

New York Court Of Appeals Decision May Put New York Brownfield Cleanup Program Back On The Right Track

James Stewart

LOWENSTEIN SANDLER PC

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 had long been a point of contention between NYSDEC and those seeking NYSDEC review and approval of environmental remediations.

The BCP was adopted by the Legislature in 2003 to promote voluntary cleanup, reuse and redevelopment. One way the BCP did so was through generous tax benefits and a procedure within NYSDEC for review and approval of environmental investigations and remediations and, upon completion of remediation, a certificate of completion with a release of liability and covenant not to sue.

Before the BCP was adopted, NYSDEC used its Voluntary Cleanup Program (VCP) as the procedure under which private parties could get NYSDEC review and approval of environmental remediations and NYSDEC waivers of liability. The VCP became the primary way for property owners to get 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 remediations on the properties and they were not in the BCP so these landowners could get no NYSDEC approval or remediations on their properties.

This limbo had real world impacts. In some cases these landowners could not get loans or approvals for uses of their properties because of uncertainty whether NYSDEC would later declare the property unsafe and in need of further remediation. The tax benefits in the original BCP were generous, so generous that they threatened to have a significant adverse impact on New York's revenues and budget. NYSDEC became increasingly stringent in admitting

James Stewart, Member of the firm, has extensive experience in complex litigation, with an emphasis on environmental litigation and class-action toxic torts. He handles such complex issues as the sale of RCRA-permitted facilities, the sale of grossly contaminated property and the environmental aspects of transactions involving facilities in various states.



James Stewart

properties into the BCP. Landowners became frustrated by NYSDEC's decisions, in part because they appeared arbitrary, in part because rejection meant they had no NYSDEC procedure available to remediate their property and get NYSDEC approval. Many court actions were filed challenging NYSDEC's rejection of properties for the BCP. Those actions had mixed results.

In *Jopal Enterprises LLC v. Sheehan*, (NY Sup. Ct. Suffolk County) the Court accepted NYSDEC's determination that contamination on the site was minimal and did not complicate redevelopment. The Court, showing extreme deference to NYSDEC, held also that the NYSDEC brownfield guidance did not have to go through notice and comment rule-making before NYSDEC applied it. NYSDEC had other litigation victories in which the court showed a willingness to defer to NYSDEC's determinations.

A few landowners were successful in obtaining a ruling that they should be admitted into the BCP. In addition to *Lighthouse Pointe Property Associates'* victory in the Supreme Court and, recently, in the Court of Appeals, the landowner was successful in *Destiny USA Development, LLC v. DEC*, (NY Sup. Ct. Onondaga Co.). There, the court ordered that the properties be admitted into the brownfield program and ruled that the NYSDEC brownfield guidance on eligibility was invalid and contrary to the BCP statute. NYSDEC appealed the *Destiny USA* decision to the Appellate Division. The Appellate Division upheld the Supreme Court ruling ordering admission of the properties into the BCP, but reversed the ruling that the guidance was invalid. Other cases in which landowners successfully challenged NYSDEC's decision not to admit them into the BCP include *East River Realty Co., LLC v. New York State Department of Environmental Conservation*, (1st Dept. Dec. 17, 2009) and *HLP Properties, LLC v. New York State Department of Environmental Conservation*, (1st Dept. Feb. 11, 2010) ("HLP").

Despite losses in the more recent

cases, NYSDEC continued to reject properties for admission into the BCP and did nothing to change its conservative view of which sites should be admitted into the BCP. The BCP legislation was amended in 2008 to put limits on the tax benefits available under the BCP, but the definition of a brownfield site remained unchanged.

The BCP definition of a brownfield site is broad. Any real property whose redevelopment or reuse may be complicated by the presence or potential presence of a contaminant is a brownfield site. 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.

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 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 who thinks her property might be eligible to participate in the BCP should act now to evaluate whether this decision helps.

Partners Notes

Lowenstein Sandler Represents Lend Lease Americas Inc. In Army Privatization Of Lodging Project Named 2009 "North American Real Estate Deal of the Year"

Lowenstein Sandler was honored at Project Finance's Deal of the Year ceremony in New York City for its role as lead counsel to Lend Lease Americas Inc. in the first-ever privatization of hotels on U.S. Army bases, a deal that was named Project Finance's 2009 "North American Real Estate Deal of the Year." The award, which recognizes innovation and achievement in the global project finance market, was presented at a reception held on March 4, 2010.

"Lowenstein Sandler served as our counsel on this landmark deal and their lawyers were integral to our success," said Gary Buechler, CEO of Lend Lease Americas Inc. "Lowenstein's real estate and corporate lawyers provided the strategic, practical and forward-thinking advice that was necessary for a deal of this scope and complexity to close."

The Privatization of Army Lodging (PAL) project covers the privatization of 3,200 existing hotel rooms in 62 lodging facilities across 10 installations in eight states. In the first phase of the deal, which closed in August 2009, more than \$125 million of privately placed debt and equity was invested in the project to upgrade and refurbish the existing lodging portfolio. The second and third

phases are expected to add approximately \$350-450 million in additional capital to finance further renovations and new construction, ultimately leading to an expansion of the project to more than 4,200 hotel rooms. The hotels in the PAL project are located on Army installations in Fort Rucker, Alabama; Fort Leavenworth, Kansas; Fort Riley, Kansas; Fort Polk, Louisiana; Fort Sill, Oklahoma; Fort Hood, Texas; Fort Sam Houston, Texas; Yuma Proving Ground, Arizona; Fort Myer, Virginia; and Fort Shafter/Tripler Army Medical Center, Hawaii. The first phase of the project is expected to be completed in 2011.

In the transaction's first phase, Lowenstein Sandler's real estate attorneys negotiated a 50-year ground lease, and municipal services and utility agreements with the Army, a long-term portfolio hotel management agreement with InterContinental Hotels, and construction loans and lock box /intercreditor agreements with three different institutional lenders. The Lowenstein team was led by Edward J. (Ted) Hunter, who chairs the firm's Real Estate Practice Group, and included David Tlusty, Norman Spindel, Brian Silikovitz, Jessica Plinio, Inshirah Muhammad and Julie Boas.

Please email the author at jstewart@lowenstein.com with questions about this article.