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## COURT OF APPEALS DECISION OPENS NEW WINDOW OF OPPORTUNITY FOR THE NEW YORK STATE BROWNFIELD CLEANUP PROGRAM

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**Eligibility into the tax credit-rich Brownfield Cleanup Program (BCP) has been eased by the New York State Department of Environmental Conservation (NYSDEC) due to a recent New York Court of Appeals decision in *LighthousePointe Property Assoc. v. NYSDEC*, 14 NY3d 161 (2010).**

**If a site exceeds cleanup standards, it appears that the site is now eligible for inclusion into the program. This ease of eligibility returns the BCP to its earlier days, when NYSDEC was eager to get sites into the Program.**

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In *LighthousePointe*, the court was reviewing NYSDEC's refusal to accept contaminated land into the BCP. NYSDEC had determined that the land, which was contaminated in excess of various cleanup levels, was not a "brownfield" as defined in the BCP statute, and thus was ineligible for acceptance into the Program. The Court reversed and found that, as a matter of law, *LighthousePointe* was eligible for acceptance into the program.

The Court held that the statutory eligibility threshold was low and consisted of two things:

1. The presence or potential presence of a contaminant on the site, regardless of the level of contamination, and
2. The presence or potential presence of contamination at the site makes redevelopment or reuse more complex, involved or difficult in some way – that is, the contamination complicates redevelopment or reuse.

The Court held that if these two simple conditions are present, NYSDEC must find that the site is a brownfield, and must accept the property into the BCP, so long as the applicant and the site is otherwise qualified to be in the program.

In *LighthousePointe*, the Court found that there was sufficient evidence in the record to establish that the site at issue was contaminated and that without acceptance into the BCP and a resulting NYSDEC-sanctioned remediation, the development would not receive necessary financing.

Although NYSDEC has not issued any formal documents that revise its BCP eligibility criteria, anecdotal situations indicate that it will now accept BCP applications if a property has contamination in excess of cleanup standards, and the property has been abandoned or underutilized for a period of time, or obtaining development financing has been difficult in the absence of a liability release from NYSDEC. It seems that it is no longer necessary to show that a site is grossly contaminated or that the site has been undevelopable for many years. This scenario is a throw-back to the initial years of the BCP, when the NYSDEC was eager to accept sites into the Program, and many sites with minor contamination were found eligible.

Of course, how long the *de facto* lower eligibility criteria will survive is unclear. There have been several attempts to "reform" the BCP, and NYSDEC may propose new legislation this fall or early next year. In the interim, the Court of Appeal's decision in *LighthousePointe* has created a new window of opportunity for sites to qualify for the benefits available under the BCP.

**Reminder:** Tax credits under the BCP include:

- (1) 22-50% of cleanup costs, depending on the level of cleanup.
- (2) 3 times cleanup costs of redevelopment costs for non-manufacturing development (capped at \$35 million).  
6 times cleanup costs of redevelopment costs for manufacturing development (capped at \$45 million).
- (3) 6% - 100% of property taxes (depending upon location of the project and number of jobs) for 10 years.

***For more information regarding the Brownfield Cleanup Program please contact Dennis P. Harkawik at 716.843.3848 or [dharkawik@jaeckle.com](mailto:dharkawik@jaeckle.com).***

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