



TESTIMONY BY NEW YORK STATE BAR ASSOCIATION
ENVIRONMENTAL LAW SECTION
ON NYSDEC PROPOSED DEFINITION OF "UNDERUTILIZED"

The New York State Bar Association Environmental Law Section is pleased to have an opportunity to comment on the definition of "underutilized" proposed by the New York State Department of Environmental Conservation Program ("DEC").

This definition is crucially important to the State's Brownfield Cleanup Program. Being an "underutilized" site is one of the few ways that a brownfield property in New York City can qualify for tangible property tax credits ("TPCs") on a going-forward basis. Obtaining these credits can mean the difference between a project being built and one that is not viable.

In enacting the 2015 BCP Amendments, the Legislature instructed DEC to define underutilized "after consultation with the business community and the city of New York, [taking] into consideration the existing use of a property relative to allowable development under zoning, the need for substantial government assistance to redevelop and other relevant factors."

We respectfully submit that DEC's proposed definition departs from the intent expressed by the Legislature in enacting the 2015 Amendments. If promulgated as proposed, it would make it virtually impossible for large numbers of contaminated sites in New York City not slated for affordable housing development to qualify as "underutilized". We do not believe this was the intent of the Legislature in providing that underutilized sites be eligible for TPCs.

The Legislature did not act in a vacuum. It chose a term, "underutilized", which appears in a number of New York statutes and regulations already applicable to various city and state programs--for example, §11.245 of the New York City Code and §431(11) of the state Economic Development Law. "Underutilized" is also commonly used in brownfield and distressed property programs in other states, as evidenced by the attached chart.

One would think that, for guidance in crafting its own definition, DEC would look to existing definitions of this term which are currently in use and have a track record of being applied to sites in New York and other jurisdictions. At a minimum, one would expect DEC to provide a reasoned explanation for departing from these other definitions to such a significant extent. However, DEC has not done so.

The definition proposed by DEC requires that, to be considered "underutilized", a site must meet each of four criteria, some of which have no clear relationship to the current site usage. For example, the proposed use of a site for residential or restricted residential purposes disqualifies it from being considered "underutilized", irrespective of the current usage of the site. Conversely, the proposed use of a site for industrial purposes would qualify the site as "underutilized", irrespective of the site's current usage.

The proposed criterion of being in arrears on property taxes would also appear to have no relationship to normal concepts of “underutilized”: a vacant or derelict property in the middle of a developed area would not be considered “underutilized” if property taxes on the undeveloped parcel have been fully paid.

DEC’s proposed definition also appears to exclude from TPC eligibility contaminated commercial or industrial sites merely because they are still being used for some purpose, even though TPC availability would enable them to be redeveloped for modern and more productive commercial or industrial uses. Such sites are often not in En-zones but are engines for employment of people who live in such zones. Since the redevelopment of such sites will typically not generate outsized tax credits, there seems little justification for making it so difficult for such sites to qualify for TPCs.

Another problem with the proposed definition is that it requires municipal certification of various elements of the criteria. Such a process has the potential to introduce delay, uncertainty and politics into decision-making on these issues. It is respectfully suggested that the better practice would be to have these determinations based on transparent and straightforward application of whatever criteria are established.

A further issue is that the definition of “substantial governmental assistance” does not include the tax credits themselves. Taken literally, this means that unless a project obtains such assistance, it will not be built with or without the tangible property tax credits. If the Legislature intended that the tax credits incentivize development, they should be considered “governmental assistance” for purposes of this definition.

Finally, the fact that the site must meet *all* these criteria, rather than simply one of them, would make the bar to qualify as an “underutilized” site impossibly high. That result would have a significant negative impact on the effectiveness of the Brownfield Cleanup Program to drive the cleanup of contaminated sites.

One of the major casualties of DEC’s proposed definition would be the many small properties in the outer boroughs of New York City that are owned by individuals or small family corporations and that have been contaminated from prior uses such as dry cleaners, filling stations and light manufacturing operations. These are by no means the “high value” sites that DEC is targeting by its restrictive definition. The tax credits that would be generated by having these properties qualify for TPCs would be quite modest. But without them, these sites are likely to remain contaminated and undeveloped for the foreseeable future.

As you may be aware, on May 12 our Section provided to DEC a set of recommendations regarding the definition of “underutilized” We believe our proposed definition is objective and verifiable; uses concepts that have been developed and used successfully under other regulatory schemes; and strikes what we believe to be a reasonable balance between an overly restrictive definition and one that would fail to accomplish the measured tightening of eligibility that the Legislature and Governor intended. A copy of our proposed definition, and the memorandum supporting it, is attached to this testimony.

We urge that you reconsider this proposed definition, and we request that these materials be made part of the administrative record.

Thank you very much for your consideration of these comments.

Respectfully submitted,

Environmental Law Section
New York State Bar Association