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A Brief Explanation of New York's Brownfield Tax Credits (by Val Washington and Dale Desnoyers – October 2012)

Background: When the Brownfield Cleanup Program (“BCP”) was established by Chapter 1 of the Laws of 2003, it offered numerical cleanup standards and liability relief for owners and developers of contaminated sites. For some, this removed barriers to cleanup and development that had existed for over 20 years after the passage of the Federal Superfund Law and New York State’s own “Superfund” law, barriers largely based on fear of liability and uncertainty as to remediation requirements.

Even so, the cost of cleanup can be an insurmountable barrier for many, if not most, contaminated properties. The Legislature understood the need to strive for a “level playing field” for these properties, but also to encourage development on cleaned up sites. The hope was that the neighborhoods that have suffered blight from brownfields could begin building a new vibrancy with new construction. Thus, the 2003 legislation offered financial incentives in the form of refundable tax credits to attract developer interest in sites that would otherwise constitute overly risky investments. The tax credits reduce income tax liability on a dollar-for-dollar basis and are “refundable” in the sense that, to the extent the credits exceed actual taxes owed, the excess amount is “refunded” as if it was a tax overpayment.

The incentive is offered to any taxpayer taking responsibility for a site accepted into the Brownfield Cleanup Program, which means it is not directly available to non-taxpaying entities, such as not-for-profits and municipalities. And, importantly, the tax credits do not become available until the Department of Environmental Conservation issues a Certificate of Completion (“COC”), indicating that the site has been cleaned up and all program requirements have been addressed. The original brownfield redevelopment tax credits, as set forth in the 2003 legislation, covered: “site preparation,” “groundwater remediation,” and “tangible property” on new development. Site preparation and groundwater remediation credits can be claimed for 5 years after receipt of the COC; while tangible property credits can be claimed for 10 years after receipt of the COC. The amount of the total allowable credit ranged from 10% to 22% of actual costs incurred for any of the three components. The higher rates included a 2% bonus for the most exacting level of cleanup and an 8% bonus for sites in “En-Zones,” designated as such by Empire State Development based on high rates of unemployment and poverty:

BROWNFIELD REDEVELOPMENT TAX CREDITS (all)		
PRE-JUNE 23, 2008	Baseline	10% – 12%
	PLUS THE SUM OF THE FOLLOWING	
	Environmental Zone	8%
	Track 1 Cleanup	2%

After a few years of experience under the law, it became clear that a percentage rate for all development costs, without restriction, could result in extremely large payouts by the State, particularly for grand scale development. It was also clear that the percentage for the cleanup components was too low to be enough help for many contaminated sites. So, in 2008, the Legislature reconfigured the tax credits, enacting higher rates for cleanup costs, and placing a cap on development incentives linked more closely to the magnitude of environmental remediation at qualifying sites.

Current Brownfield Redevelopment Tax Credits: For sites that have entered the BCP on or after June 23, 2008, the credits allowed for **cleanup costs** are double those available under the original legislation. Credits for the cost of site preparation and on-site groundwater remediation (together informally referred to as cleanup costs) now range from 22% to 50%, depending on the level of cleanup, as follows:

SITE PREPARATION COMPONENT AND ON-SITE GROUNDWATER COMPONENT					
POST- JUNE 23, 2008		Unrestricted	Residential	Commercial	Industrial
	Track 1	50%	N/A	N/A	N/A
	Tracks 2 & 3	N/A	40%	33%	27%
	Track 4	N/A	28%	25%	22%

The credits allowed for tangible property, informally referred to as **development costs**, currently range from 10% to 24%, subject to a cap, described below. The applicable percentages vary based on the type of taxpaying entity, whether the site is in an En-Zone, and, to a lesser extent, whether the remediation is the highest level achievable and whether the site is in a Brownfield Opportunity Area. These percentages are very similar to those set out in the original law, with the only difference being the availability of an additional 2% bonus for sites in a Brownfield Opportunity Area. However, the total amount of allowable credits are now limited to the lesser of \$45 million, or six times the total cost of the site preparation and the on-site groundwater remediation components, in the case of manufacturing facilities, and the lesser of \$35 million, or three times the cost of the site preparation and the on-site groundwater remediation components, for all other sites.

TANGIBLE PROPERTY COMPONENT (subject to a cap for post-June 2008 application approvals)	
Baseline	10% - 12%
PLUS THE SUM OF THE FOLLOWING	
Environmental Zone	8%
Track 1 Cleanup	2%
Brownfield Opportunity Area (only available for post-June 23, 2008 approvals)	2%

Other Brownfield Tax Credits: The 2003 Brownfield Law also included real property tax credits for brownfields, computed on the basis of a number of factors, and environmental insurance tax credits, amounting to \$30,000, or 50% of the eligible premiums. These were not changed in 2008 and remain available today.

Deferral of Redevelopment Tax Credits: In response to severe State budget constraints in 2010, the Governor and the Legislature chose to temporarily defer certain tax credits, including brownfield tax credits, when the amount of the available credit for an individual taxpayer exceeds \$2 million for that year or for the years 2011 and 2012. Taxpayers will be allowed to claim the deferred tax credit amounts starting with tax years beginning on or after January 1, 2013. No interest will be paid on the deferred tax credit amounts.

Brownfield Tax Credits Sunset: The 2003 Brownfield Law provided that the financial incentives would only be offered to projects that receive a Certificate of Completion by March 31, 2015. However, on October 3, 2012, Governor Andrew M. Cuomo signed into law, as Chapter 474 of the Laws of 2012, a bill extending the tax credits. Chapter 474 will delay the sunset of those tax credits until December 31, 2015, giving program participants nine (9) additional months to complete their work and obtain a Certificate of Completion from the Department of Environmental Conservation.

Tax Return Audits: Returns claiming brownfield credits have been subject to audit by the New York State Department of Taxation and Finance. The audits have delayed the timing of the receipt of the credits and have questioned or disallowed some claimed credits. It is important for taxpayers planning to claim the credit to establish strict accounting procedures relative to costs claimed under each category of the brownfield redevelopment tax credits.

What's Next: For the same reasons that these incentives were created, it is possible that the Governor and the Legislature will revisit the issue and extend the credits, or replace them with another program to encourage the cleanup and redevelopment of brownfields. One such comprehensive proposal is the brownfield bill that was re-introduced on January 9, 2012 by Senator Grisanti, Chair of the Senate Environmental Conservation Committee. (See S.5228A). To date, no action has occurred on this bill.

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Allen & Desnoyers LLP assists clients in resolving complex environmental, regulatory, and real estate issues associated with contaminated properties. We are also available to provide services to municipalities and non-profits participating in the Brownfield Opportunity Area Program. Our lawyers are recognized leaders in environmental law. Our experience with brownfield sites ranges from large industrial and commercial properties to raw development sites, and covers all types of contamination issues, including hazardous waste, air quality, water quality, waste storage, and clean-up.

The foregoing has been prepared for general information and is not meant to provide legal advice with respect to any specific matter and should not be acted upon without professional counsel.