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New York State Regulator Finalizes Definitions Under Amended Brownfield Program Relating to Eligibility For Tangible Property Credits For New York City Brownfield Projects

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On July 29, the ***Department of Environmental Conservation (DEC)*** adopted a new rule for the Brownfields Cleanup Program (BCP) to effectuate the brownfield amendments passed by the Legislature last year. Under amendments to the BCP passed in connection with the executive budgeting process, the Legislature sought to limit the availability of certain tangible property tax credits in New York City to Brownfield properties that are: (i) located in an En-Zone as defined by the New York State Department of Labor; (ii) slated for use for affordable housing; (iii) are “upside down” properties where the cost of remediation will exceed the projected value of the remediated properties; or (iv) are “underutilized.” The new rule helps to clarify the scope of some of those eligibility requirements, namely the affordable housing and underutilized categories.

The rule—which provides the definitions for “affordable housing,” “underutilized,” and “brownfield site”—was originally proposed by the DEC on June 10, 2015, and received extensive public comment through Aug. 29. After incorporating additional concerns, the current rule was noticed for additional comments on March 9, 2016; because there were only minimal clarifications provided for the definition of “underutilized,” the slightly amended March 9 proposed rule was adopted, effective Aug. 12, 2016.

The rule itself provides four definitions that end up providing the contours of the tax credit:

- “Brownfield site” was redefined to comport with the definition provided by the 2015 amendments, meaning “any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations.” There were no significant changes between the proposed rule and the adopted rule.

- Under both rules, “Affordable housing project” was defined as “a project that is developed for

residential use or mixed residential use that must include affordable residential rental units and/or affordable home ownership units." Additionally, projects must be subject to a federal, state, or local affordable housing program.

    - In a rental project "a percentage of the residential rental units in the affordable housing project to be dedicated to tenants at a defined maximum percentage of the area median income based on the occupants' households annual gross income."

    - In an ownership project, the project must "set[] affordable units aside for homeowners at a defined maximum percentage of the area median income."

- The primary changes between the originally proposed rule and the adopted rule came in the definition of "underutilized." Under both definitions, underutilized property means nonresidential "real property on which no more than 50 percent of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zoning"

    - The original rule applied the same requirements for all nonresidential real property—property "other than residential or restricted residential"—regardless of the type of proposed use. Under the proposed rule, additional gradation was added for the distinction between primarily industrial projects and primarily commercial projects. To qualify, the proposed use of a property must be either

        - The 75 percent industrial; or

        - 75 percent of commercial and industrial combined.

    - The new rule does not apply the same requirements for industrial properties, which previously had to have a full showing of tax delinquency or structural deficiencies. Now, only a property with proposed commercial uses must show that it would not be feasible to develop the project without substantial government assistance and that it meets one of the following conditions:

        - property tax payments have been in arrears for at least five years immediately prior to the application;

        - a building is presently condemned, or presently exhibits documented structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; or

        - There are no structures.

    - The time frame for nonuse—the certification by the municipality that no more than 50 percent of the permissible floor area has been used under applicable zoning—has been reduced from five (5) years to three (3) years.

The revision to the definition of "underutilized" is a modest improvement to DEC's prior definition, under which few or no properties would likely have qualified. However, these modest changes still do not remove the significant hurdles an applicant for any commercial development would face in

qualifying for tangible property Brownfield credits in New York City. The definition still curiously defines current underutilization of a property by focusing on future end use, which makes little sense as it seems that the future use of a property should not be determinative of whether a property's current condition is underutilized. The definition appears to show that DEC does not want to provide tangible property credits to residential projects within the City of New York, and wants to make it extremely challenging for commercial developments to obtain the tax credit as well. The requirement that an applicant convince the regulator that it has met a vague standard – that the project would not be feasible to develop without substantial government assistance – is a poison pill likely to deter most applicants from even attempting to obtain tax credits for nonindustrial or nonaffordable housing projects, which may have been the agency's intent by including such a vague and onerous standard within the definition. In the event that an applicant could surmount the biggest hurdle – establishing that the project would not have been developed without "substantial" government assistance – the remaining requirements would not appear to be difficult to satisfy for any "soft" development site that is underbuilt pursuant to existing zoning. In such case it would appear that demolition of any structures at the project site would trigger eligibility as long as an applicant could demonstrate that less than 50 percent of the permissible floor area had been used prior to demolition.

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