

Memorandum Regarding Proposed Definition of “Underutilized” of the Brownfield Cleanup Program

ENVIRONMENTAL LAW SECTION

Environmental #1

May 12, 2015

As you know, the 2015 Brownfield Cleanup Act amendments restrict the availability of tangible property components credits (TPCCs) for new Brownfield Cleanup Program (BCP) applicants for sites in New York City. To qualify for TPCCs, such sites must meet one or more newly-established criteria, one of which is that the site be “underutilized”.

“Underutilized” is not defined in the statute. Rather, DEC is tasked with developing regulations that define this term, in consultation with the business community and the City of New York. The regulations must “take into consideration the existing use of a property relative to allowable development under zoning, the need for substantial governmental assistance to redevelop and other relevant factors.” The regulations must be adopted no later than October 1, 2015.

DEC has already consulted with representatives of the City and the Real Estate Board of New York. It is now finalizing its proposed definition, which it apparently intends to publish in the Environmental News Bulletin as early as May 19.

The Section's Brownfield Task Force (BTF) believes that an appropriate definition of “underutilized” is crucial to the continued viability of the BCP for sites in New York City. We also strongly believe that it would be preferable to provide the Section's input on these issues to DEC while it is still in the drafting process, rather than after the proposed regulation has been published for public comment.

Accordingly, the BTF has developed the attached definition on an expedited basis. We believe it accomplishes the following key objectives:

Adopting objective, verifiable standards rather than subjective ones, to maximize predictability for applicants as to whether their sites qualify, and to minimize the likelihood of litigation against DEC by applicants who feel that their sites were wrongly prevented from receiving TPCCs;

Using definitions and terms that have been developed and used successfully under other regulatory schemes rather than inventing new definitions from scratch. Such an approach takes advantage of existing knowledge and experience as to how such terms have been interpreted, as well as reducing the likelihood of controversy as to differing interpretations of the same term under different programs; and

Striking a reasonable balance between an overly restricted definition that would make it virtually impossible for sites to qualify, and an overly-generous definition that would fail to accomplish the measured tightening of eligibility that the Legislature and Governor intended.

We believe that the attached proposed definition accomplishes these goals. It uses definitions of key terms that already exist in the New York City Administrative Code and Rules of the City of New York. It also makes use of the recognized concept of environmental zones and New York City's established "E" designation system. For your ease of review, we have also attached copies of relevant statutory and regulatory materials.

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