage of tax credits (to be applied against franchise taxes) in significant amounts under the BCP, effective for tax years beginning on or after April 1, 2005. Amounts which can be offset against franchise taxes include 12% of development costs for businesses and 10% for individuals (percentages increase by 2% for sites remediated to Track 1). These percentages increase by 8% if at least half of the site is located in an "environmental zone," as identified by the Commissioner of Economic Development as having a 20% poverty rate and an unemployment rate at least equal to 1.25 times the statewide average.

Taxes may be reduced by costs incurred in preparation of the site for its intended purpose and includes, for example, the expense of excavation, demolition, scaffolding and security. Site preparation costs do not include the cost of acquiring the site. Costs of tangible personal property may be offset against taxes if the personal property has a useful life of at least four years, is depreciable under the Internal Revenue Code and is used for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing).

Another substantial financial incentive under the program is that an applicant is eligible for an environmental remediation insurance credit of up to \$30,000 or 50% of the cost of the insurance premium. As environmental insurance is more widely utilized and more generally required by lenders, this benefit could prove very valuable to applicants. The legislation also refinances the State's Superfund Program, establishes an innocent purchaser

defense under the State's Superfund Law, increases to ninety percent (90%) from seventy-five percent (75%) the eligible costs of an environmental restoration project that the state may provide to a municipality, and allows municipalities to receive one hundred percent (100%) assistance from the state for remediation of off-site contamination, among other things.

In Summary

The new brownfield law changes the dynamic in real estate development in New York. Savvy owners, investors, lenders and developers now have unprecedented opportunities to maximize values by structuring transactions to take full advantage of the various provisions of the law.

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