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New York Court of Appeals Decision May Put New York Brownfield Cleanup Program Back on the Right Track

On February 18, 2010, the New York Court of Appeals decided [In the Matter of Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation](#), in which the Court reversed a New York State Department of Environmental Conservation (NYSDEC) decision not to admit the Lighthouse Pointe property into the Brownfield Cleanup Program (BCP). The decision is important because NYSDEC's narrow view of what sites should be admitted into the program has long been a point of contention between NYSDEC and those seeking NYSDEC review and approval of environmental remediations.

The BCP was adopted by the New York State Legislature in 2003 to promote voluntary cleanup, reuse and redevelopment. The BCP defines a brownfield site as any real property whose redevelopment or reuse may be complicated by the presence or potential presence of a contaminant. Under the BCP, a contaminant is a hazardous substance or acutely

hazardous substance listed in ECL 37-0103, a hazardous waste or petroleum. NYSDEC, however, interpreted the provisions narrowly and deemed the NYSDEC to have discretion to determine whether the presence of contaminants complicated the redevelopment or reuse of the property.

Before the BCP was adopted, NYSDEC used its Voluntary Cleanup Program (VCP) as the procedure under which private parties could seek NYSDEC review and approval of environmental remediations and NYSDEC waivers of liability. The VCP became the primary method for property owners to obtain official NYSDEC approval of property remediations. Once NYSDEC replaced the VCP with the BCP *and* limited the sites it would accept into the BCP, many landowners were left in limbo — their properties were not such high risks that NYSDEC required and oversaw environmental remediation on the properties, and they were not in the BCP so these landowners could not get NYSDEC approval of remediation on their properties.

This situation gave rise to the [Lighthouse Pointe](#) case. Lighthouse Pointe's property had soil contamination above the BCP

restricted use residential Soil Cleanup Objectives, and ground water in all monitoring wells on the property exceeded the Water Quality Standards and guidance values. Soil vapors were elevated for Volatile Organic Compounds. In addition, the presence of contamination complicated development. The County Health Department objected to development of the property until it went through the BCP. Despite these facts, NYSDEC refused to admit the property into the BCP.

The Court of Appeals relied on the plain meaning of the definition of a brownfield site and reversed the NYSDEC decision. Under the plain language, contaminants were present on the real property and their presence complicated — made complex, involved or difficult — the redevelopment and reuse of the property. While characterizing this evaluation of a brownfield site as a "low eligibility threshold," the Court deemed it consistent with the legislative history of the BCP legislation.

This ruling is a repudiation of the NYSDEC practice of ignoring the plain

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meaning of the definition of "brownfield site" to screen out properties from the BCP. This clear ruling from the Court of Appeals should prevent NYSDEC from continuing to apply the factors from its guidance that do not appear in the BCP statute as a basis for denying admission of properties into the BCP. The Court of Appeals decision should allow private parties to participate in the BCP to obtain NYSDEC review and approval of environmental cleanups on their properties whenever they meet the "low eligibility threshold" in the definition of brownfield site. Any real property owner in New York who thinks his or her property might be eligible to participate in the BCP should act now to evaluate whether this decision helps them.

The Greener, Greater Buildings Plan of New York City—Coming Soon to a Building Near You

When it was passed on December 9, 2009, New York City's Greener, Greater Buildings Plan (GGBP) became one of the nation's most comprehensive legislative initiatives aimed at regulating energy efficiency and greenhouse gas emissions from existing commercial, residential and government buildings. One major component of the GGBP, the New York City Energy Conservation Code ("ECC"), went into effect on July 1, 2010 and requires that nearly all additions, renovations or alterations of residential and/or commercial buildings comply with the ECC. The ECC imposes minimum requirements on the design, construction and alteration of buildings for the effective use of energy in New York City by requiring, among other things, the use of certain energy efficient

technologies and/or systems in building construction and renovation work. The ECC is essentially New York City's local adoption and integration of the Energy Conservation Construction Code of New York State, but with a broader scope that makes the ECC applicable to any renovation work that requires permit approval from the New York City Department of Buildings, as opposed to the State code, which is applicable to larger renovations of at least 50% of a building's systems.

Other noteworthy provisions of the GGBP include the Benchmarking Energy and Water Use Bill, which requires that no later than May 1, 2011, owners or managers of all private buildings in New York City greater than 50,000 square feet, or public buildings greater than 10,000 square feet, must annually benchmark energy and water use.

In addition, the Lighting Upgrades and Sub-metering Bill (LUSB) requires that by January 1, 2025, all non-residential buildings in New York City over 50,000 square feet must upgrade lighting systems to meet the standards of the ECC. The LUSB also requires that electric sub-meters be installed in commercial tenant spaces larger than 10,000 square feet and requires owners to provide tenants with a monthly statement of electricity usage and costs.

Finally, the Audits and Retro-Commissioning Bill requires owners of existing commercial and residential buildings in New York City over 50,000 square feet to perform an energy audit and conduct a retro-commissioning study once every ten years, with the first audit report due by 2013.

To assist in providing financing for the projects required by the GGBP, New York City has established a loan fund using \$16 million in Energy Efficiency and Conservation Block Grants pursuant to the American Recovery and Reinvestment Act.

New York City enacted the GGBP in an effort to achieve a 30% reduction in New York City's annual greenhouse gas emissions by 2030. Given that the City has estimated that 80% of citywide emissions come from energy used in buildings, the GGBP is viewed as a major step toward reducing the City's greenhouse gas emissions.

Additional NYS Income Tax Is Proposed on Carried Interests of Out-of-State Fund Managers

The New York State Legislature is considering legislation that would tax all investment fund managers (including real estate fund managers) who work in New York but live outside the state on the income received from their "carried interests." If this legislation is enacted, real estate fund managers who reside outside New York but who work in New York would pay New York State income tax (at rates as high as 8.97%) on their distributive share of income (including gain from the sale of real estate) derived from their carried interests. If New York enacts this legislation, fund managers residing outside New York could potentially face double taxation on such income, depending on whether the manager's state of residence provides for a tax credit and the amount of any such tax credit.

Under current law, real estate fund managers who are not New York residents but who work in New York are taxed by New York only on their

distributive share of management fees or guaranteed payments from the fund. Nonresident fund managers generally are not currently taxed by New York on their carried interests, unless the income is otherwise sourced to New York (e.g., New York real estate). Under the proposed legislation, carried interest income allocated to a real estate fund manager would be treated as payment for services rendered in New York, thus becoming New York source services income subject to New York State income tax.

However, of particular interest to the real estate fund community, the pending New York legislation has an exception for carried interests earned

by certain real estate fund managers. More specifically, the exception would apply to a carried interest earned with respect to a fund if at least 80% of the average fair market value of the fund's assets during a taxable year consist of real estate.

The pending New York legislation (which would be retroactively effective to January 1, 2010) is independent of any carried interest legislation pending in Congress, which pending legislation is discussed in the National section of this newsletter.

Please contact any member of Lowenstein Sandler's Real Estate Practice Group with questions regarding the topics discussed in this newsletter.

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www.lowenstein.com

New York

1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto

590 Forest Avenue
Palo Alto, CA 94301
650 433 5800

Roseland

65 Livingston Avenue
Roseland, NJ 07068
973 597 2500