



## **Brownfield Cleanup Program: An underutilized tool on Long Island - by Jesse Hiney and Derek Ersbak**

July 16, 2024 - Long Island



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Long Island is home to about 15% of New York state's overall population, but only accounts for about two percent of the state's overall area. With the small footprint, land is a precious commodity. While development can be seen across the island, there are many properties lying vacant, abandoned, and underutilized because of a former use that has negatively impacted the environment. Many such properties satisfy the New York State Dept. of Environmental Conservation's (NYSDEC's) definition of a brownfield.

In New York, efforts were put forth to successfully return these brownfields to the tax rolls. In 2003, New York state developed the Brownfield Cleanup Program (BCP) to offer financial incentives in the form of refundable tax credits to parties that completed brownfield revitalization pursuant to the BCP. The incentives have been historically lucrative and spurred significant cleanup and development across the site. After several revisions to the BCP, including additional proposed revisions considered concurrent with this writing, current applicants can receive refundable tax credits pursuant to the qualified tangible property credit for up to \$35 million for most brownfield sites, or up to \$45 million for sites used primarily for manufacturing activities<sup>1</sup>. To the extent that the tax credits received exceed an applicant's state income tax liability, they are treated as an overpayment and the state will issue a refund for the balance. Your environmental team will be able to outline ways to maximize available credits such as achieving an unrestricted use cleanup, adding affordable housing components, adding a manufacturing use, looking for projects in En-Zones or Brownfield Opportunity Areas (BOAs), which can increase the applicable tax credit percentage from 10% up to

24% of the tangible/hard cost of the project.

While this program has been very successful throughout the state, Region 1, which represents Nassau and Suffolk County, has fallen to the back of the line. Out of the 1,279 approved program applications, only 50 (4%) were from Region 1. Out of the 519 completed sites in the program, only 13 (2.5%) were from Region 1. In 2023 alone, the state issued approx. \$600 million in tax credits to brownfield developers; Region 1 only accounted for approximately \$1.3 million in credits.

The need for increased housing stock and housing variety on Long Island has been consistently identified by economic development think-tanks, and local and state government, as critical to economic growth on Long Island. The BCP lends itself to this type of development; in addition to providing lucrative tax credits, completed BCP projects receive Certificates of Completion (COC). A COC provides significant liability protection, including a release and covenant not to sue from the state, and contribution protection from third-party lawsuits related to the issues mitigated as part of the BCP cleanup. In a risk-averse real estate market, the inherent value of a COC from a marketing perspective is invaluable – it informs prospective lenders, purchasers and other interested parties that environmental investigation and remediation have been undertaken to the satisfaction of NYSDEC, providing the necessary comfort to transactional partners that environmental issues are accounted for. The BCP provides the tools to redevelop and reuse environmentally impacted sites and maximize financial return through the tender of available tax credits and the liability protection afforded a COC.

Despite the benefits, the BCP is not without issues. Reluctance to use the BCP on Long Island, and elsewhere, is often focused on the perception that the potential additional timing and cost to complete the BCP outweighs the resultant benefits. Redevelopment on Long Island already goes through a grueling local and municipal review period, and adding the BCP process can appear unworkable. However, while applicable BCP regulations prescribe a series of workplans, reports, public engagement and comment periods, the municipal and BCP processes can run concurrently.

An experienced environmental team can navigate the regulatory processes to leverage efficiencies and provide guidance to streamline an environmental schedule that works for the project and is feathered into overall project milestones. In our collective experience, communication is the key to navigating a BCP development and managing the development process. Successful development relies on communication to express project goals and timelines, to relay regulatory timeframes to the development team and to inform regulators of project-based schedules and expectations. Communication allows the project team to anticipate and prepare for project bottlenecks and regulatory sticking points, to maintain momentum and keep a project moving forward.

Partnering with NYSDEC on a BCP development can also help to reduce skepticism regarding the scope of cleanup and how the development may be protective of the environment and surrounding communities. Development often provokes a “not in my backyard” response. A project with environmental concerns can exacerbate community push back. Having NYSDEC and the New York State Department of Health support the project as a neutral party and explain the environmental and health benefits, can carry weight and assist in easing public views and opinions.

As Long Island's real estate market continues to evolve with a focus on transit-oriented development along the region's rail lines, once dormant environmentally challenged properties are being considered for redevelopment. There is no better time than now to gain a greater understanding of the state's brownfield program and make it work for you!

1 The qualified tangible property credit is calculated using a varying percentage (10-24%), dependent in part on eligible site location, census characteristics and the end use of the proposed development. For non-manufacturing sites, the credit calculation is capped at the lesser of 3x site preparation/groundwater remediation costs or \$35 million. For manufacturing development sites, the credit calculation is capped at the lesser of 6x site preparation/groundwater remediation costs or \$45 million. In addition, available credits depend on which generation of brownfield regulations apply to a specific project.

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