Economic Incentives to Encourage Brownfields Redevelopment in New Jersey

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On January 6, 1998, New Jersey's Governor Christine Whitman signed into law the Brownfield and Contaminated Site Remediation Act (the "Act"). The Act became effective immediately and is expected to have significant ramifications for New Jersey's environmentally impacted properties and communities. Unlike New York, where there is no brownfields program comparable in size or scope, the new legislation is a bold attempt to facilitate the remediation and redevelopment of New Jersey's older, frequently abandoned industrial sites. The majority of these sites, often referred to as "brownfields," typically are located in urban areas and are contaminated with hazardous substances or suspected of being so. The uncertain, as well as significant, cost of remediating such sites and the threat of future liability are believed to have been major deterrents in the past to the revitalization of these distressed properties.

The provisions of the Act, which include amendments to existing statutes as well as several new laws, can essentially be categorized into three distinct subject areas: economic incentives, liability protection and remediation issues. This article will focus solely on the financial inducements now available under New Jersey law to encourage redevelopment of brownfield sites.

**Economic Incentives.** In contrast to the New York brownfields initiative, which has limited funds available only to municipalities to remediate their own contaminated sites, New Jersey's brownfields program now contains four different types of economic incentives meant to spur remediation of privately owned brownfield properties: (1) property tax exemptions under the pre-existing Environmental Opportunity Zone Act (the "EOZA"), (2) State-offered Redevelopment Agreements authorizing the reimbursement of up to 75 percent of the cost of remediating a brownfields property, (3) remediation funding source waivers providing relief from the obligation to
post financial assurance to complete the cleanup in certain instances, and (4) loans, loan guarantees and grants from the State's Hazardous Discharge Site Remediation Fund to assist in the cost of certain remediations. Although the overall intent of the Act is to make it easier for developers to restore these properties to a productive state, even parties legally responsible for the contamination may take advantage of several of the financial incentives embodied in the Act.

**Property Tax Exemptions.** The EOZA, New Jersey's first attempt at brownfields legislation, was enacted in 1995. It provides property tax exemptions for "qualified properties" located in "environmental opportunity zones" ("EOZs"). A "qualified property" is "any parcel of real property that is now vacant or underutilized, which is in need of remediation due to a discharge or threatened discharge of a contaminant." In order for a qualified property to be eligible for the tax abatement, the municipality in which it is located must adopt an ordinance designating the property as an EOZ. Unlike the federal "Taxpayer Relief Act of 1997," which places population and income restrictions on the designation of target areas where cleanup costs may be expensed in the year incurred, the designation of an EOZ has no such limitations. Also, once remediated, the property in the EOZ must be used for commercial, industrial, residential or other productive purposes during the period that the tax exemption is in effect. The exemption is available to both innocent and responsible parties alike, but the property owner must contractually agree with the State to remediate the property, and the remediation must be performed in accordance with New Jersey technical remedial requirements.

The tax exemption is for ten years, but in accordance with a change brought about by the Act, may now be extended to fifteen years if the property is to be remediated either with no restrictions, or at most, with institutional controls (e.g., deed restriction, groundwater classification exception area). The extension is not available, however, if there are to be engineering controls (e.g., capping, fencing, diking) employed at the site. Finally, this is not a complete tax exemption; the property owner must make annual payments in lieu of property taxes. In the first year, no payment will be due; in each successive year, the payment will equal a greater percentage of the taxes otherwise due, until the difference between the property taxes otherwise due and the payments in lieu of those taxes equals the total remediation costs for the property. The exemption will terminate prematurely if the property owner fails to finish the cleanup.

**Redevelopment Agreements.** Another financial mechanism now available to induce remediation of brownfield sites is the Redevelopment Agreement. It is available only to persons not responsible for contamination at the site under the New Jersey Spill Compensation and Control Act (the "Spill Act"). Entry into a Redevelopment Agreement entitles the developer, if certain conditions are met, to recoup up to 75 percent of the total remediation cost, including property tax exemptions, grants and other incentives. The decision to make available a Redevelopment Agreement for a particular redevelopment project lies solely within the discretion of the New Jersey Commissioner of Commerce and Economic Development and the State Treasurer. Some of the factors that
the Commissioner and Treasurer must consider are:

* the extent of the economic and related social distress in the area to be affected by the redevelopment project;
* the likelihood that, upon completion of the redevelopment project, it will be capable of generating new tax revenue in an amount in excess of the amount to be reimbursed to the developer pursuant to the redevelopment agreement;
* the need for the redevelopment agreement to ensure the viability of the redevelopment project; and
* the degree to which the redevelopment project enhances and promotes job creation and economic development.

In order to qualify for a Redevelopment Agreement, the developer must enter into Memorandum of Agreement for remediation of the site and must agree to perform and complete the remediation as required by the New Jersey Department of Environmental Protection. Once a developer enters into a Redevelopment Agreement, however, he or she is not eligible for reimbursement until a business begins to operate within the redevelopment project. To receive the actual reimbursement, the developer must submit a written application to the Director of Taxation for his/her review and certification, and there will be no reimbursement until the anticipated tax revenues from the redevelopment project have been realized by the State in an amount sufficient to pay for the cost of reimbursement. The reimbursement rate will equal the occupancy rate at the site, but a 90% occupancy rate will entitle the developer to full amount of reimbursement set forth in Redevelopment Agreement.

**Remediation Funding Source Waivers.** Under existing law, certain persons are required to establish a remediation funding source (i.e., remediation trust fund, environmental insurance policy, credit line, self-guarantee) to ensure that a cleanup will be completed as required. These persons are:

* the owner or operator of an industrial establishment required to perform remediation activities under the Industrial Site Recovery Act ("ISRA"); or
* a discharger or person otherwise liable under the Spill Act, who has been issued a directive or a cleanup order by a State agency or a court, or who has entered into an administrative consent order with a State agency.

The Act creates a waiver from the obligation to maintain a remediation funding source for those persons who undertake a remediation in an EOZ. A remediation funding source waiver also is provided for that portion of a cleanup where an innovative technology is used or where a cleanup with no restrictions, or at most, with institutional but no engineering controls, is implemented.

**Loans and grants from the Hazardous Discharge Site Remediation Fund.** The Act now makes financial assistance (loans and loan guarantees) available to parties who are responsible for cleanups under ISRA and the Spill Act, as well as to parties undertaking voluntary cleanups. Financial assistance is limited to the amount that the person is unable to fund through one of the enumerated remediation funding sources, if one is required, or if
none is required, through commercial means.

Pre-existing law provided for "innocent party grants." Innocent party grants, which are extremely difficult to qualify for, are available to persons who: (1) acquired property prior to December 31, 1983, (2) did not use the hazardous substance that was discharged, and (3) can certify that he or she did not discharge any hazardous substance at the area where the discharge is to be remediated. Innocent party grants are for up to 50 percent of the remediation costs at the area of concern for which the person qualifies, but not to exceed $1,000,000. The Act also provides two new grants, in amounts not to exceed $100,000 each, for persons having assets less than $2,000,000. Matching grants are available for up to 25 percent of the cost of innovative technologies and for up to 25 percent of the cost of unrestricted or limited restricted use remedial actions.

It is impossible to predict how successful these financial incentives will be in bringing about the desired goals of urban revitalization and environmental remediation in New Jersey. Much will depend upon the willingness of municipalities to designate EOZs within their borders. Also, the willingness of the State to allow developers to enter into Redevelopment Agreements or to gain access to financial assistance or grants from the Hazardous Discharge Site Remediation Fund remains to be seen. Moreover, even if these financial inducements are readily available, it is unclear whether the potential benefits to be derived from them will be sufficient to tip the scales from a project that is not economically feasible to one that makes economic sense. Nonetheless, with the enactment of the Brownfield and Contaminated Site Remediation Act, it is apparent that the Governor and the Legislature of New Jersey are anxious to find new and creative ways to attract private investment in the redevelopment of the State's industrialized urban centers.

P.L. 1997, c. 278.
N.J.S.A. 54:4-3.150 et seq.
P.L. 105-34 (H.R. 2014)
N.J.S.A. 58:10-23.11 et seq.
N.J.S.A. 13:1K-6 et seq.

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