



DEC Issues Revised Regulations Defining Terms for Purposes of the Brownfield Cleanup Program

Syracuse, New York

March 2016

On **March 9, 2016**, the New York State Department of Environmental Conservation (DEC) issued revised proposed regulations defining terms relating to the Brownfield Cleanup Program (BCP) tax credits for sites located in New York City. The revisions modify proposed regulations issued last June and discussed in our prior alert. The revised proposed regulations apparently reflect the DEC's consideration of comments to the initial proposed regulations released in **June 2015**.

Significance of the Definitions

The regulations will affect sites located in cities with a population of 1,000,000 or more people (i.e., New York City) that are accepted into the BCP on or after July 1, 2015. Under the 2015-16 NYS Budget provisions, sites located in New York City will be eligible for the tangible property credit component only if:

- at least 50% of the site area is in an Environmental Zone; or
- the site is "upside down"; or
- is "underutilized"; or
- the site will be developed as an "affordable housing project."

The 2015 statutory revisions reviewed in our **April 2015 Alert** included definitions for Environmental Zones and "upside down," but left the definitions of "underutilized" and "affordable housing project" to regulations. Those terms were the subject of the June 2015 proposed regulations, now revised by NYSDEC¹.

"Underutilized"

According to the DEC, the revised definition of "underutilized" is intended to expand the number of eligible sites. The revised proposed definition of "underutilized" includes any real property that meets the following characteristics:

1. No more than 50% of the permissible floor area of the building or buildings is certified by the applicant to have been used under the applicable base zoning for at least three years prior to the application, **and**
2. The proposed use for the site is either:
 - a. At least 75% for industrial use, **or**
 - b. The site meets the following set of conditions:
 - i. At least 75% for commercial uses or commercial and industrial uses, **and**
 - ii. The proposed development could not take place without substantial government assistance, as certified by the municipality in which the site is located, **and**

¹ Both the June 2015 and March 2016 regulations also included a definition of "Brownfield site." The June 2015 regulation revised the regulatory definition of a Brownfield site to be consistent with the change in that definition that was included in the Budget legislation. The March 2016 regulations make no changes to the definition proposed in the June 2015 regulations

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- iii. At least one of the following conditions exists, as certified by the applicant:
 1. Property tax payments have been in arrears for at least five years immediately prior to the application; or
 2. The site contains a building that is condemned, or has documents structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; or
 3. There are no structures on the site.

Any site seeking "underutilized" status must demonstrate that no more than 50% of the permissible floor area has been used in the preceding three-year period.

Sites with proposed uses that are not at least 75% "industrial" or 75% "commercial and industrial" cannot be "underutilized" under this definition. That means, for example, that any site with a proposed use that is more than 25% residential use cannot be "underutilized"

Once the proposed use threshold has been met, sites that intend to be at least 75% industrial need not show anything further. Sites that intend to be at least 75% commercial or commercial/industrial, however, must demonstrate that it needs substantial government assistance and has had tax arrearages, has been condemned, is structurally unsound, or has no structures.

Whether a site meets this definition of "underutilized" is determined as of the date of the BCP application. A chart showing the changes from the June 2015 proposed regulations is available on the next page.

"Affordable Housing Project"

The June 2015 proposed regulations erroneously used the term "tenant" when defining affordable home ownership programs. The March 2016 proposed regulations correct that error.

The definition of an "affordable housing project" is now any project developed for residential or mixed residential use that is subject to a federal, state, or local government housing agency's affordable housing program, subject to a local government's regulatory agreement, to provide either (1) a percentage of rental units dedicated to tenants at a defined maximum percentage of the area median income, or (2) affordable units for homeowners at a defined maximum percentage of area median income.

Comments: The new "underutilized" definition would remove the requirement to obtain municipal certification of certain conditions. Instead, applicants will need to certify to certain conditions. This approach still allows for accountability, while not providing municipal government with an effective veto over a project's eligibility for the tangible property credit component.

Notwithstanding those improvements, the definition is still complex and may prove difficult to attain.. The revised regulations clearly favor "industrial" uses for remediated brownfield sites. The emphasis on industrial use seems anomalous for New York City sites, where so much development is being directed to residential and commercial use. As we noted in our prior alert, the definition would effectively bar market-rate housing development from obtaining the tangible property credit component unless at least half of the site is in an Environmental Zone or the site is "upside down," as that term is defined in the statute.



June 2015 Proposed Regulations	March 2016 Revised Proposed Regulations
As of the date of application, no more than 50% of the permissible floor area of the building or buildings on the site is certified by the municipality to have been used under the applicable base zoning in effect for at least the prior five years .	As of the date of the application, no more than 50% of the permissible floor area of the building or buildings on the site is certified by the applicant to have been used under the applicable base zoning in effect for at least the prior three years .
The proposed development is solely for a use other than residential or restricted residential .	The proposed used is at least 75% for industrial uses, commercial uses, or commercial and industrial uses
The property could not be developed without substantial government assistance, as certified by the municipality in which the site is located.	If the proposed use is ≥75% commercial or commercial/industrial , the proposed development could not take place without substantial government assistance, as certified by the municipality in which the site is located.
At least <i>one</i> of the following conditions exists, as certified by the municipal department responsible for such determinations of the municipality in which the site is located: <ul style="list-style-type: none"> property tax payments have been in arrears for at least five years immediately prior to the application; the site contains a building that is condemned, or has documents structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; <i>or</i> the proposed use is in whole or substantial part for industrial uses.	If the proposed use is ≥75% commercial or commercial/industrial , at least <i>one</i> of the following conditions exists, as certified by the applicant : <ul style="list-style-type: none"> property tax payments have been in arrears for at least five years immediately prior to the application; the site contains a building that is condemned, or has documents structural deficiencies, as certified by a professional engineer, which present a public health or safety hazard; <i>or</i> there are no structures on the site.

Bousquet Holstein's Brownfield Practice Group works extensively with investors, developers, consultants, and other stakeholder in connection with New York's Brownfield Cleanup Program. Please do not hesitate to contact us with questions you have regarding these developments and your brownfield projects.



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