

Brownfields Update: Law and Policy

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EARLIER THIS YEAR, NEW LEGISLATION EXPANDED New Jersey's brownfields reimbursement program to provide even more opportunities for developers to recover all of their cleanup costs. Developers must be aware, though, of new policies that the New Jersey Economic Growth Commission, New Jersey Department of Environmental Protection (DEP) and the New Jersey Department of Treasury (Treasury) have put into practice in implementing the program. As the

CERTAIN DEVELOPERS MAY NOW HAVE AN OPPORTUNITY TO RECOVER 100 PERCENT OF THEIR REMEDIATION COSTS BY BEING REIMBURSED 75 PERCENT OF THE COSTS THROUGH THE BROWNFIELDS PROGRAM AND BY OBTAINING CBT CREDITS TO RECOUP THE REMAINING 25 PERCENT.



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Early in the brownfields program, new sales or corporation taxes created by new business at the site was the typical way to generate tax revenue from which a developer could recover remediation costs. Under the new legislation, sales taxes paid on the purchases of building materials for any structure will be counted towards the tax revenue generated from which reimbursements will be made. The state policy for reimbursement of residential-only projects, however, typically limits the reimbursement to 50 percent of the developer's cleanup costs, even though the brownfields statute allows a developer to recover up to 75 percent of its cleanup costs. The rationale is that the state is only getting a one-time injection of new tax revenue in the form of sales taxes paid on the purchase of new building materials. This is unlike retail or other commercial projects where the state will receive ongoing sales, corporate or other taxes.

The new legislation has eased the documentation burden on developers seeking reimbursement. In lieu of an exact accounting of expenditures, the developer may stipulate that the sales tax paid on building materials equals one percent of the developer's contract price for remediation and improvements (but not the real property).

By opting for the flat, one percent, the administrative burden of tracking all costs and sales taxes is greatly reduced. Moreover, agreeing to the flat percentage will not trigger the automatic tax audit of the developer and its contractors when an exact accounting of sales taxes must be made. Finally, the state may further allow that percentage to be as high as three percent—as long as the developer presents clear and convincing evidence that the percentage should be greater than one percent (i.e., by demonstrating actual taxes paid with documentation).

The new legislation further provides that when redevelopment of a site is performed in phases, reimbursement payments may be made in the same percentages as the occupancy rate of that portion of the site where a No Further Action letter (NFA) has been issued. This benefit removes the existing requirement that construction and

occupancy be 90 percent complete before reimbursement.

Developers also need to be aware that Natural Resource Damages (NRD) can affect the timing of NFAs. The DEP will not issue an NFA for a site until NRD is addressed. There are two ways to address this. First, the developer may be able to obtain a soils-only NFA while other elements of the cleanup, such as groundwater remediation or wetlands restoration, await NRD review. A soils-only NFA is considered sufficient to allow Treasury to reimburse cleanup costs. Second, the DEP has issued policy directives providing that NRD may not be assessed against certain brownfields developers and that a brownfields developer may be able to request an explicit NRD waiver in the brownfields application process.

Finally, the new legislation established a Corporation Business Tax (CBT) credit for certain remediation costs, so long as the site is located in Planning Area 1 (Metropolitan) or Planning Area 2 (Suburban) as designated by the State Planning Act. New Jersey's tax laws now provide that a taxpayer is allowed a credit against the CBT it would ordinarily pay in an amount equal to 100 percent of the eligible costs of the remediation for remediation performed between Jan. 1, 2004 and Jan. 1, 2007.

The annual amount of the tax credit may not exceed 50 percent of the tax liability otherwise due. In effect, certain developers may now have an opportunity to recover 100 percent of their remediation costs by being reimbursed 75 percent of the costs through the brownfields program and by obtaining CBT credits to recoup the remaining 25 percent. ■

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