

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

625 Broadway

Albany, New York 12233-1550

In the Matter

of the

PROPOSED AMENDMENTS TO TITLE 6 OF THE OFFICIAL COMPILATION OF CODES,
RULES AND REGULATIONS OF THE STATE OF NEW YORK (6 NYCRR) PART 375
(ENVIRONMENTAL REMEDIATION PROGRAMS)

HEARING REPORT

by

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

September 3, 2015

Proceedings

The New York State Department of Environmental Conservation (the Department) held a legislative public hearing on July 29, 2015 to receive public comments about the Department's proposed revisions to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 375 (Environmental Remediation Programs). The legislative public hearing commenced at 1:00 PM in the auditorium at the Offices of the New York City Department of Public Health located at 125 Worth Street in Manhattan.

The Department proposes to revise 6 NYCRR Part 375 to conform with the legislative amendments outlined in Part BB of Chapter 56 of the Laws of 2015. The 2015 amendments revised the language of Environmental Conservation Law of the State of New York (ECL) Article 27, Title 14 (Brownfield Cleanup Program [BCP]), among others. First, the proposed regulations would amend the definition of the term, *brownfield site*, at 6 NYCRR 375-1.2(b) to conform with the definition of that term outlined in the recent amendments (*see* ECL 27-1405[2]). In addition, the proposed rule would amend 6 NYCRR Subpart 375-3 to add two new definitions. The first is the term, *affordable housing project*. The second is the term, *underutilized*. Finally, the term, *brownfield site*, at 6 NYCRR 375-3.3(a)(1) would be repealed to conform with the recent amendments.

The Department published a notice in the June 10, 2015 editions of the Department's *Environmental Notice Bulletin*, and the *State Register*. The Department issued a press release concerning the proposed amendments to 6 NYCRR Part 375 on June 8, 2015. The June 10, 2015 notice provided for a written comment period until August 5, 2015. Comments could be sent via email to derweb@dec.ny.gov, or by regular mail to the Department's Division of Environmental Remediation in Albany, New York. In addition, the notice provided a link to the Department's web page that provided further details about the proposed regulatory amendments at: <http://www.dec.ny.gov/regulations/101908.html>.

The June 10, 2015 notice scheduled the legislative public hearing in New York City for July 29, 2015, prior to the close of the written comment period. The following is a summary of the oral statements received during the legislative public hearing. The Office of Hearings and Mediation Services received the transcript from the July 29, 2015 legislative public hearing on August 12, 2015. Any written comments sent directly to Department staff, via email or by regular mail, are not addressed in this Hearing Report, but will be addressed separately.

Oral Statements

About twenty people attended the July 29, 2015 legislative public hearing in New York City, and five provided oral comments. Generally, the speakers commented about the proposed definition of the term, *underutilized*. For the reasons outlined below, the speakers recommended revisions to the proposed regulatory definition.

David J. Freeman, Esq., who is the Director of the Real Property & Environmental Section at Gibbons, P.C. (New York, New York), and **Lawrence Schnapf**, Esq., (Schnapf LLC, New York, New York) spoke jointly on behalf of the New York State Bar Association, Environmental Law Section. Messrs. Freeman and Schnapf co-chair the Brownfield Task Force of the Environmental Law Section.

Mr. Freeman spoke about the proposed definition of the term, *underutilized*. He said that the Environmental Law Section does not have a position about the proposed definitions of either the terms, *brownfield*, or *affordable housing*. Mr. Freeman argued that properly defining the term, *underutilized*, is crucially important to the success of the brownfield cleanup program. Sites admitted in the program after July 1st of this year, which are underutilized, is one of the few ways that they can qualify for tangible property tax credits (TPTCs). Mr. Freeman said that obtaining TPTCs can make a difference about whether a site is redeveloped.

Referencing the 2015 amendments, Mr. Freeman noted that the New York State Legislature instructed the Department about how to define the term, *underutilized*, by requiring the Department to consult with the business community and the City of New York, and to consider the existing use of the property relative to allowable development under zoning, and the level of governmental assistance needed to redevelop properties. According to Mr. Freeman, the proposed definition would make it virtually impossible for large numbers of contaminated sites in New York City, not destined to be used for affordable housing, to qualify as underutilized, which would be contrary to the intent of the Legislature.

Mr. Freeman noted that the term, *underutilized*, commonly appears in New York statutes and regulations, as well as in statutes from other states related to brownfield and distressed property programs. Mr. Freeman inquired whether the Department considered using an existing definition of this term. Mr. Freeman characterized the proposed definition as “totally unlike any other.”

Mr. Freeman said an underutilized site, based on the proposed definition, would be required to meet all four of the drafted criteria. According to Mr. Freeman, this would be a very high standard that would negatively impact the brownfield cleanup program. Mr. Freeman also said that some of the drafted criteria have no relationship to the current usage of the site. For example, whether a site is in arrears on property taxes is not usually related to whether a site is underutilized. Mr. Freeman was critical of the proposal to require municipal certification of various conditions to meet the proposed definition of the term, *underutilized*. Mr. Freeman also said that the proposed municipal certification process would introduce delay, uncertainty, and politics into the decision-making process. He argued that developers need predictable, transparent, and well-understood criteria.

Mr. Freeman said that if the Department adopts the proposed definition, many small properties in the outer boroughs of the city would no longer qualify for the brownfield cleanup program. These properties were contaminated by prior uses, such as dry cleaners, filling stations, and light manufacturing, and are currently owned by individuals or small, family

corporations. Mr. Freeman argued that such sites are not the high-value sites that the Department's proposed, overly restrictive definition appears to be targeting. Mr. Freeman acknowledged that the benefits from the TPTCs generated from these properties, if qualified, would be quite modest. Nevertheless, Mr. Freeman noted that without TPTCs, these sites would remain contaminated and undeveloped for the foreseeable future.

Mr. Freeman stated that the Environmental Law Section sent the Department a set of recommendations about the proposed definition of the term, *underutilized*, on May 12, 2015. The recommendations rely on concepts from other successful regulatory schemes. Mr. Freeman requested that the Department reconsider the language of the proposed definition, and incorporate the recommendations offered by Environmental Law Section into the proposed amendments to 6 NYCRR Part 375.

Mr. Schnapf said that the definition of the term, *underutilized*, was intended to "smooth out" the limitations associated with other qualifying criteria related to En-zones, affordable housing, and the upside-down test. However, Mr. Schnapf argued that the proposed definition is very narrow, and that commercial properties located in the Bronx, Queens, and Brooklyn would be excluded from the brownfield cleanup program if the Department adopts the proposed definition.

Mr. Schnapf said there are at least twenty sites in the outer boroughs, which are currently in the brownfield cleanup program, that generate \$3 million in TPTCs. Mr. Schnapf said that these commercial properties are located in middle-class neighborhoods and have been used, for example, as dry cleaners and filling stations. If the Department adopts the proposed definition of the term, *underutilized*, Mr. Schnapf argued that these properties would not qualify for TPTCs. Mr. Schnapf, argued further that if these properties were excluded from the brownfield cleanup program, they could only be remediated through the Superfund Program. Mr. Schnapf urged the Department to substantially revise the proposed definition of the term, *underutilized*, so that as many properties as possible could qualify to participate in the brownfield cleanup program.

Michael Brady is the Director of Special Projects and Government Relations for the South Bronx Overall Economic Development Corporation (SoBRO). Since 1972, SoBRO has fostered community and business development. SoBRO adds over \$1 billion annually to the economic vitality of the Bronx, and operates four divisions. With respect to real estate, SoBRO owns 19 buildings, manages five city-owned properties and one public plaza. SoBRO serves over 75,000 students with its youth and adult education programs. As part of its work force development, SoBRO has assisted more than 30,000 individuals with sustained employment and training. Through its community and economic development division, SoBRO gives voice to the community and provides an incremental approach to area development, environment concerns, land use, and business growth.

As part of its community and economic development division, SoBRO has administered five New York State Brownfield Opportunity Areas (BOA) contracts, and is currently

administering three BOA contracts. In addition, SoBRO is assisting four community-based organizations at 12 brownfield sites throughout the city.

On a daily basis, SoBRO works with brownfields, as well as vacant and underutilized properties. Mr. Brady said that underutilized properties include, for example, a small site adjacent to a residence, a property that could be used for 7,000 housing units, and a site for 1.5 million square feet of commercial/manufacturing space. According to Mr. Brady, the proposed definition of the term, *underutilized*, would stymie holistic community and economic development by excluding contaminated sites not slated for affordable housing. He noted that communities need more than housing options. They also need business and manufacturing opportunities because they serve as economic drivers that ensure the viability of the community. Mr. Brady said that a variety of property uses helps to balance the community.

Mr. Brady provided two examples of past projects that were part of the brownfield cleanup program, and which received TPTCs, that would not qualify for the brownfield cleanup program if the Department adopts the proposed definition of the term, *underutilized*. According to Mr. Brady, the proposed definition would exclude contaminated commercial or industrial sites from TPTCs because the sites would not be converted to other uses. Mr. Brady also noted that these sites may be located outside En-zones, even though they could contribute to the economic vitality of the community.

The first example is the site of an abandoned service station on Third Avenue in the South Bronx. This site was remediated and is being redeveloped into a mixed use commercial space within the MX zone. According to Mr. Brady, the project generated more than 50 construction jobs, and is expected to employ 20 individuals upon completion. The second example is the site of an abandoned service station in the East Bronx that was adjacent to a residence. The lot had been contaminated with two underground petroleum tanks. The tanks were removed, and the site was remediated under the brownfield cleanup program. The site was redeveloped as an eco-minded filling station specializing in alternative fueling. The redevelopment employed 20 construction workers, and now has a full-time staff of six individuals.

Mr. Brady said that these properties would not have been considered underutilized based on the proposed definition because they were located outside En-zones, were not upside-down, and were not redeveloped for affordable housing. According to Mr. Brady, these redevelopment projects were possible with TPTCs because smaller sites, such as these, are typically owned by families who do not have access to significant lines of credit or other financing options. He acknowledged that these properties were not “high-value” sites. Nevertheless, the redevelopment of them is important. Mr. Brady said that the proposed definition of the term, *underutilized*, would prevent community and economic growth. He recommended that the Department reconsider the proposed definition.

Mimi Raygorodetsky is an environmental consultant from Langan Engineering (New York, New York), and spoke on behalf of the New York City Brownfield Partnership. The Partnership is an organization of more than two dozen community members, nonprofit site owners, and service providers whose goal is to the cleanup and redevelop brownfield sites.

Ms. Raygorodetsky commented about the proposed definition of the term, *underutilized*, and characterized it as very restrictive. Ms. Raygorodetsky explained that the Partnership commissioned a study by Professor Barry Hersh, Director of the Real Estate and Development Program at New York University's Schack Institute of Real Estate, to evaluate the impact of the 2008 amendments to the brownfield cleanup program. Professor Hersh's study was published in January 2014 and updated in April 2015. The study shows that the 2008 amendments had a significant impact on sites that were admitted into the program and the tax credits that were earned by those sites. On average, sites remediated after the 2008 amendments were smaller, more geographically diverse, and more likely to have industrial or affordable housing end uses than those remediated from 2003 to 2008. They also had a much greater proportion of tax credits earned for cleanup expenses than sites remediated earlier. To date, those sites have been less than 50% as expensive to the State in terms of total tax credits earned. Ms. Raygorodetsky submitted a copy of the updated April 2015 Hersh study under separate cover before the close of the August 5, 2015 comment period.

Notwithstanding the improvements in the brownfield cleanup program since 2008, the Partnership believes that eligibility for TPTCs should be refined. Consequently, the Partnership supports the 2015 amendments. However, the proposed definition of the term, *underutilized*, is very restrictive, and would prevent many sites that are truly underutilized from qualifying for TPTCs. According to Ms. Raygorodetsky, Partnership members know dozens of such sites, many of them single lots in the outer boroughs, owned privately by small corporations that have prior uses as dry cleaners, filling stations, or light manufacturing operations. Ms. Raygorodetsky said that even though these sites are underutilized under any normal definition of the term, these sites would not qualify as such under the proposed regulatory definition. Given that the owners of these sites are not wealthy, and because the sites are not particularly well-suited for redevelopment, these sites would remain contaminated and undeveloped for the foreseeable future.

Ms. Raygorodetsky said that the Partnership supports the alternative language proposed by the New York State Bar Association, Environmental Law Section, and urged the Department to adopt the alternative language in place of the proposed regulatory definition.

Linda Shaw, Esq., (Knauf Shaw LLP, Rochester, New York) said that she is aware of several sites that would become ineligible for the brownfield cleanup program if the Department adopts the proposed definition of the term, *underutilized*. According to Ms. Shaw, the City of New York would not rezone a number of sites in Long Island City (Queens County), and they would remain in the industrial zoning category. Without being rezoned, Ms. Shaw said that the properties would not meet the proposed definition of the term, *affordable housing*.

Ms. Shaw agreed with some of the comments provided by the other speakers. She argued that the New York State Legislature did not intend for the proposed definition of the term, *underutilized*, to be one that no one in New York City could meet. According to Ms. Shaw, the proposed definition would exclude the redevelopment of former commercial and industrial sites for new commercial and industrial uses. Ms. Shaw noted that some sites would be redeveloped for commercial purposes or even new manufacturing purposes, but these sites could not participate in the brownfield cleanup program. Ms. Shaw said the definition should be expanded to include a category that would permit commercial and industrial reuses at former commercial, industrial brownfield sites.

Ms. Shaw argued that the proposed definition of the term, *underutilized*, would create a legal problem because the term is already defined in existing laws related to other economic development programs. If those programs, which are not designed for brownfields, allow people to obtain alternative funding or gain financial benefits, Ms. Shaw observed that project sponsors would not undertake any commercial and industrial development on brownfield sites.

According to Ms. Shaw, a disconnect would result among various economic development programs where it would be easier to obtain funding or gain financial benefits from the State to undertake projects on non-brownfield sites rather than on brownfield sites. Given the restrictive nature of the proposed definition, Ms. Shaw supports the alternative language recommended by the New York State Bar Association, Environmental Law Section, and urged the Department to adopt the alternative language in place of the proposed definition. According to Ms. Shaw, the benefits of a revised definition of the term, *underutilized*, would include job creation as well as the redevelopment of sites into commercial and industrial uses, in addition to affordable housing. Ms. Shaw acknowledged the importance of affordable housing projects, but stated that the city cannot focus exclusively on housing when its residents also need places to work.