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Environmental LAW

Cuomo seeks state brownfield cleanup program change – again

A brownfield is a developed, but now vacant or underutilized property, where redevelopment or reuse is hampered by the presence of contamination. There are thousands of properties fitting this description across New York state.

Initial efforts to identify the most severely contaminated properties and make polluters pay for cleanups spawned the Superfund program and an entire remediation industry. Superfund, however, was never intended to address sites with lesser environmental problems that likely would not pose a significant threat to the environment or public health, but where the added expense and uncertainty of dealing with those problems was enough to scare off investment and tip the scale against redevelopment.

In 2003, New York adopted a Brownfield Cleanup Program to encourage redevelopment and reuse of underutilized or abandoned properties. In exchange for cleanup and redevelopment, the BCP provides liability protection and tax incentives in the form of tax credits calculated as percentages of money invested in site preparation costs (cleanups) and redevelopment, including capital costs for new construction or rehabilitation.

Since inception, BCP has been the subject of an ongoing debate as to whether the tax credits were necessary or too generous, and whether it diverted tax dollars to projects that would have happened anyway or would not produce enough public benefit to justify the cost.

In 2008, following several individual projects that paid tax credits in the range of \$50 million each, the Legislature modified the formulas and capped the credits for any one project. The Legislature also built in a deadline whereby the tax credit program would only be available to projects where cleanups were completed, which is now Dec. 31, 2015.

In 2014, Gov. Cuomo proposed to extend the tax credit program deadline to the end of 2025, but also proposed broad changes to revamp the entire program and further restrict the tax credits. The Legislature did not accept the governor's proposal and ultimately tried to kick the can down the road by extending

the existing program through 2017.

In December, Gov. Cuomo vetoed the Legislature's extension, setting the stage for a showdown over the BCP this year. On Jan. 21, the governor released his executive budget proposal for 2015, which includes over 40 pages of amendments to the BCP.

Just prior to that, on Jan. 8, the Environmental Law Section of the State Bar Association came out with a series of recommendations to reform the BCP. Also new to the debate are economic studies which attempt to explore the hypotheses that the BCP has been hijacked by big money projects that would have been built anyway or that BCP projects, in general, produce too little benefit for the tax dollars invested in the credits.

The reports issued in January 2014 by the New York University Schack Institute of Real Estate, and in February 2014 by the Developers Brownfield Alliance, attempted to assess the economic and environmental impacts of projects undertaken within the BCP. The reports concluded that because of the BCP tax credits, sites have been cleaned and developed, jobs have been created, private investment and financing have been encouraged and that, over a 20-year period, each \$1 invested by the state through tax credits will return more than \$2 in new tax revenues.

Nevertheless, doubts that the BCP is effective or worthwhile remain. State Comptroller Thomas DiNapoli has been a vocal critic of the current program, projecting in 2013 that projects already approved will reduce tax revenues by \$3.3 billion, ranking the program "among the most generous in the nation."

Gov. Cuomo's proposed changes would extend the deadline for completion of sites currently in the BCP two years, to Dec. 31, 2017, extend the tax credit program through 2025, but change tax credit calculations and eligibility for sites accepted into the program after April 1, 2015.

Among many revisions the governor is seeking from the Legislature: limiting tangible property (development) credits to three

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classes of sites – those in prescribed environmental zones, those where the projected cleanup cost is greater than the value of the property as clean, or those classified as affordable housing projects; changing the definition of what property qualifies as a brownfield to sites where contamination exceeds applicable cleanup standards established by the DEC, but also include state Superfund sites where the responsible parties cannot be identified or are unable to pay for cleanups; retaining tax credits for cleanup costs, but adding new criteria on what expenses qualify for reimbursement; creating a new, streamlined review process (BCP-EZ) for sites where the developer waives the right

to claim tax credits; and limiting DEC's ability to assess reimbursement of its oversight costs.

These proposals are similar to those made by the governor in 2014, which both the Assembly and Senate rejected in favor of their own reforms. It remains to be seen whether the governor's decision to force the issue by vetoing the extension of the current program will produce new legislation. However, with the BCP tax credit program set to expire on Dec. 31, 2015, all parties should be motivated to act during the current session of the Legislature.

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