

M A Y 2 0 0 7

MISSING THE TARGET



MAKING THE BROWNFIELD TAX CREDITS
WORK FOR COMMUNITIES



NPCR
NEW PARTNERS FOR
COMMUNITY
REVITALIZATION, INC.



NEW YORK STATE'S BROWNFIELD TAX CREDITS MISSING THE TARGET

May 2007

INTRODUCTION

The State's comprehensive Brownfield Law, enacted in 2003 after nearly a decade of debate among a wide range of environmental, economic and community interests, represents a triumph of collaboration and a remarkably successful quest for political common ground. The Law is intended to protect communities from toxic pollution, stop the leaching of contaminants into our waters, revitalize decaying communities, rebuild older urban neighborhoods, and conserve outlying forests and farmland. Three years after its implementation, however, it is clear that the Law has flaws and will not meet its promise without repair, most critically in the automatic link between eligibility for the cleanup program and the Law's financial incentives. These incentives, primarily in the form of tax credits, which are among the richest in the country, have not resulted in the groundswell of applications that should accompany such generous financial incentives. This is because the tax credits have proven to be ineffective to spur redevelopment in communities hardest hit by decay and disinvestment, unavailable for some brownfield sites in poor areas with certain types of contamination, and because of the uncertainty surrounding eligibility for and reliance on the tax credits. The incentives also have the potential effect of undermining the Law's goals by encouraging development that is incompatible with community planning and economic development strategies. The need for repair is urgent – without immediate action, revitalization opportunities will be lost, delayed or misused, at a significant cost to the State without sufficient justification for the fiscal impact.

New Partners for Community Revitalization (NPCR), many of whose staff and directors participated in the multi-year effort to enact brownfields legislation, is a non-profit organization that partners with both lenders and nonprofit and for-profit developers who are attempting to use the redevelopment of brownfields to drive neighborhood revitalization. Through its on-the-ground work, and its interactions with community groups, developers, state and local officials, urban revitalization organizations in other states, and its own board members, who represent a diverse range of stakeholders from bankers and developers and other practitioners to environmental and environmental justice advocates, NPCR has intimate experience with the Brownfield Law, which forms the basis for this assessment. To be clear, NPCR is not suggesting a reopening of the brownfields debate or an overhaul of the 2003 Law. Rather, based on the findings and observations set forth in this analysis, NPCR is urging discrete but critical changes in the program that will allow it to work as intended, to provide for a safe urban environment, curb sprawl and unsustainable development, promote environmental justice, help build economic viability in upstate cities, stem the displacement of low-income residents in the State's "hot market" cities and wealthier suburbs, and create housing and other amenities to meet a growing downstate population.



THE PROMISE OF THE 2003 BROWNFIELD LAW

BACKGROUND. What made New York's brownfields debate so complicated and prolonged is the fact that brownfields pose a number of problems that go beyond the well known and difficult environmental issues surrounding the cleanup of toxic chemicals. Creating a cleanup program was the necessary starting point, but it was also important to build into the program elements that would attract participation. Brownfields are abandoned for a number of reasons — cost of cleanup, fear of liability, and lack of economic vitality in the communities they burden, primary among them — and these impediments to cleanup and redevelopment also had to be addressed. The 2003 Brownfield Law was intended to do that.

One cornerstone of the Law is the Brownfield Cleanup Program (BCP), housed in the State's Department of Environmental Conservation (NYSDEC), which provides cleanup oversight and liability protection to site owners and developers who voluntarily undertake the investigation, cleanup and redevelopment of contaminated land in accordance with government rules and a signed agreement with NYSDEC. The Law was meant to encourage site owners and developers to enter the program by offering, not just liability relief, but also specific cleanup levels and some very significant financial incentives in the form of an assemblage of tax credits. In addition to the BCP, through which applicants receive NYSDEC oversight, liability relief and brownfield tax credits for cleaning up individual sites, the Law also created a new area-wide planning program intended to revitalize neighborhoods burdened by multiple brownfield sites, the Brownfields Opportunity Area (BOA) program. Through the BOA program, municipalities and community-based organizations can receive grants for investigation, planning and community visioning, which will lead to a comprehensive and community supported area-wide plan. Such a plan would address proposed future uses for brownfields, and the needed infrastructure investments, such as upgrades in sewer capacity, street lighting, roadways and sidewalks that are critical to successful revitalization. The centerpiece of the BOA program is this area-wide approach to reclaiming brownfields and revitalizing neighborhoods so that new community anchors are established, creating value and reversing the spiral of deterioration, decline, and decay. The BOA program provides flexible funding for market and infrastructure studies and other activities needed to carry out a constructive visioning process, based not on what is there now or what the real estate market might otherwise attract or resist, but on what the community needs and wants. By looking at the area as a whole, the most productive, innovative and appropriately scaled end uses will be planned, creating new opportunities and helping put properties back on the tax rolls with new job creation, housing, and retail opportunities — catalyzing the reversal of economic decline and disinvestment — which in turn will allow for further community improvement.¹

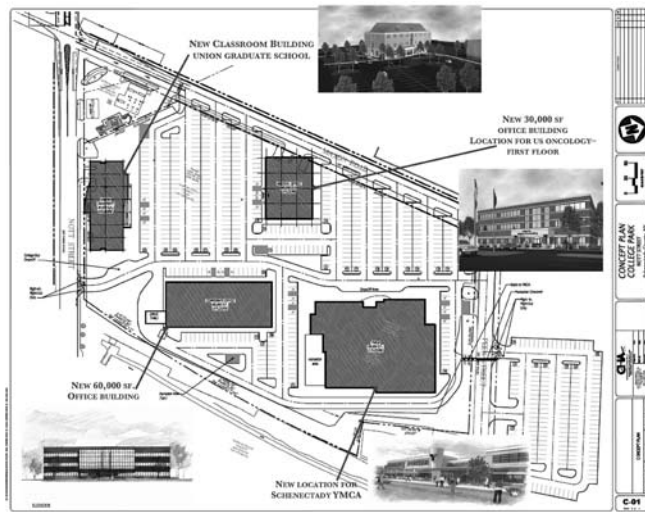
1. In January, 2007, NPCR published a report on the BOA program, BROWNFIELDS BREAKTHROUGH, A Report on New York's Community Revitalization Tool for the Future, which can be accessed from the NPCR website, www.NPCR.net.

Unfortunately, the programs created by the Brownfield Law have not been working as intended. The principal problem is the way brownfield tax credits are awarded. Essentially, any site that enters the Brownfield Cleanup Program, regardless of public benefit, relative cost of cleanup compared to development, consistency with economic development objectives, or compatibility with a regional or municipal plan generates brownfield tax credits as-of-right. Meanwhile, because the incentives are not targeted, the least marketable brownfield sites — due to their location or level of contamination — continue to be ignored, effectively eliminating from the Brownfield Law its intended use as a tool for urban revitalization. This programmatic flaw has also had another insidious consequence. Because the tax credits are so very generous and are available as-of-right to any participating site, the State has sought to limit tax credit outlays by limiting eligibility into the BCP², leaving many sites that belong in a cleanup program — because they contain levels of contamination above existing health-based cleanup standards — in limbo, without a government program to oversee remediation, award liability protection to owners and builders who eliminate health threats, or offer needed financial assistance.

BROWNFIELD TAX CREDITS. The law offers Redevelopment Tax Credits to, in effect, reimburse a developer for between 10 and 22% of the total cost of the cleanup and development of a project site³. Because the Redevelopment Tax Credits are “refundable,” the developer will receive a tax reduction to the extent there is tax liability, and the remainder of the credited amount will be awarded in cash.⁴ The percentage of reimbursement varies according to the level of cleanup, whether the developer is an individual or a business, and whether the site is in an Environmental Zone or “En-zone,” an area delineated by relatively high unemployment and poverty rates.⁵ So, for example, a corporation that spends \$100 million to clean up and redevelop a large brownfield in an En-Zone could get back \$22 million from the State government in the form of tax write-offs and what amounts to outright grants through the Redevelopment Tax Credit.

2. This is in part due to the NYSDEC judgment that they were receiving applications for some sites which, but for the tax credits, would not otherwise apply for the BCP.
3. Though not the subject of this analysis, there is additional financial assistance available in the form of real property tax relief based on job creation and tax credits for the purchase of environmental insurance.
4. Redevelopment Credits provide a dollar-for-dollar reduction in the recipient’s State income tax liability for corporate income tax, corporate franchise tax, personal income tax, banking corporations tax and insurance corporations tax. Thus the law offers benefits only to for-profit corporations and other taxable entities. Nonprofits must create for-profit entities to take advantage of this significant benefit (See Appendix 2).
The tax credits are more fully explained in Appendix 1, a fact sheet published by Empire State Development.
5. The amount of the Redevelopment Credit that an applicant is entitled to is computed by multiplying the costs incurred by the owner or developer of a qualified site by an applicable percentage computed as follows: 10% for individual taxpayers and 12% for businesses; which percentage is increased to 12% for individual taxpayers and 14% for businesses if the Site has been cleaned up to unrestricted conditions — the highest level of cleanup. An additional 8% is available if at least half of the site is in an Environmental Zone (“En-Zone”), defined as an area with a poverty rate of at least 20% and an unemployment rate of at least 1.25 times the statewide average. Forty-five counties across the state contain designated En-zones. A map and listing of En-Zones can be found on the Empire State Development website: http://www.nylovesbiz.com/BrownField_Redevelopment/

PROGRAM START-UP. The NYS Legislature understood that the redevelopment of polluted sites is a risky and expensive venture. Often the cost of cleanup can approach or exceed the value of the property, and the neighborhoods involved are frequently unattractive, compared with the more pristine lands untainted by previous uses. To provide a real alternative to the development of greenfields, the State saw the need to offer strong reasons to take a second look at urban and post industrial properties. The developers that have entered the Brownfield Cleanup Program have taken that second look and seen the opportunities that neglected properties can offer in light of the proffered inducements. Likewise, the site owners have embraced the chance to get out from under the liability that site contamination represents and recoup some value on land that had been a burden, and in some cases, a nightmare. The neighborhoods in which these sites reside are, in many cases, seeing new vitality, which will be the inspiration that earns other properties in the area a second look. Almost invariably, clusters of new development in once moribund communities around the State include brownfields that are benefiting from the important incentives offered in the BCP.



So far, over three hundred sites have applied to the BCP, and, though dozens were denied participation or have withdrawn, 25 have thus far succeeded in obtaining the NYSDEC sign-off necessary to secure the tax credits — a Certificate of Completion. There are about 148 sites currently active in the Brownfield Cleanup Program — not an insubstantial number considering the many controversies that have arisen over the Brownfield Law, as demonstrated in a highly charged vetting and revision of program guidance and regulations and at least four legal challenges to program rules,

COLLEGE PARK, SCHENECTADY

The Galesi Group is redeveloping a former “Big N” plaza in Schenectady, which had been built on top of an old industrial site. The planned development, called College Park, will feature a new YMCA and at least three office buildings. The developers will be cleaning up the YMCA property to the NYSDEC’s highly protective “Track I” remediation level, and will be giving the property to the YMCA, which is currently raising funds for its new 65,000 square foot building. Investors believe that the presence of the YMCA, with its work-out equipment and pool, will enhance demand for the new office space, and local development authorities believe it will attract more than 1000 people a day to downtown Schenectady. The total investment at College Park is expected to exceed \$20 million. David Buiko, the Chief Operating Officer for the Galesi Group told NPCR that “the project would not have been possible without the Brownfield Tax Credits.”

two of which are still pending.⁶ Still the number of properties in the program is underwhelming given the size of the brownfield problem in New York.⁷

Interviews with developers have revealed that the tax credits are perceived by some as “too good to be true” and, therefore, some developers and banks, concerned that the tax credits might not still be there when a site has finally made it through the cleanup process, have been unwilling to rely on them for project financing. Others are waiting to see the direction New York’s new Governor is likely to take in the context of the “brownfield reform” promised in his 2007 State of the State message. These concerns, in addition to the urgent nature of program problems discussed in this analysis, underscore the importance of making a few critical changes in the Law without further delay.

THE FAILED PROMISE OF BROWNFIELD INCENTIVES

Three years after initial implementation it is all too clear that, thus far, the grander hopes for the Brownfield Law have proven to be largely illusory, and the beneficial result of the Law’s incentive programs has not unfolded as imagined.

The brownfield tax credit program attracted controversy at the outset when it appeared that some very expensive, high-profile development projects in New York City might receive upwards of a hundred million dollars in refundable tax credits from the State, a level of program cost that, when extrapolated for large projects across the State and over the years, would be significant. The problem was – and is – that any site that qualifies for participation in the Brownfield Cleanup Program is eligible for tax credits as-of-right, whether or not the property involved actually needs incentives to attract a developer. To avoid the kind of cost the State would face if, for example, the developers of the \$850 million New York Times building off Times Square were to be granted the estimated \$170 million in brownfields tax credits, the Department of Environmental Conservation tightened the eligibility requirements for entry into the program.

It was the eligibility problem that prompted NPCR to look at the program to better understand how the tax credits might otherwise influence whether and how brownfields get cleaned up. The concluding observation is that generous brownfield tax credits are extremely important, but the restriction on eligibility is just the first of a list of problems surrounding the tax credit program.

6. The eligibility criteria were upheld in *JOPAL ENTERPRISES LLC, and BELMONT VILLAS LLC vs. SHEEHAN and NYSDEC*, decided on July 31, 2006, and in *377 GREENWICH LLC vs. NYSDEC*, decided on November 15, 2006. More recently, various provisions of the brownfield regulations relating to cleanup requirements are being challenged by the Superfund Coalition, a group of corporations that own contaminated land, and, in a separate proceeding, by an alliance of four environmental groups, in which case the ineligibility of historic fill sites, among other program elements, is being challenged.

7. The number of brownfield sites in NYS is unknown, but there is reason to believe they number in the tens of thousands. NYC Mayor Bloomberg estimates that there are 7,600 acres in NYC alone, Long Island has an estimated 6,800 brownfield sites, and it has been said that nearly 40% of the entire city of Buffalo is brownfields.

ELIGIBILITY. DEC's flexibility in interpreting the statute regarding the as-of-right nature of the tax credits is limited. Without statutory changes, it is doubtful, for example, that it could lawfully vary the amount of tax credits available to project participants based on need, cost of remediation, project location, community support or other criteria. Even if it had authority to do so, it is the wrong agency to make this kind of judgment — DEC's expertise is in environmental protection, not economic development or social policy. The only alternative the agency had in controlling the cost of the program was to deny eligibility based on a crabbed reading of the statute. The statutory definition of "brownfield," which is "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant," was clearly meant to be broad, but in an apparent attempt to restrict brownfield tax credits to certain projects, DEC chose to interpret it narrowly, applying a set of guidance criteria on a case-by-case basis in determining whether, 1) contamination is present or potentially present,⁸ and, if so, 2) whether the actual or potential contamination complicates redevelopment.⁹ These are necessarily subjective judgments since it is arguable that any contamination or concern about potential contamination makes development decisions more complicated. But, in light of the New York Times Building application — which was one of the first sites to be denied entrance to the program — the DEC saw in this judgment call an opportunity to control the State's financial exposure by limiting BCP eligibility.

As of the publication of this report, 39 sites have been denied eligibility into the Brownfield Cleanup Program, or about 13% of all applicants. For a small handful of these sites, it appears from the denial letters that there was insufficient demonstration of contamination or potential for contamination, based on actual sampling and historic use of the site. For a few others, the denials were based on statutory standards for eligibility, for example, at least one applicant had a history of failures in working with the State, and for others denial was based on participation in other cleanup programs. For the rest, the NYSDEC's controversial eligibility guidance was applied, and

8. NYDEC's Draft Brownfield Cleanup Program Guide reads in pertinent part:

In determining whether there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, the Department will consider the following factors, to the extent such factors are relevant to the proposed site:

- (A) the nature and extent of known or suspected contamination;
- (B) whether contaminants are present at levels that exceed standards, criteria or guidance;
- (C) whether contamination on the proposed site is historic fill material or exceeds background levels;
- (D) whether there are or were industrial or commercial operations at the proposed site which may have resulted in environmental contamination; and/or
- (E) whether the proposed site has previously been subject to closure, a removal action, an interim or final remedial action, corrective action or any other cleanup activities performed by or under the oversight of the State or Federal government.

9. NYDEC's Draft Brownfield Cleanup Program Guide reads in pertinent part:

In determining whether there is a reasonable basis to believe that the contamination or potential presence of contamination may be complicating the development, use or re-use of the property, the Department will consider the following factors, to the extent such factors are relevant to the proposed site:

- (A) whether the proposed site is idled, abandoned or underutilized;
- (B) whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination;
- (C) whether properties in the immediate vicinity of the proposed site show indicators of economic distress such as high commercial vacancy rates or depressed property values; and/or
- (D) whether the estimated cost of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.

the results are troubling. Approximately half of denials (17 of the 34 denials for which the reasons for denial could be gleaned from the denial letter) acknowledged that contamination existed on site, but, in light of the size of the project or other factors, was not deemed to be a complicating factor for development. In some cases the contamination is described as existing at low levels, and in others there is no characterization of the contaminant level; rarely are actual numbers listed in the denial letters. For at least 10 of these sites, the fact that the contamination was contained in historic fill material and did not originate from a definable spill on site was sufficient to exclude the site from the program, usually with no other characterization of the pollutant levels, except to describe it as “typical of” or “consistent with” historic fill.

Most of these sites belong in a cleanup program because they contain contamination that exceeds the State’s health-based standards and require remediation before re-use. Because the contamination and the owner’s knowledge of it will continue to be a liability concern, these excluded sites may get “cleaned up” and redeveloped – but without any government oversight, or the further testing and monitoring that the government would require if the site was granted entry in the BCP. The community is also shortchanged in that these off-the-radar cleanups do not involve any community notification or involvement. The developer will also be at a competitive disadvantage because of the lack of the State’s financial assistance. In the case of otherwise worthy projects operating on a shoestring in a marginal market, the added unsubsidized cost of cleanup may cause delays or downsizing of the project. It is also possible that some sites will continue to lie dormant because their owners or potential developers cannot obtain financing or government incentives.

IMPLICATIONS OF THE ELIGIBILITY SQUEEZE. The decision by NYSDEC to limit eligibility has a number of less obvious but significant consequences that also argue for a more expansive program and for a more careful targeting of financial incentives:

- Of particular concern to NPCR is that, because of the indiscriminate nature of the narrowing of eligibility, some socially or economically beneficial projects, badly in need of financial assistance to help pay for the cleanup, may not be able to move forward, or will have to be reduced in scope. The reason for rejection from the program may be a relatively moderate level of contamination, but the contamination still needs to be cleaned up. For example, most housing projects that require government subsidies to make the units affordable cannot support the cost of remediation, even if it is from the incremental cost to excavate and dispose of contaminated fill, without having it impact the affordability of the project, or the number of units developed. These projects are the victims of a policy designed to keep outsized development with minor contamination out of the Brownfield Cleanup Program.

- The disqualification of historic fill sites disproportionately affects New York City, perhaps deliberately so because of the strong real estate market. This brings into question the merits of structuring government incentives that increase based on the cost of development, which results in bigger incentives in strong market areas which can support more expensive projects. Still, the City is in an affordable housing crisis and the BCP and tax credits are critical to ensuring that a good portion of the estimated 7,600 acres of brownfields — constituting nearly all the vacant and underutilized land left in New York City — is made available for low and middle income housing, parks, job producing services and industries, and public amenities, all of which support Mayor Bloomberg’s laudable sustainability goals.



ERBOGRAPH BUILDING, HARLEM, NYC

This quarter acre property, an abandoned eyesore for five decades, is part of Bradhurst Village, one of the poorest neighborhoods in Central Harlem. It is being developed by the nonprofit Harlem Congregations for Community Improvement (HCCI), a consortium of 92 houses of worship devoted to the holistic revitalization of Harlem. HCCI plans to construct a new eight-story building with 53 units for the frail elderly, one of the fastest growing segments of the population in this community; and HCCI will consolidate its offices and programs in the lower floors. The project requires significant housing subsidies from multiple sources in order to achieve the community’s affordability goals.

The site was used by several film production companies from 1925 until 1959 and was acquired through foreclosure in 1991 by the NYC Department of Housing Preservation and Development. The building has been vacant since the late 1950s and the doors and windows were bricked over at that time. Soil testing suggests impacts to the subsurface from photographic development operations at the site and contamination associated with historic fill. About 7,300 tons of soil will require off-site disposal as contaminated material, a petroleum storage tank in the basement requires decommissioning and removal, and a sub slab soil vapor barrier is likely needed below the building. This work is estimated to cost as much as \$640,000. Asbestos and lead paint remediation will bring the remedial price tag to \$1.1 million, about 9% of the total development cost.

HCCI submitted a Brownfield Cleanup Program (BCP) application to the NYSDEC on May 23, 2006. On November 6, 2006, HCCI was notified by NYSDEC that, although the site has “elevated levels of contaminants,” the conditions are “consistent with historic fill,” and the site was denied entry into the State’s Brownfield Cleanup Program. The project is currently on hold as HCCI seeks funding to cover the cleanup costs and to achieve affordability targets.

- The eligibility criteria and the analysis that NYSDEC undertakes in determining eligibility has built significant new delay into the program. The BCP is often criticized for its protracted process, and the cost of the eligibility analysis in time and uncertainty can be debilitating, especially to narrow-profit-margin projects, such as affordable housing. Program applicants complain that they have waited months for a determination of eligibility. NPCR is concerned that applicants for good, public purpose projects may give up even before trying — either dropping a project that may be highly anticipated and valued within its community, or avoiding the DEC and seeking private-sector affirmation of cleanup efforts.

- There are environmental justice implications to the DEC's approach to historic fill in that it excludes properties from the Brownfield Cleanup Program that require cleanup for safe reuses simply because an entire area was subject to the historically bad practice of using contaminated fill materials to build up areas for development. DEC is denying entire communities built on contaminated historic fill (as many low income neighborhoods and communities of color are) the health and environmental benefits of the Brownfield Cleanup Program as well as the lucrative tax credits, and, thus tends to perpetuate the historically disproportionate amount of environmental harm and disinvestment visited on these communities
- Projects that are excluded from the BCP are also excluded from the ability to secure a liability release from the Department of Environmental Conservation. Lack of access to liability relief can negatively impact the ability of a developer to secure financing for cleanup and redevelopment.
- With a letter from the State in hand explaining that a particular site is not a brownfield, an owner or developer might well treat the document as a clean bill of health, ignoring known contamination and proceeding with any type of reuse of the property, even if it means exposure to contaminants by site workers, future employees, residents and other users of the site. This undermines the intent of the health-based cleanup standards and weakens the State's credibility in their enforcement.

WASTED OPPORTUNITY. It is impossible to estimate what the total cost to the State will be from the brownfield tax credits. This is because the credits are based on the cost of remediation and redevelopment and NYSDEC does not require program applicants to provide information about development costs as part of their application or even once a site is accepted into the BCP. It is not even clear from the NYSDEC database what the specific end uses of most of these sites will be, much less sufficient information to estimate costs, by, for example, applying square footage estimates. This fact is not surprising or necessarily worthy of disparagement; NYSDEC is in the business of protecting the environment and the brownfield tax credits have taken the Agency well beyond its traditional role and expertise into the realm of real estate development and fiscal policy.

In any event, the failure to collect data on which to assess the cost of the program means that the State is unable to do a cost benefit analysis of the program or compare the current approach to other means of incentivizing brownfield redevelopment. Certainly, significant financial incentives are needed to advance the re-use of many brownfield sites, justifying a significant financial commitment on the part of the State. The more brownfields that get profitably reused, the fewer toxic exposures to the State's citizens, the fewer greenfields succumbing to sprawl, the more opportunities for housing, business and jobs and the more local tax revenues. But there are problems not just with the State's lack of accounting, but with the lack of more careful targeting in the way incentives are awarded.

To the extent that the credits are generous to all sites and for all projects, there will be little incentive for a developer to invest in neighborhoods that are suffering the highest levels of economic devastation. While the current program offers an extra 8% in tax benefits for sites in En-zones, these tend to comprise fairly large swaths of land, particularly in upstate cities where the poverty and unemployment statistics will be skewed because of the high proportions of old industrial lands that have no significant population. The En-zones alone do not provide a precise enough instrument for targeting the State's economic development largesse. Nor does the tax credit formula contemplate the value of a particular development project to the community — whether, for example, it will contribute to the community's economic viability or quality of life — or whether it is even welcome in that community.

Another problem is the overall cost of the program which, while unknown, is certain to be substantial. The success of the program could be its own undoing if the number of applications grows in even a moderate way, rapidly expanding the cost. If brownfield tax credits were to be suddenly reduced because of the prohibitive accumulating costs, it will surely discourage participation, as developers, site owners and financial institutions need to be able to rely on anticipated incentives before investing substantial resources in a piece of property. Experienced developers and bankers are too prudent in their investments to view the tax credit program as infinite in its munificence; there is evidence even now that banks are unwilling to offer predevelopment funding and bridge loans in reliance on promised tax refunds. For one NYC project, the brownfield tax credits are currently being valued at fifty cents on the dollar.

And even as the rough justice meted out by the eligibility criteria punishes deserving development projects, the Brownfields Tax Credits reward some sites that do not need and others that do not deserve the level of assistance that the statute offers. For example, it can be readily demonstrated that, for many site owners and developers, liability relief, and not the financial incentives, are the motivating factor for application to the Brownfield Cleanup Program. One demonstration is in the fact that 88 BCP sites transitioned from the now defunct Voluntary Cleanup Program (VCP), which, while similar to the Brownfield Cleanup Program in its requirements, offered no financial incentives. Nine of these sites are among the 25 now eligible for brownfield tax credits and will receive 10% to 22% of their cleanup costs and their development costs – even though they had no expectation of any benefit when they entered the VCP beyond the government's imprimatur on their cleanup programs and the liability protections offered by both the VCP and the BCP.

There are other sites that will be admitted to the program and receive its benefits even if the proposed development is counter to economic development strategies, sites that change the character of established, well functioning neighborhoods, for example, or are otherwise opposed by the local community. There is nothing in the Brownfield Law that requires a builder to work with the community, local government or with development agencies in order to collect the significant State subsidies for developing the project.

MISSING THE TARGET.

The State's liability and financial inducements should make the difference between a promising investment in redevelopment and the historical dilemma for owners of contaminated land: is it worth the financial risk to invest in cleanup and rebuilding in the face of government oversight, possible hidden

According to Henry Lanier of Forsyth Street Advisors, "Investors hate uncertainty. With the Brownfield Tax Credit program, they can analyze projections of remediation costs and development schedules, assess different economic impacts on financial projections, etc., but it is much more difficult to quantify the risk of political uncertainty—an "externality" if there ever was one. The long term success of the Federal Low Income Housing Tax Credit has dimmed the market's memory of the disastrous consequences of the Tax Reform Act of 1986, which retroactively repealed certain tax benefits relating to real estate transactions, but it has not completely expunged it. Since then, the LIHTC has developed into a dependable syndication vehicle and it has led the way for other credits such as the New Markets Tax Credits. So the efficacy and utility of tax credits is well established, but only if there is a clear and ongoing commitment from the political sponsors of the programs. If the State is going to modify the Brownfield Tax Credits, it needs to be done as quickly as possible and there needs to be a strong, publicly articulated commitment to the program. In the absence of this it will be hard to get developers to build the tax credits into their financing structures or for syndicators to find investors willing to commit capital. In the best case, the value of the credits will be diminished and their prices will decline. In this context it would be tremendously important to the market if Governor Spitzer were to publicly indicate his support for the Brownfields Tax Credits and put to rest any doubts regarding their future."

Forsyth Street Advisors is a consulting firm in New York specializing in real estate and affordable finance. Among other projects, it serves as Fund Manager for the New York City Acquisition Loan Fund.

costs when site contamination is more carefully examined, and a market that might not reward the contemplated development? Given the substantial rewards of New York's program, there is reason to be hopeful that, over time, significant numbers of site owners and builders will find the risk acceptable and thousands of brownfields will be cleaned up and reused as a result. Positive experience with the program and certainty that the tax credits will be available when the project is built will help assure the success of the Program.

There is, of course, no way of accurately predicting how many brownfields will be cleaned up and redeveloped as a result of the tax incentives, but, however generous, they are simply not enough, in themselves, to induce a developer to invest in certain areas. Where urban decay and disinvestment have done their worst, even uncontaminated sites may lay fallow or underutilized for generations. To the extent that incentives are readily available for more promising communities, there is even less likelihood that a developer or financial institution will be induced to invest in neighborhoods that the engines of urban and suburban sprawl have left

behind. Getting these communities cleaned up requires not just special financial inducements, but a strategy that will lead developers to envision potential renewal and investment opportunities.

The 2003 Brownfield Law contains such a strategy in what many believe to be the most innovative brownfields initiative in the country – the Brownfield Opportunity Area program. It was created with the recognition that a brownfield program that is based on a one-parcel-at-a-time strategy will not result in the revitalization of the State's most distressed communities, and will frequently invite dirty or stigmatizing uses such as garbage transfer stations into those areas. The BOA approach is meant to reverse the cycle of disinvestment and decay by encouraging municipalities and community-based organizations to create a plan for an entire area burdened by brownfields.

It is the Brownfield Opportunity Area program that sets New York's brownfield program apart and positions New York as an innovator in community revitalization. As conceived and championed by a range of constituencies committed to the revitalization of our urban cores, the BOA program offers real hope for reversing the economic and environmental forces that continue to drive our upstate cities from Yonkers to Buffalo into despair and to feed the seemingly inexorable creep of sprawl development. At the same time, it offers the City of New York a ready-made tool to achieve the Mayor's sustainable growth goals and address its dwindling land supply while accomplishing environmental justice in low income communities. And in Long Island, Westchester and other wealthy suburban communities, the BOA Program provides a tool that can successfully counter resistance to local development and the growing need for affordable housing.

While the promise of the BOA program as an economic and revitalization tool remains strong, the experience of dozens of communities participating in BOA planning has demonstrated a critical need for substantial incentives to encourage participation on the part of private landowners. In theory, the tax credit program and the Brownfield Opportunity Area Program should be symbiotic, with the BOA program offering special help to communities to address entire areas impacted by the economic and health burdens from multiple brownfields; and the tax credits offering the financial incentives to make the individual deals work. Unfortunately, despite being created in the same Law, the programs have insufficient interconnection to provide what could be a highly synergistic relationship. Instead, the tax credit program almost guarantees that communities who attempt to do revitalization planning can expect to get little or no help from developers enjoying the liberal benefits of the tax incentives.

CITY OF BUFFALO, NY BROWNFIELD OPPORTUNITY AREA

The City of Buffalo is developing a Brownfield Opportunity Area revitalization plan for an 1,800-acre area in South Buffalo characterized by hundreds of brownfield properties. The study area is bordered by Lake Erie to the west, the Buffalo River to the north, and the Buffalo/Lackawanna City line to the south, and includes major heavy industrial areas abandoned circa 1980's by the steel industry, and a mixed use residential area surrounding these former plant sites. Major parcels include abandoned properties, landfills, wetlands and neighborhoods. Redevelopment of the area will be advanced due to its strategic regional location, with access to major highways, a bi-national bridge, environmentally rich setting and proximity to railways, Lake Erie and the Buffalo River.

A plan for redevelopment and revitalization of the South Buffalo community will include a significant number of very large underutilized and contaminated properties. The availability of vast parcels of "near shovel-ready" land in an urban center of regional significance, coupled with the natural and man-made resources that exist in close proximity will create the right conditions for considerable opportunity. The South Buffalo community envisions office parks, light industrial, clean manufacturing, warehousing, distribution, all set within a natural environment including greenway trails. The community also conceives of enhanced neighborhood and recreational amenities, like golf, public boat launches and passive natural open space. Wind energy is also being pursued in portions of the BOA to facilitate economic redevelopment, and will complement similar development just south of the BOA, in the City of Lackawanna, (The "Steel Winds" Project). Ultimately, it is anticipated that the BOA will spur economic productivity and quality of life enhancements in the area of South Buffalo, as well as preserve property values, enhance the tax base, and generate new employment opportunities.

The BOA program is a tool for creating value. It requires applicant municipalities or community-based organizations to undertake specified studies to fully describe proposed BOAs in terms of community assets and needs, infrastructure, marketability, opportunities for assistance, and so



forth. Applicants are offered funds for the “identification of strategic sites,” presumably the brownfields within the BOA that will constitute the focal points for the plan that emerges from the BOA research and visioning processes. Unfortunately, in many areas, the owners

of these strategic sites are not willing to work with the community or government in getting their property tested, cleaned up and put to productive re-use. There is simply no incentive for a brownfields site owner to participate in the community planning process, cooperate with the community, or develop a site consistent with a BOA plan. If these site owners decide to enter the BCP and redevelop their sites, they will receive up to 22% of the cost of remediation and development regardless of whether the project serves larger community or economic development purposes. A hoped for assemblage of locally owned restaurants and shops may be preempted by an outsized “big box” store, needed housing by an office complex, or a neighborhood park by a parking facility. In fact, many BOA grant recipients have reported that they have been unsuccessful in securing the cooperation of brownfield site owners in their planning efforts. Still, New York’s taxpayers will pay the developer generously for whatever the development choice may be.

SOUTH TROY BROWNFIELD OPPORTUNITY AREA

The City of Troy is developing a Brownfield Opportunity Area revitalization plan for the southern portion of the city along the Hudson River in Rensselaer County New York. The study area consists of 2.5 miles of waterfront, inclusive of a federal navigation channel, and offers a broad range of redevelopment opportunities. The South Troy Brownfield Opportunity Area encompasses the city’s largest area of vacant, developable land consisting of more than 200 acres characterized with 54 potential brownfield sites. The BOA is divided into a primary study area consisting of a large number of vacant and underutilized industrial sites, and a secondary study area consisting of the surrounding residential neighborhoods. The City’s Brownfield Opportunity Area Plan will result in a blueprint for the redevelopment of brownfields and improvements to the surrounding residential neighborhood. The plan will set forth a redevelopment scenario, based on local and regional economic trends and conditions that may result in new office, residential, research and development, industrial, and retail businesses, as well as opportunities for waterfront recreation. The BOA plan will also serve to: expedite needed transportation improvements; facilitate environmental cleanup; and create waterfront access and green open space. In doing so, the BOA will improve the economic productivity of the South Troy waterfront, protect the residential tax base and property values, enhance the city’s commercial and industrial tax base, generate new employment opportunities, and improve overall quality of life.

A clear indication of the legislative intent to reward site owners who cooperate in the development and implementation of a BOA plan is found in a statutory provision that states:

To the extent authorized by law, projects in brownfield opportunity areas designated pursuant to this section may receive a priority and preference when considered for financial assistance pursuant to any other state, federal or local law. General Municipal Law §970(5)(r)

It is easy to imagine how various existing government programs and functions could be employed to support and build on community revitalization efforts while remaining true to their established missions and eligibility criteria. For example, it makes perfect sense to give priority to infrastructure repair and improvement in neighborhoods that are making serious revitalization efforts. It also makes sense to reward landowners for their cooperation with such efforts by offering enhanced services, financial incentives and other government resources. Unfortunately the language in the statute is not mandatory, relates to financial incentives only, and offers no mechanism for the cooperation of other agencies and other levels of government. In fact, not much has been done with “priority and preference” provision of the statute and NPCR is aware of only one program that has adjusted its eligibility criteria or priorities to explicitly offer preference to BOA efforts.¹⁰

The Brownfield Law includes a promising combination of new programs and incentives designed to give all brownfields significant benefits and to offer special incentives to those contaminated sites least likely to attract investment in the absence of more focused strategies. In the absence of targeted incentives, the purposes of the program are readily undermined, and both community and public investment is lost.

RECOMMENDATIONS

Passage of the Brownfield Law in 2003 was a singular achievement, filling the need for a program to clean up contamination in New York’s communities and offering both funding and innovative strategies for neighborhood revitalization. Like any major legislative initiative, after a trial implementation period it requires and deserves revisiting and evaluation for needed revision. Though a thoroughgoing review is warranted, with input from all stakeholders and involved government agencies, there are amendments that need to be made without further delay to remove the unsupportable constraints on program eligibility and to more carefully target the State’s significant financial investment in brownfield redevelopment. Based on the foregoing observations and analysis, NPCR strongly urges the following changes:

10. The Legislature enacted a new program in 2006, known as Restore New York’s Communities, that offers preferential treatment to restoration projects within BOAs. Chapter 109 of the Laws of 2006.

1. Eligibility for participation in the Brownfield Cleanup Program must be de-linked from the brownfield tax credits and based solely on environmental considerations. To the extent that contaminated sites are excluded from the Brownfield Cleanup Program, new regulatory and environmental problems are created. Excluded sites may not get the attention they require in the form of thorough testing or remediation, and, to the extent these sites will suffer for a lack of a government sign-off and liability protection, there is already a call to create yet another regulatory program, like the Voluntary Cleanup Program that the BCP was meant to replace. Having two programs that do essentially the same thing is obviously counterproductive in terms of bureaucratic efficiency. Absent the tax incentives, which are the sole basis for the constriction on eligibility, there is no sound reason why any site that is contaminated or reasonably believed to be contaminated should not qualify for the BCP, which will guide the applicant through the requisite site investigation and environmental remediation that will be protective of public health and provide the applicant with useful liability protection. By restructuring the brownfield tax credits by more carefully targeting and apportioning subsidies to development projects, there will be no need to limit entry into the program.

Subsidizing cleanups is a readily acceptable and laudable public policy pursuit because it will always result in a cleaner environment. And, providing cash incentives for cleanup costs (in the form of refundable tax credits) to every project on a dollar for dollar ratio with the sole requirement that the cleanup adhere to the State's BCP is a straightforward and direct way of achieving this public policy objective. However, subsidizing development projects is a more complicated matter. Before committing State subsidies for development projects, there should be, at a minimum, a qualitative and quantitative evaluation to determine whether the financial assistance will achieve the State's and the locality's economic and community development goals. It is impossible to do this if development subsidies provided are as-of-right for every project that gets accepted into the BCP, where eligibility for the BCP is based solely on the presence and type of contamination.

2. Once a site is accepted into the Brownfield Cleanup Program, financial incentives should be awarded to encourage the cleanup and reuse of brownfields in ways that will:

- allow brownfields to be more competitive with greenfields,
- advance sites that would not otherwise attract development,
- offer special assistance to specific community benefit uses, and
- support community planning efforts.

The goal is to develop criteria that rewards brownfield development generally (keeping in mind that financial incentives are in addition to the liability relief that comes with participation in the program, i.e., the ability of the site owner to get out from under the well-known hazardous waste liability black cloud), but does not subsidize development that is likely to take place in the absence

of financial assistance or where a proposed project works at cross-purposes with a larger economic development agenda. The task of targeting financial rewards based on need and value will require a combination of approaches. NPCR urges the following:

a. Remediation Tax Credit Assistance {Site Preparation Component and On-Site Groundwater Remediation Component}. Because the Brownfield Cleanup Program is intended to address contamination in the environment, there needs to be a financial award, available to all program participants, that relates to the cost of remediation and the need to create a level playing field vis-à-vis greenfields. NPCR suggests, as an incentive available to all BCP participants, a tax credit based on the cost and level of remediation, to be awarded in two components:

- NPCR suggests that remediation tax credits be available for up to 80% of the total cleanup cost, based on the degree to which contamination deters reclamation as determined by the proportion of the cost of cleanup in relation to the development costs. Thus, for those sites for which the cleanup costs are a significant part of the total development cost (TDC) — 5% or more, for example — maximum tax credits would be generated. To the extent that the remediation of site contamination will be a very small part of the TDC — less than 1% for example — few tax credits would be generated.
- Because the remedial tax credit should also reward the highest levels of cleanup, some additional proportion of the remediation tax credit should be generated by cleanups that achieve Track I and Track II level cleanup. Therefore, NPCR suggests that tax credits valued at an additional 5% to 20% of the cleanup costs be generated for those projects which achieve the most protective cleanups, with the highest tax credits going to projects that achieve Track I cleanups and gradually downwards for Track II residential, Track II commercial, and Track II industrial cleanups. Thus, a brownfield with significant contamination that is cleaned up to the most protective levels could earn remediation tax credits equaling 100% of the cleanup cost.

b. Development Tax Credit Assistance {Tangible Property Component}. Contamination is frequently not the only obstacle to brownfield reclamation. Many brownfields are community eyesores — vacant and abandoned properties — where there is illegal dumping, ongoing noxious activities and an ever outward spread of contamination and abandonment. These sites contribute to a neighborhood's downward cycle of deterioration and decay, and ultimately, disinvestment. Many brownfields in upstate regions and downstate areas where there are intractable pockets of poverty suffer from surrounding blight and lack of economic viability that deter investment. Significant resources beyond remediation subsidies are needed to reverse this cycle. NPCR suggests that tax credits of up to 14% of the total development cost of the project be provided where there is a documented need, where need is defined not just by remediation, but also by economic factors. NPCR suggests that instead of the current as-of-right development subsidies

(the tangible component), that tax credits attributable to development costs only be available to brownfield projects that meet certain threshold criteria.

It is crucial that the criteria for the awarding of incentives be clear and sufficiently definitive to fully advise potential participants of the incentives that would apply to their particular situation upfront. Any protracted or case-by-case analysis makes it difficult for a site owner or developer to make the significant early investment that a brownfield redevelopment project usually requires. Property owners and developers need to be able to calculate the amount of tax credits that their project will generate with certainty, prior to submission, and there should be little or no discretionary decision-making, as this leads to uncertainty, delay, and frequently, lawsuits.

Projects that pass threshold would be eligible to receive tangible BTCs; and projects that fail threshold would receive no tangible tax credits. NPCR suggests the following threshold criteria for determining eligibility for development/tangible tax credits:

- **The brownfield will be developed within and consistent with a BOA Plan.** By providing financial incentives within BOAs, the tax credit program will also serve to encourage municipalities and the communities within them to work together in their planning and revitalization efforts. This kind of collaboration has many benefits beyond those that may be gleaned from the awarding of incentives based on statistical mapping. It helps to ensure, for example, that infrastructure needs are delineated and prioritized, that revitalization proceeds with an understanding of market conditions, that highly-functioning neighborhoods are not displaced, and that, because of community consensus, there will be less delaying opposition and litigation as plans are implemented. To ensure that consistency determinations can be projected with alacrity by developers, the State will need to require a high level of specificity in BOA Plans as they are adopted.

or

- **The brownfield is in a weak market area.** Recognition must be given to the stark differences in property values and economic health of New York City and its wealthier suburbs compared to the economic devastation of upstate regions. Weak market areas can be defined (and mapped) by the State's economic development department, Office of Real Property Services, or other offices using demographic and economic data. The mapping of weak market areas should be upfront, and on the basis of clear, established demographic criteria. The criteria should include population decline, percent job loss, poverty rates, number of residents on public assistance, etc., within specific geographic areas, (i.e., census tracts) delineated and updated by the State every few years to reflect market trends.

or

Illustrative Worksheet – Tangible Component – for sites that pass Threshold

Analysis of BTCs when Tangible Component is Linked to Remedial Cost on a sliding scale percentage of Total Development Cost (TDC)

Assume \$10 million project with varying levels of contamination

Remedial Cost	Ratio to TDC	Total Dev. Cost	Sliding Scale % of Tangible Component	Assume 22% BTC \$ 2,200,000 Total Tangible BTCs generated:
\$ 500,000	5.0%	\$ 10,000,000	100%	\$ 2,200,000
\$ 250,000	2.5%	\$ 10,000,000	50%	\$ 1,100,000
\$ 100,000	1.0%	\$ 10,000,000	25%	\$ 550,000
\$ 50,000	0.50%	\$ 10,000,000	10%	\$ 220,000

Assume \$20 million project with varying levels of contamination

Remedial Cost	Ratio to TDC	Total Dev. Cost	Sliding Scale % of Tangible Component	Assume 22% BTC \$ 4,400,000 Total Tangible BTCs generated:
\$1,000,000	5.0%	\$ 20,000,000	100%	\$ 4,400,000
\$ 500,000	2.5%	\$ 20,000,000	50%	\$ 2,200,000
\$ 200,000	1.0%	\$ 20,000,000	25%	\$ 1,100,000
\$ 100,000	0.50%	\$ 20,000,000	10%	\$ 440,000

Assume \$100 million project with varying levels of contamination

Remedial Cost	Ratio to TDC	Total Dev. Cost	Sliding Scale % of Tangible Component	Assume 22% BTC \$ 22,000,000 Total Tangible BTCs generated:
\$5,000,000	5.0%	\$ 100,000,000	100%	\$ 22,000,000
\$2,500,000	2.5%	\$ 100,000,000	50%	\$ 11,000,000
\$1,000,000	1.0%	\$ 100,000,000	25%	\$ 5,500,000
\$ 500,000	0.50%	\$ 100,000,000	10%	\$ 2,200,000

This illustration shows the BTCs generated where the size of the project varies in each scenario but the percentage of cleanup costs and tax credits is constant.

- **The brownfield will be used for a community benefit project.** There are brownfield redevelopment projects outside of BOAs and weak market areas that will need financial incentives. For example, there is a serious and growing affordable housing crisis in the New York metropolitan area. NPCR suggests that community benefit projects, defined as those projects that contain government subsidies that are tied to both the financial need of the project and also to developer profit restrictions, be eligible for development tax credit assistance. The intention is to encourage brownfield redevelopment projects that serve the public interest while protecting against developer windfalls. Examples of existing programs which have institutional profit restrictions that ensure that BTCs generated will go toward the project, include, the low income housing tax credit program, and the NYS Affordable Housing Corporation programs. To reduce delay and uncertainty, the State should develop a list (and update it regularly) of programs that meet this test.

and

- **The brownfield redevelopment project is not inconsistent with a BOA Plan.** Projects that are in a weak market area or are community benefit projects that would otherwise be eligible for tangible tax credits would not be eligible if the project is inconsistent with an adopted BOA Plan.

Projects that pass threshold would be eligible to receive brownfield tax credits up to 14% based on a sliding scale. The highest level of brownfield tax credits would be generated where the cost of remediation represents a significant proportion of total development cost, with the smallest awards generated by those projects for which the cleanup costs represent a very small fraction of the total cost of redevelopment. (See illustration on previous page of how such a sliding scale approach would work on projects with varying ratios of cleanup to development costs). NPCR believes that this correction would help to direct the State's resources to projects that are hindered by the presence of contamination and where market conditions will not drive the particular kinds of redevelopment projects desired by the community.

NPCR further proposes that the current bonus of 8% for projects constructed in Environmental Zones should be expanded to also include such bonus for projects built consistent with adopted BOA plans, so that an additional 8%, up to a total of 22%, of BTCs would be generated by projects that are also located within an En-Zone and/or are built consistent with a BOA Plan.

3. The “priority and preference” language of the BOA statute needs to be strengthened and aggressively implemented. Given the potential of the BOA program to transform our urban centers by creating value, much more needs to be done to assure that resources are made available in a timely way and that cooperation is encouraged among residents, businesses, property owners and government agencies. The “priority and preference” language was clearly intended to encourage the husbanding of resources and collaboration, but the provision lacks detail and clear direction. NPCR recommends that the law be amended to clearly direct financial and other incentives to encourage developers and property owners to participate in and cooperate with the BOA planning process. Statutes that administer other government programs, such as housing and infrastructure subsidies and economic development grants and loans, should be amended to codify the “priority and preference” language of the BOA program. Likewise, municipal and state capital programs, such as those for road improvement, sewer system repair, parks, and street lighting, should include BOAs in their criteria for prioritizing projects within their annual work plans.

4. The awarding of financial incentives should be accomplished through an economic development or planning agency, not the Department of Environmental Conservation. The fact that NYS-DEC has been forced, in essence, to turn its back on sites with contamination levels above health standards, solely because of the fiscal impact of tax credits, is a strong indication that there is a conflict between the multiple roles the agency has been given under the Brownfield Law. While NYSDEC should retain all environmental regulatory decision-making, it should not logically have a role in economic evaluation of projects in connection with eligibility decisions; and it need not have a role in the administration of tax credits.

5. Eliminate the duplicative bureaucracy that slows decision-making and dilutes accountability in the BOA program. The BOA program has an inefficient and costly dual agency construct, which charges the implementing agencies with tasks that illogically expand their traditional roles. For example, it makes no sense for the DEC to be involved in economic development and planning decisions, with which it has no experience or expertise. Every step in the BOA process is plagued by delay and uncertainty with each project proceeding through a series of planning and implementing stages, and each stage requiring a new application and sign-off by both the Department of State and the Department of Environmental Conservation. The BOA program and its funding should be placed in a single agency that does not rely on another agency’s budget or oversight. Between the DEC and the DOS, the better candidate is the DOS, which has historically functioned as the State’s planning agency and liaison with local government. While the DEC should retain all environmental regulatory decision-making, DEC does not logically need to have a role in the administration of the BOA program, which requires distinct types of expertise unrelated to environmental considerations.

6. Reduce delays and uncertainties of the BCP. If the above revisions are made immediately to the statute, and clear criteria for decision-making are established upfront, it will go a long way towards reducing the uncertainty and delays in the eligibility determination process. In our research, we heard from many stakeholders that once an applicant gets into the BCP, there are also significant delays. Beyond these immediate statutory corrections, it will be important going forward to streamline what is now a one-size-fits-all BCP. At a minimum, the program should allow for a more streamlined process for moderately contaminated sites without reducing protection of public health and the environment or meaningful community involvement.

CONCLUSION

The 2003 Brownfield Law needs to be repaired, and repaired quickly, to get the State going on cleaning up its tens of thousands of brownfield sites. Fine tuning of the tax credits and clarifying the eligibility will both increase participation in cleanups and also ensure that State assistance advances both the State's and local economic development objectives. First and foremost, eligibility for entry into the Brownfield Cleanup Program must be opened up to all contaminated sites and not be constrained by concerns over the cost of tax credits to projects that don't need or warrant assistance. Such constraints will simply not be needed if development subsidies are more carefully awarded. With relatively minor corrections, the Law can be used to promote the cleanup of thousands of potentially dangerous parcels of land, revitalize communities, inspire thoughtful and sustainable development, and attract critical private dollars needed for the economic rebirth of our upstate urban centers. The longer the tax credits are left as currently written, the purposes of the programs will be undermined, while leaving the taxpayer footing the bill for an expensive but less than fully effective program.

FACT SHEET
NEW YORK STATE TAX CREDITS
Brownfields Cleanup Program
(For taxable years beginning on or after April 1, 2005, 2006 for calendar year taxpayers)

Three tax credits (Tax Law sections 21, 21 and 23) are available to taxpayers, subject to tax under Tax Law Articles 9, 9-A, 22, 32 and 33, who remediate a site under the Brownfield Cleanup Program under Title 14 of Article 27 of the Environmental Conservation Law:

1. **The Brownfield Redevelopment Credit**-consists of the sum of following three components:

- Site preparation costs (expenses related to qualification for a remediation certificate or preparing a site for development)
- Tangible property costs (similar to ITC credit, e.g. buildings and structural components thereof)
- On-site groundwater costs (remediation of groundwater contamination)

This Credit is calculated using the following % of the costs for each component that qualifies for the credit:

<u>Taxpayer</u>	<u>Base</u>	<u>*Track 1</u>	<u>En-Zone</u>	<u>Maximum</u>
Article 22	10%	+2%	+8%	20%
All others	12%	+2%	+8%	22%

This credit increases by 2 % if the Site is remediated to a cleanup level (Track 1) that will allow the site to be used for any purpose without restriction (see subdivision 4 of section 27-1415 of the Environmental Conservation Law) and another 8% if at least one half of the Site is located in an Environmental Zone (En-Zone – see description below).

2. **Remediated Brownfield Credit for Real Property Taxes**

For real property taxes paid for a qualified site. The amount of the credit is 25% of the product of the taxpayer's employment factor (a percentage based on the number of persons employed by the taxpayer on a qualified site) and the taxpayer's "eligible real property taxes" (see section 22(b)(4) of the Tax Law).

<u>Full-Time Employees</u>	<u>0 – 24</u>	<u>25 - 49</u>	<u>50 - 74</u>	<u>75 - 99</u>	<u>100 or more</u>
<u>Employment No. Factor</u>	0%	25%	50%	75%	100%

If the Site is located in an En-Zone the credit is 100% of the product of the employment factor and the real property taxes paid. There is a credit limitation equal to the product of the number of full time employees at the qualified site times \$10,000. For instance, if the eligible real property taxes are \$50,000 and the taxpayer employs 100 employees:

- Outside of an En-Zone: the credit = \$12,500 (25% of 1.0 times \$50,000)
- Inside an En-Zone: the credit = \$50,000 (100% times 1.0 times \$50,000)

3. **Environmental Remediation Insurance Credit**

For premiums paid for Environmental Remediation Insurance (see section 3447 of the Insurance Law) up to the lesser of \$30,000 or 50% of the cost of the premiums.

An **En-Zone** is an area designated by the Commissioner of Economic Development as such by December 31, 2003. The area, as of the 2000 census, must have a poverty rate of at least 20% and an unemployment rate of at least 1 ¼ times the statewide unemployment rate.

A taxpayer must have been issued a **Certificate of Completion** (also referred to in the law as a Remediation Certificate) from the Commissioner of Environmental Conservation to be eligible for these tax credits (see section 27-1419 of the Environmental Conservation Law).

Only costs incurred on or after the *date of execution* of the **Brownfield Cleanup Agreement** (see section 27-1409 of the Environmental Conservation Law) are eligible for purposes of computation of the credit.

ANALYSIS ON THE USE OF BROWNFIELD TAX CREDITS BY NOT-FOR-PROFIT ORGANIZATIONS

MAY 2007

NEW PARTNERS FOR COMMUNITY REVITALIZATION, INC. (“NPCR”) is a not-for-profit organization working to revitalize New York communities with a particular focus on brownfield sites in and proximate to low and moderate income neighborhoods and communities of color. NPCR is implementing an integrated approach to brownfields redevelopment that is designed to provide the tools and capacity necessary to promote community-based productive re-use of brownfields. This multi-pronged initiative was developed through on-the-ground work with environmental justice organizations, community based groups, nonprofit and for profit developers, community lenders, and nationwide research on innovative programs

Several community based not-for-profit organizations have asked NPCR for help utilizing brownfield tax credits (“BTCs”) to advance their community supported projects in connection with NPCR’s START-UP Pool Program, through which NPCR provides targeted technical assistance to overcome brownfield obstacles. Some of these projects involve affordable housing and the utilization of federal low income housing tax credits (“LIHTCs”). NPCR ascertained that, because BTCs are very different from LIHTCs, there is much confusion in the community development industry as to how and when BTCs can be applied. Adding to the confusion is the fact that the practical implementation of BTCs is evolving, as the statute that created the BTCs is relatively new. Consequently, NPCR identified the need to develop an analysis that (i) outlines the law under which BTCs were established, (ii) analyzes how not-for-profit corporations might utilize BTCs, (iii) examines whether the BTCs can be used in the context of projects developed under a cooperative or condominium ownership structure, (iv) considers whether the BTCs can be used in conjunction with LIHTCs, and (v) identifies those areas which are open to interpretation. The objective was to provide a factual foundation upon which not-for-profit entities can make informed decisions about how to structure their involvement in a specific project in order to obtain the benefit of BTCs.

NPCR retained the law firm, Hirschen Singer & Epstein LLP, to help carry out this analysis of the BTCs. This firm was selected due to its strong reputation in representing not-for-profit and for-profit developers in the development of affordable housing and its creativity in developing strategies to utilize federal low income housing tax credits. In November 2005, the report, “A Baseline Analysis on the Use of Brownfield Tax Credits by Nonprofit Organizations” was jointly released by NPCR and Hirschen Singer & Epstein LLP after receiving input from a wide range of brownfield stakeholders and various State officials. In the summer 2006, the State legislature enacted an amendment to the statute that clarified several open issues regarding the applicability and use of BTCs. This Analysis has been revised to reflect those recent changes to the statute.

The research, writing and editing that produced this analysis were jointly carried out by Jody Kass and Mathy Stanislaus, Co-Directors of NPCR; and Alan Epstein and Russell Kivler of Hirschen Singer & Epstein LLP. For additional information, contact Jody Kass, jodykass@npcr.net; or Alan Epstein, aepstein@hirschensinger.com or at 212-819-1130. Additional information on NPCR’s programs can be obtained at www.npcr.net

SUMMARY

- **A not-for-profit corporation can utilize BTCs by forming a for-profit affiliate to undertake the development of the project for which BTCs are sought.**
 - Only entities subject to state tax are eligible to receive BTCs. While not-for-profit corporations are not subject to state tax, they may utilize BTCs by forming a for-profit corporation or limited liability company to undertake the development of the project. The not-for-profit corporation will own and control the for-profit development entity as either the shareholder in the case of a corporation or as a member in the case of a limited liability company. Note that in order for a limited liability company to be eligible for the BTCs, it will have to have for-profit members or elect to be taxed as a corporation for tax purposes.
- **Projects developed under condominium and cooperative ownership structures are eligible for BTCs.**
 - In June 2006, the statute was amended to specifically provide that condominium and cooperative buildings constitute “qualified tangible property” and, as such, will qualify for BTCs.¹
- **BTCs can be used in conjunction with LIHTCs.**
 - The typical structure of a LIHTC transaction accommodates eligibility for BTCs.
- **Although BTCs can be used with LIHTCs, there are significant and important differences between BTCs and LIHTCs.**
 - BTCs generated by a project will pass through to the partners or members of the development entity, provided that such partners or members are New York state taxpayers. Given that all partners or members of a development entity that owns property in New York are required to file a New York state tax return, all partners or members of the development entity should be eligible to receive the benefits of the BTCs. BTCs generated by a project that are in excess of the state tax liability of the development entity’s partners or members are refunded to the partners or members as an overpayment of taxes in the year in which they are earned and, therefore, can not be syndicated in the same manner as LIHTCs. Assuming the partners or members of the development entity have a modest state tax liability, a majority of the BTCs will be refunded as an overpayment of taxes and will provide a significant infusion of cash when earned.
 - Because of the efficiency of the LIHTC market, investors will pay in advance for the anticipated credits and the proceeds from the sale of the LIHTCs can be available at the commencement of construction to directly pay for construction costs. Most of the BTCs generated by a project will be received in the year in which the project is placed in service. The market for BTCs is undeveloped and partners or members of the development entity will likely be hesitant to provide equity installments based on to-be-earned BTCs. As a result, the cash infusion in connection with the BTCs is likely to be made only after it is certain that the project will receive the BTCs and the partners or members will receive the benefits. However, as the Brownfield Cleanup Program (BCP) and the use of BTCs mature, investors may agree to provide equity installments based on the to-be-earned BTCs that could be used to fund remediation/construction costs, and/or other sources of bridge financing may be made available with the BTC serving as collateral.

¹ L.2006 c. 420.

Unlike LIHTCs, which are allocated based on a need or gap analysis (i.e., a calculation to determine whether the cost of the project warrants the amount of subsidy being provided) conducted by the state allocating agency, there is no gap analysis provided for in the statute that created BTCs. Nevertheless, the State has reduced the number the projects that receive BTCs by applying a set of eligibility criteria, developed as a guidance, for participation in the BCP on a case-by-case basis, thereby limiting access to the program and its benefits and adding uncertainty to the process. Once a project is accepted into the BCP, however, full benefits, including BTCs, are available if program requirements are met. Thus, on a project that has received a certificate of completion upon approval and completion of a remedial plan, the development entity will receive the BTCs as-of-right based on the formula provided in the statute.

– While the federal government allocates a certain number of LIHTCs to each state per year, New York’s brownfield law places no limits on the number of sites that can receive BTCs: all program participants that are accepted into the BCP and otherwise meet statutory requirements are eligible for the credits.

– LIHTCs in New York State are allocated and administered by the New York State Division of Housing and Community Renewal and the New York City Department of Housing Preservation and Development (for some New York City sites). BTCs, on the other hand, are awarded by the New York State Department of Environmental Conservation and the New York State Department of Taxation and Finance.

- **The Department of Taxation and Finance (“DTF”) will be instrumental in determining the practical implementation of BTCs**

– The statute neither directs the State to develop guidelines nor to use any particular type of existing tax credit upon which to model the implementation of the BTCs. Accordingly, the statute leaves open a number of issues regarding implementation. It appears that DTF will be the lead agency in the creation of necessary policies and procedures needed to implement the program, and preliminary indications are that DTF’s treatment and analysis of certain Investment Tax Credit issues will serve as a basis for the treatment of BTCs.

– The tangible property credit component of the BTCs will be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the development entity. The tangible property credit component of the BTCs can be claimed by the partners or members of the development entity for up to ten taxable years after the date of the issuance of the certificate of completion. In other words, if the partner or member does not claim the credit in the year the building is placed in service (i.e., the first year in which the credit could be claimed), it can do so at anytime within ten years of the issuance of the certificate of completion.

OVERVIEW OF THE LAW

In October 2003, New York State adopted legislation intended to promote the remediation and redevelopment of brownfield sites.² As part of the legislation, the New York Tax Law (the “Tax Law”) was amended to add a new set of tax credits applicable to the development of brownfields.³ The BTCs consist of three distinct credits: a Brownfield Redevelopment Tax Credit⁴ (the “Redevelopment Credit”); a Remediated Brownfield Credit for Real Property Taxes⁵; and an Environmental Remediation Insurance Credit⁶. This analysis focuses on the provisions of the law governing the Redevelopment Credit and its application to the development of projects by not-for-profit developers.

I. BROWNFIELD REDEVELOPMENT TAX CREDIT

The Redevelopment Credit was established in a new Section 21 of the Tax Law and is divided into three separate credit components: (i) Site Preparation; (ii) Tangible Property; and (iii) On-site Groundwater Remediation.⁷ The amount of the Redevelopment Credit that an applicant is entitled to is computed by multiplying the costs incurred by a qualified site by an applicable percentage as delineated in the Tax Law. Generally, a qualified site is a brownfield site that has undergone remediation in accordance with the specifications established under the Brownfield Cleanup Program (the “BCP”) and which has been issued a certificate of completion from the New York State Department of Environmental Conservation (“DEC”).⁸ The applicable percentage rate used in determining the amount of the Brownfield Credit ranges from 10% to 22% of the eligible costs incurred.⁹ The factors considered in determining the applicable percentage include: the type of applicant; the location of the property; and the extent of the remediation work undertaken.

The Redevelopment Credit provides a dollar-for-dollar reduction in the recipient’s State income tax liability. One of the most notable aspects of the Redevelopment Credit, and BTCs as a whole, is that the amount of the Redevelopment Credit that exceeds the recipient’s State income tax liability in the year in which the Redevelopment Credit is allowed will be treated as an overpayment of taxes and will be refunded to the recipient.¹⁰ As discussed in more detail below, most of the Redevelopment Credit will be received when the building is placed in service. As such, most of the refund generated by the Redevelopment Credit will not be available to directly fund remediation or construction costs.

a. SITE PREPARATION COMPONENT

The Site Preparation Component is based on the costs incurred in connection with remediation work undertaken pursuant to a Brownfield Cleanup Agreement (“BCA”) as required of participants in the BCP in order to earn a certificate of completion from the NYS DEC, as well as the costs incurred in preparing the site for the erection of a building and costs that are otherwise necessary to establish a site as usable for its industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes.¹¹ The amount of the

2 L.2003, c. 1. The law was the subject of technical amendments adopted as L.2004 c. 577 and was further amended by L.2006 c. 420.

3 L.2003, c.1. Tax Law §21, 22 and 23.

4 Tax Law §21.

5 Tax Law §22.

6 Tax Law §23.

7 Tax Law §21(a)(2), (3) and (4), respectively.

8 New York Environmental Conservation Law, Part A, Title 14, Article 27.

9 Tax Law §21(a)(5).

10 Tax Law §187-g with respect to corporate tax under Article 9. Tax Law §210(33)(b) with respect to corporate franchise tax.

11 Tax Law §21(b)(2).

Site Preparation Component credit that is associated with costs incurred in connection with the site's qualification for a certificate of completion, generally the costs associated with remediating the site, is earned in the taxable year in which the certificate of completion becomes effective.¹² However, the statute limits eligible costs to those incurred on or after the date the BCA is executed.¹³

To the extent that the DEC does not accept projects into the BCP until after the site investigation is complete, some of the costs associated with site qualification will not constitute eligible costs, thus reducing the value of this component of the Redevelopment Credit. If DEC maintains this position, it may have an unintended and disproportionate impact on low profit-margin projects (e.g., an affordable housing project in a low income community with a need for resources to cover upfront site preparation costs).

The BTCs for eligible site preparation costs may be taken prior to completion of the improvements. The remainder of the Site Preparation Component credits (i.e., those not associated with the remediation) may not be taken until the tax year in which the improvements are placed in service.¹⁴

b. TANGIBLE PROPERTY COMPONENT

The Tangible Property Component is based on costs incurred in connection with the construction of buildings and structural components of buildings, which constitute qualified tangible property.¹⁵ Qualified tangible property, for the purpose of the Redevelopment Credit, was originally defined as property that (i) is depreciable pursuant to Section 167 of the Internal Revenue Code ("IRC") (i.e., the depreciation deduction allowed for the exhaustion, wear and tear of property used in the trade or business of the taxpayer, or of property held for the production of income), (ii) has a useful life of four years or more, (iii) has been acquired by a purchase as defined in Section 179(d) of the IRC (i.e., property purchased in connection with a trade or business), (iv) is located on a qualified site (i.e., a site for which a certificate of completion has been issued), and (v) is principally used for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing).¹⁶ The 2006 amendment to the statute expanded the definition of qualified tangible property to include property that (i) is part of a dwelling whose primary ownership structure is covered under either Article 9-B of the Real Property Law (i.e. condominium apartment buildings) or meets the requirements of Section 216(b)(1) of the IRC (i.e. cooperative apartment buildings) and (ii) meets the requirements enumerated in (iii) and (iv) of the foregoing sentence.¹⁷

The Tangible Property Component credit can be taken only after the property is placed in service and must be claimed within ten taxable years after the date of the issuance of the certificate of completion.¹⁸

Typically, a majority of the costs associated with new development are attributable to construction of the building and, therefore, it is likely that the Tangible Property Component will constitute the bulk of the Redevelopment Credit for a given project.

¹² Tax Law §21(a)(2).

¹³ Tax Law §21(a)(6).

¹⁴ Id.

¹⁵ Tax Law §21(a)(3).

¹⁶ Tax Law §21(b)(3).

¹⁷ L.2006 c. 420, amending Tax Law §21(b)(3).

¹⁸ Tax Law §21(a)(3).

C. ON-SITE GROUNDWATER REMEDIATION COMPONENT

The On-site Groundwater Remediation Component is based on costs incurred in connection with the remediation of on-site groundwater contamination pursuant to the remedial action plan agreed to in the BCA, which are not included in the determination of the Site Preparation Component or Tangible Property Component.¹⁹ Like credits earned in connection with remediation work under the Site Preparation Component, the On-site Groundwater Remediation Component credit incurred in connection with the issuance of the certificate of completion can be claimed in the year in which the certificate of completion is issued.²⁰

As noted above, the statute limits eligible costs to only those incurred on or after the date the BCA is executed.²¹ To the extent that DEC does not accept projects into the BCP until after the remedial investigation is complete, a potentially significant portion of the costs associated with groundwater contamination will not constitute eligible costs, reducing the value of this credit component.

II. ELIGIBILITY FOR THE REDEVELOPMENT CREDIT

Taxpayers that are eligible to apply for and benefit from the Redevelopment Credit, and BTCs generally, are limited to those subject to taxation under Article 9 (corporate income tax), Article 9-A (corporate franchise tax), Article 22 (personal income tax), Article 32 (banking corporations) and Article 33 (insurance corporations) of the Tax Law.²² As a result, whether an applicant is eligible for BTCs depends on the type of entity that is engaged to develop the project.

In general, for-profit corporations and limited liability companies are subject to state tax under Article 9-A of the tax law and, therefore, either type of entity may be used for the development of a project that contemplates using BTCs. Further, so-called “pass through” entities, such as S corporations or limited liability companies that have elected for “pass through” treatment, may be formed to develop projects using BTCs so long as they are structured with an eligible entity as the shareholder or member. In other words, in the context of a project undertaken by a not-for-profit organization, a for-profit entity must be formed to act as the shareholder or member.

III. NOT-FOR-PROFIT CORPORATION’S ELIGIBILITY FOR THE REDEVELOPMENT CREDIT

Not-for-profit corporations are not subject to state tax under any of the articles of the Tax Law specified in connection with the Redevelopment Credit or the BTCs in general and, therefore, they are not entitled to directly apply for or receive BTCs. However, by structuring the entity that will undertake the development of the project as a for-profit corporation or limited liability company subject to State tax under Article 9-A of the Tax Law, a not-for-profit corporation can indirectly obtain the benefit of the Redevelopment Credit.

a. STRUCTURE OF TRANSACTION

The not-for-profit corporation will form, own and control a for-profit corporation or limited liability company to own and develop the property that is the subject of environmental remediation performed in accordance with the BCP. In addition to owning and developing the property, the newly-formed for-profit corporation or limited liability company will be the applicant for the Redevelopment Credit. The not-for-profit corporation will be the sole shareholder of the for-profit

¹⁹ Id.

²⁰ Id.

²¹ Tax Law §21(a)(6).

²² Tax Law §21(a)(1).

corporation, or in the case of a limited liability company, the sole member.²³ In this way, the not-for-profit corporation will retain control of the construction and operation of the project and will indirectly own the property and project through its ownership of the for-profit corporation.

The Redevelopment Credits generated by the project will be earned by the for-profit corporation upon obtaining from the DEC a certificate of completion with respect to the remediation work. The Redevelopment Credits earned for the Site Preparation Component and On-site Groundwater Remediation Component, based on costs incurred in connection with and prior to the issuance of the certificate of completion, are allowed to be taken in the taxable year in which the certificate of completion is issued.²⁴ Redevelopment Credits generated under the Tangible Property Component are allowed to be taken in the taxable year in which the project is placed in service.²⁵

b. OPEN ISSUES AND PRACTICAL CONSIDERATIONS

1. USE OF THE BTCs/TIMING OF RECEIPT OF BTCs

The 2006 amendment to the statute clarified the criteria for determining when a building will be placed in service for the purposes of determining when the Redevelopment Credits generated by the Tangible Property Component can be claimed by providing that a building is deemed placed in service when a certificate of occupancy is issued for the property.²⁶

Presuming that the bulk of the Redevelopment Credit will be generated under the Tangible Property Component and further presuming that the development entity or its partners or members will have a nominal state tax liability, an overwhelming majority of the Redevelopment Credit will be refunded to the recipient as an overpayment of state income tax in the year in which the project is placed in service. As such, a majority of the refund generated by the Redevelopment Credit will not be directly available to fund construction costs. In the context of commercial housing, the development entity or the partners, members or shareholders may choose to use the refund to either retain the proceeds or reinvest the refund in the project. If the development entity decides to reinvest the refund, it could be used to decrease the amount of permanent debt encumbering the project and/or establish reserve accounts. By decreasing the amount of permanent debt, the project may realize increased cash flow that will benefit the not-for-profit shareholder.

There exists an important question as to how the BTCs will be valued in the market-place by lending institutions. Although the BTCs do not provide cash upfront, once the project has been accepted into the BCP, provided that the remedial work plan has been fully implemented, the project will be the as-of-right beneficiary of a significant cash infusion once it is built. Thus, if lending institutions become comfortable with a project's eligibility for BTCs, the BTCs might be viewed as a source of takeout funding for a remediation/construction loan. As the BTCs evolve, it is also likely that once a project has been accepted into the BCP, that lending institutions may view the future cash infusion that will be generated by the BTC as one component of a developer's collateral that could be used to increase the amount of the traditional construction loan. However, it is critical to the valuation of the BTCs, and lending institutions' comfort in viewing the BTCs as collateral, that the State clarify the open issues regarding eligibility for and availability of the BTCs.

²³ Note that if the not-for-profit corporation is the sole member of a limited liability company, it must elect to have the limited liability company treated as a corporation for tax purposes in order to be eligible for the BTCs.

²⁴ Tax Law §21(a)(2) (with respect to the Site Preparation Component); Tax Law §21(a)(3) (with respect to the On-Site Groundwater Remediation Component).

²⁵ Tax Law §21(a)(3).

²⁶ L.2006 c. 420.

2. TAX ISSUES

Pursuant to the BTC statute, the BTCs and any refund generated is not subject to state income tax, but it is unclear whether the IRS will view the tax refund as subject to federal income tax for the development entity. However, even if the IRS views the cash refund generated by the BTCs as taxable income, the distribution will not be subject to further federal income tax if it is ultimately distributed to a not-for-profit shareholder that is exempt from federal taxation, provided that the distribution is not characterized as unrelated business income of the not-for-profit corporation.

3. RECAPTURE/CHANGE IN USE

The statute provides for a recapture of a portion of the Redevelopment Credit in the event that the property ceases to be in qualified use prior to the end of its useful life.²⁷ The term qualified use is not clearly defined in the statute. However, it seems likely that the definition of qualified use will be similar to the uses established in the definition of qualified tangible property, which states that qualified tangible property must principally be used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing).²⁸

The statute also provides for a recapture of all Redevelopment Credits upon a revocation of the certificate of completion based on a determination made pursuant to §27-1419 of the ECL.²⁹ The ECL states that a certificate of completion can be revoked if (i) the applicant is not in compliance with the BCA, (ii) there is a misrepresentation of material fact by the applicant or (iii) for “good cause” as determined by the DEC.³⁰ It is not clear what constitutes “good cause” for the revocation of the certificate of completion under the statute, and, in its formal response to comments requesting clarification, DEC declined to give examples of “good cause,” stating that “any attempt at an enumeration contains the potential for implicitly excluding what is omitted from enumeration.” However, DEC officials have informally stated their understanding that the intention of the “good cause” recapture provision was to give DEC discretion with respect to monitoring the remediation work, and that the mere transfer of title to an affiliate of the for-profit development corporation will not constitute “good cause” for the revocation of the certificate of completion.³¹

In addition to recapture provisions, the ECL gives the DEC authority to approve or disapprove a change in use with respect to the project. The ECL defines “change in use” to include the transfer of title to a brownfield site that is the subject of a BCA.³² DEC officials have confirmed that the intent of the ECL is to protect public health and the environment and that the DEC’s discretionary authority with respect to the transfer of property will be used to address threats to the remedial program and public safety. Therefore, the DEC views the transfer of title from the for-profit development entity to its not-for-profit parent corporation an approvable change of use.³³ In its formal response to comments on this point, DEC has stated, “In this context, it is unlikely that the Department would seek to modify or vacate a COC or reopen liability protections solely as a result of a transfer of ownership, where such new owner commits to comply with the terms and conditions of the remedial program.”

27 Tax Law §21(d)(1).

28 Tax Law §21(b)(3)(E).

29 Tax Law §21(e).

30 Environmental Conservation Law §27-1419(5).

31 On September 20, 2005, NPCR met with Dale Desnoyers, DEC’s Director of the Division of Environmental Remediation and Carl Johnson, DEC Deputy Commissioner, and received verbal clarification on this issue.

32 Environmental Conservation Law §27-1425(3)(a).

33 On September 20, 2005, NPCR met with Dale Desnoyers, DEC’s Director of the Division of Environmental Remediation and Carl Johnson, DEC Deputy Commissioner, and received verbal clarification on this issue.

4. ADDRESSING THE LOSS OF BENEFITS TYPICALLY ASSOCIATED WITH DEVELOPMENT BY NOT-FOR-PROFIT CORPORATIONS

The 2004 technical amendment to the statute eliminated the recapture of BTCs based on a disposition of the property prior to the end of its useful life and, therefore, the for-profit development entity, formed to undertake the project on behalf of the not-for-profit corporation, may transfer title to the not-for-profit corporation after it has received the Redevelopment Credit and any refund associated therewith.³⁴ By doing so, the not-for-profit corporation could eliminate some of the negative income tax consequences associated with holding the property in an affiliated for-profit corporation, such as federal and state income tax liability to the development entity.

However, as a result of having to develop the project through a for-profit affiliate in order to be eligible for the Redevelopment Credit, the not-for-profit corporation risks losing some of the tax benefits traditionally provided to a not-for-profit corporation when it develops a project. These benefits include the mortgage recording tax exemption and the sales tax exemption in connection with the purchase of construction materials. A possible solution is to create a structure whereby legal and beneficial ownership of the project is bifurcated. By using what is often referred to in the low income housing tax credit arena as the “nominee structure,” legal title can be held by the for-profit development entity, thus allowing the project to qualify for the Redevelopment Credit, while transferring beneficial title to the not-for-profit corporation, thus allowing the project to qualify for the mortgage recording and sales tax exemptions.

If DTF determines that the “nominee structure” is an acceptable way to structure a project in order to make it eligible for the Redevelopment Credit, any cash flow generated by the project may be allocated to the not-for-profit corporation as the beneficial owner of the project and, as such, will eliminate the need to transfer the project to the not-for-profit corporation after receipt of the Redevelopment Credit. Thus, the “nominee structure” may provide a solution for dealing with the adverse tax consequences associated with employing a for-profit development entity.

5. JOINT VENTURES/ALLOCATION ISSUES

The same structure discussed above could be used in the context of a joint venture between a for-profit developer and a not-for-profit corporation, with each participant’s interest and control of the project defined by agreement and by its ownership interest in the newly formed for-profit development entity that will be the recipient of the Redevelopment Credit.

In a joint venture or any structure in which ownership of the development entity is not centralized, it is important to consider how the Redevelopment Credit will be allocated. The BTC statute is silent as to allocation. If the DTF follows the Investment Tax Credit as its model, the Redevelopment Credit will be allocated based on the allocation of the project’s profits and losses and not based on the partners’ percentage of ownership in the development entity. This allocation may force a distribution of BTCs that varies from the business arrangement of the partners. The partners may need to adjust the terms of the joint venture to correct any imbalance.

IV. USE OF BTCS IN THE CONTEXT OF PROJECTS DEVELOPED FOR SALE AS COOPERATIVE OR CONDOMINIUM UNITS

Prior to the 2006 amendment to the statute, it was unclear whether condominium or cooperative buildings could qualify for the Redevelopment Credit. With the support of NPCR, the Legislature revised the definition of qualified tangible property to explicitly include both condominium and cooperative apartment buildings.³⁵ Now, developers of condominium, cooperative and mixed use

³⁴ L.2004, c. 577.

³⁵ L.2006 c. 420.

projects can qualify for the Redevelopment Credit. This amendment presents significant opportunities for developers of both market rate and affordable homeownership projects to develop contaminated sites that would not otherwise be economically viable due to the cost of environmental remediation.

V. USE OF THE REDEVELOPMENT CREDIT IN CONJUNCTION WITH LIHTCS

There are significant differences between the Redevelopment Credit and the LIHTCs. Most importantly, the Redevelopment Credit in excess of the recipient's state tax liability for the year in which the Redevelopment Credit is allowed is refunded as an overpayment of taxes and, therefore, can not be syndicated in the same manner as LIHTCs. However, the benefits of the Redevelopment Credit may be passed through to the partners or members of the development entity. Further, unlike LIHTCs, the Redevelopment Credit is not allocated on an annual basis. Rather, the Redevelopment Credits are as-of-right once a project has been accepted into the BCP and has received a certificate of completion for the remediation work performed. Finally, in the context of LIHTCs, the allocating agency will perform a "gap analysis" to ensure that a given project is not awarded more LIHTCs than are necessary to establish viable financing for the project.

There is no "gap analysis" for BTCs, nor are the BTCs based on need. To the contrary, eligibility for the Redevelopment Credits is governed by admission to the BCP as administered by DEC, regardless of need or other factors beyond mere participation in the Brownfield Cleanup Program.

Despite these differences, it appears that the typical corporate structure of a LIHTC transaction will accommodate a project that also plans to utilize BTCs.

a. STRUCTURE OF TRANSACTION

Rental housing projects receiving LIHTCs are typically structured using either a limited partnership or limited liability company as the owner of the project and development entity. As discussed above, availability of Redevelopment Credits is based on whether an applicant is subject to state tax under delineated sections of the Tax Law.³⁶

It appears that limited liability companies that elect to be treated as corporations or limited liability companies whose members are subject to state tax are eligible to apply for and receive the Redevelopment Credits since they are subject to state tax under Article 9-A of the Tax Law. Further, limited partnerships may also qualify if the partners of a limited partnership are subject to state tax. For the purposes of this analysis, this section will discuss the limited liability company structure.³⁷

Typically, the developer of the rental housing project will form a limited liability company to hold title to the property, enter into contracts for construction and development of the site and incur costs related to the project. The managing member of the company, which will be controlled by the developer, will only hold a 0.01% interest in the newly formed limited liability company, but will control the operation and development of the project. A LIHTC syndicator or investor will acquire 99.99% of the limited liability company, but, in general, will not be involved in the operation and development of the project. As the 99.99% owner of the project, the syndicator or investor is entitled to 99.99% of the LIHTCs and depreciation losses generated by the project.

³⁶ Tax Law §21(a)(1).

³⁷ Note that in the context of LIHTC transactions, there is not a substantive difference between using the limited partnership or limited liability company structure.

b. PRACTICAL CONSIDERATIONS

In exchange for an equity investment in the project, the LIHTC syndicator or investor receives the LIHTCs and the depreciation losses based on its percentage of ownership in the limited liability company. Despite the ownership percentages, the IRC allows for a special allocation of up to 90% of the net cash flow generated by the project to the managing member (i.e., the developer) of the project. The statute that created the Redevelopment Credit is silent as to whether it can be specially allocated or must be distributed in accordance with the distribution of the profits and losses of the limited liability company. If the Investment Tax Credit is used as the model, the Redevelopment Credit will have to follow the profits and losses of the project. If DTF determines that the Redevelopment Credits must follow profits and losses without regard to the special allocation allowed for in the context of LIHTCs, the syndicator may have to provide an increased equity contribution based on the amount of the Redevelopment Credit it receives. Ideally, DTF will determine that the Redevelopment Credit can be specially allocated to the managing member of the limited liability company. If this is the case, the developer of the project will be entitled to the entire Redevelopment Credit and any refund generated by the project.

It has yet to be determined what affect the Redevelopment Credit will have on the gap analysis performed by the allocating agency to determine the amount of LIHTCs to which a project is entitled.

Additionally, profit restrictions associated with LIHTC transactions may result in the developer declining to apply for the full amount of BTCs to which a project is entitled. Since the LIHTCs can be syndicated and the cash made available during development, given the option, a developer is likely to prefer the LIHTCs over the BTCs. It is possible that the Redevelopment Credit may significantly reduce the number of LIHTCs that a project is awarded. However, it is also possible, that even with the full Redevelopment Credit, a project will not be viable without LIHTCs. For now, the determination will need to be made on a project-by-project basis.



The Co-Directors of New Partners for Community Revitalization, Inc. (NPCR) and many of NPCR's board members were involved in the legislative policy debate that resulted in the 2003 NYS Brownfield Law. NPCR has a tremendous interest in working to ensure that the programs created by that Law are implemented in a manner that advances community revitalization interests and is consistent with the intent of the statute.

In addition to NPCR Co-Directors, Jody Kass and Mathy Stanislaus, the following senior staff and consultants contributed to the production of this report:

- Barbara Nagel
- Jeff Jones
- Laura Truettner
- Val Washington (formerly NPCR Senior Policy Analyst)

NPCR is a 501c3 nonprofit organization formed to advance the revitalization of New York's communities with a particular focus on brownfield sites in and proximate to low and moderate income neighborhoods and communities of color. The creation of NPCR as an independent nonprofit organization emerged out of the multi-year policy debate that surrounded the passage of brownfields legislation in NYS and the recognition that low and moderate income (LMI) areas could be left behind without an organization whose mission it was to develop programs and policies to address the needs specific to LMI communities. Jody Kass and Mathy Stanislaus, who co-founded NPCR, co-direct the organization with the help of an active and diverse board of directors whose varied perspectives help inform NPCR programs and policies. This analysis may not reflect the individual positions of the board members.

NPCR BOARD OF DIRECTORS

- | | |
|---|---|
| – Joan Bartolomeo, <i>Brooklyn Economic Development Corporation</i> | – Ajamu Kitwana, <i>Youth Ministries for Truth and Justice</i> |
| – Eric Bluestone, <i>NYS Builders Association</i> | – Kevin McCarty, <i>HDR/LMS Engineers</i> |
| – Diane Borradaile, <i>Bank of America</i> | – Jeff Nixon, <i>Wachovia Bank</i> |
| – Joan Byron, <i>Pratt Institute Center for Community and Environmental Development</i> | – Jon Salony, <i>JPMorgan Chase</i> |
| – Veronica Eady, <i>NY Lawyers for the Public Interest</i> | – Brian Segel, <i>HSBC Bank</i> |
| – Lou Evans, <i>Nixon Peabody, LLP</i> | – Linda Shaw, <i>Knauf Shaw</i> |
| – Eva Hanhardt, <i>Planning Center at Municipal Art Society</i> | – Mathy Stanislaus, <i>New Partners for Community Revitalization, Inc.</i> |
| – Barry Hersh, <i>Newman Institute, Baruch College</i> | – Tim Sweeney, <i>Environmental Advocates</i> |
| – Jody Kass, <i>New Partners for Community Revitalization, Inc.</i> | – Jim Tripp, <i>Environmental Defense</i> |
| | – Michelle de la Uz, <i>Fifth Avenue Committee</i> |
| | – Elizabeth Yeampierre, <i>United Puerto Rican Organization of Sunset Park (UPROSE)</i> |

The decision to create NPCR, with an independent board of directors and a mission that was focused on brownfields and community revitalization in low and moderate income communities, emerged out of a collaborative process. In early 2002, a diverse Technical Advisory Committee was

convened to consider what was needed to address NY's thousands of brownfield sites that lay abandoned or under-utilized, primarily in low and moderate income neighborhoods. While NYC had led the country re-building urban America in the 1980s and 1990s with some of the most successful housing programs in the nation, there was a growing realization that the landscape had changed. The portfolio of developable land was dwindling, and what was left was often contaminated from previous uses or illegal dumping. At the same time, the overheated real estate market was leading to rising property values, speculation and displacement. It was determined that there was a need to create new tools and approaches that would respond to this changed landscape. And, there was the recognition of the need to affirmatively address environmental justice concerns by rejecting the notion that only low uses (such as waste transfer stations) can be built on brownfield sites in low and moderate income communities.

NPCR PROGRAM OVERVIEW

NPCR is implementing an integrated approach to brownfields redevelopment that is designed to provide the tools and capacity necessary to promote community-based productive re-use of brownfields. This multi-pronged initiative was developed through on-the-ground work with environmental justice organizations, community based groups, nonprofit and for profit developers, community lenders, and nationwide research on innovative programs and approaches:

BROWNFIELDS START-UP POOL: Research has revealed that the single, most important factor in advancing a community-supported brownfields reclamation agenda is the availability of good technical assistance and flexible funding (that may or may not get re-paid) that can be invested upfront to reduce the uncertainty of a project to the point where a site is "developable." The Brownfields Strategic Technical Assistance Resources Targeted to Underutilized Properties Pool (or "START-UP Pool") has been created to fill this need. Nonprofit developers and nonprofit groups working with for-profit developers are invited to seek assistance being made available through the START-UP Pool for site-specific, community-supported brownfield redevelopment projects. (See START-UP Pool Open Invitation for application instructions)

NY METRO BROWNFIELDS REDEVELOPMENT FUND PROGRAM: On April 14, 2005, the first public-private, public purpose regional brownfields financing mechanism in the country was launched. The NY Metro Brownfields Redevelopment Fund Program uses public grant dollars to leverage private remediation loans. It was conceived as a tool to help implement community-driven plans, including plans that emerge from the Brownfield Opportunity Areas (BOA) program. The Metro Fund Program links a ready source of capital to finance the riskiest part of a brownfields redevelopment deal with a sophisticated environmental underwriting infrastructure that will allow borrowers to achieve environmental closure in a way that is predictable, quantifiable, transparent, and protective of public health and the environment. The nonprofit Low Income Investment Fund (LIIF) is NPCR's financial partner for the first round of loans.

BROWNFIELDS POLICY AND PROGRAM INITIATIVES: The founders of NPCR, Jody Kass and Mathy Stanislaus, were instrumental in translating the real world problem of brownfield sites, particularly in low income urban communities, into legislative solutions; and NPCR is continuing to educate policy makers as the new federal and State brownfields laws and regulations mature. Specifically, technical assistance provided and loans underwritten by NPCR in connection with the Brownfields START-UP Pool and the NY Metro Brownfields Redevelopment Fund Program are being catalogued, and the problems, concerns and solutions that arise during the underwriting process and during remediation are being documented. NPCR is using this brownfields data and experience to help identify, inform and prioritize the program and policy solutions that NPCR is pursuing.

For additional information about NPCR, see web page: www.npcr.net



NPCR
NEW PARTNERS FOR
COMMUNITY
REVITALIZATION, INC.

11 Penn Plaza,
5th floor
New York, NY 10001
www.NPCR.net