

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

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In the Matter of the Application of :
EAST RIVER REALTY COMPANY, LLC, : DECISION AND
 : ORDER
 :
Petitioner, :
 :
For a Judgment Pursuant to Article 78 of the : INDEX NUMBER
Civil Practice Law and Rules, : 117040/07
 :
-against- :
 :
NEW YORK STATE DEPARTMENT OF :
ENVIRONMENTAL CONSERVATION, :
 :
Respondent . :
----- X

Hon. Lewis Bart Stone:

This proceeding was commenced by Notice of Petition dated December 21, 2007, by Petitioner, East River Realty Company, LLC, (“East River”), the owner of four parcels of land located between East 36th Street and East 41st Streets on both sides of First Avenue in Manhattan, to review a determination of New York State Department of Environmental Conservation (“DEC”) rendered on October 9, 2007 (the “Determination”), which denied East River’s application to include such parcels in the New York State Brownfield Cleanup Program (“BCP”).

At the initial oral argument on June 17, 2008, the Court directed the parties to submit supplemental briefings on the meaning of certain terms used in New York

Environmental Conservation Law (“ECL”) §27-1405(2), specifically three issues, viz, the definition of “brownfield site,” the impact of DestiNY USA Development, LLC. v. DEC, No. 08-1015 (Sup. Ct., Onondaga County, June 10, 2008) (hereafter “DestiNY”), a decision considering many of the issues here which was decided several days before the initial oral argument, and the impact recent amendments to the BCP made by Laws 2008, ch. 390, (the “2008 Amendments”) which became law on July 23, 2008. Because the latter two matters occurred after the initial written submissions were made, neither was addressed in the parties’ initial submissions.

Both parties submitted briefs on such matters and a supplemental oral argument was heard on August 22, 2008, the matter being fully submitted at that time.

THE STATE BROWNFIELD CLEANUP PROGRAM

New York enacted the BCP by Laws 2003, ch.1 as ECL Title 14 (ECL §27-1401 to 27-1433). Its purpose is set forth at length in ECL §27-1403, the relevant part of which reads:

“The Legislature hereby finds that there are thousands of abandoned and contaminated properties that threaten the health and vitality of the communities they burden, and that these sites, known as brownfields, are also contributing to sprawl development and loss of open space. It is therefore declared that, to advance the policy of the State of New York conserve, improve, and protect its natural resources and environment and control water, land,

and air pollution in order to enhance the health, safety, and welfare of the people of the state “and their overall economic and social well being, it is appropriate to adopt this act to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment by establishing within the department a statutory program to encourage cleanup and redevelopment of brownfield sites.

ECL §27-1405(2) defined a “brownfield site” for the purposes of the BCP as:

“any real property the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant.”

Although sites involving ongoing environmental enforcement proceedings and Superfund sites were excluded from this definition, the parties agree that such exclusions do not apply to the East River sites.

Under ECL §27-1407, to participate in the BCP, an applicant must apply to the DEC, which determines whether the site and proposed remediation qualifies under the standards for participation set forth in the aforementioned ECL section. The owner of a qualified site must thereafter enter into a Brownfield Site Cleanup Agreement (a “Cleanup Agreement”) and become subject to DEC oversight to assure compliance. The benefits for successful participants include limitations on certain future environmental liabilities and tax credits for certain remediation and development costs.

The BCP imposed no limit on the number of eligible sites and no limit on the amount of tax credit benefits available for any site or as an aggregate in any period. Those tax benefits applied both to cleanups and development costs.¹

Before the BCP was enacted, DEC had established by regulation an earlier voluntary program to address brownfield issues, known as the Voluntary Cleanup Program (“VCP”). The purpose of the BCP was to increase the inducements to owners over those available under the VCP in order to expedite the return of brownfields to productive uses. Recognizing the new approach, DEP, following the enactment of the BCP, announced in January 2004 that it would no longer accept applications for the VCP and encouraged VCP participants to switch to the BCP.

As the BCP includes “any property” which meets the criteria for the BCP, it was enacted as an entitlement program, i.e., if one qualified, one received the benefits.

FACTS

The four sites (collectively, the “Sites”) at issue here are:

1. 708 First Avenue, (the “708 Site”) located approximately between East 40th and East 41st Streets and between First Avenue and the Franklin

¹ Interview with D. Desnoyers, Director of Environmental Remediation of DEC, reported in Brownfield News.

Delano Roosevelt Drive (“FDR Drive”) in Manhattan.

2. 700 First Avenue (the “700 Site”) located approximately between East 38th and East 40th Streets and between First Avenue and the FDR Drive in Manhattan.
3. 685 First Avenue (the “685 Site”), located between East 39th and East 40th Streets, west of First Avenue in Manhattan.
4. 616 First Avenue (the “616 Site”), located between East 35th and East 36th Streets and between First Avenue and FDR Drive in Manhattan.

The Sites had been used for industrial purposes for many years. For example, a Coal Gasification facility was formerly located on the 708 Site; the former Waterside electric generating facility was located on the 700 Site, and the former Kips Bay Fuel Terminal was located on the 616 Site. Industrial operations on these Sites had led to the presence of substantial contaminants. The Sites are now being developed for multi-use residential developments.

In June 2001, East River entered the VCP program with respect to all four Sites. In March 2004, following the enactment of the BCP, East River, believing its Sites to qualify thereunder, applied to DEC to transfer such Sites to the BCP.

On June 30, 2004, DEC advised East River that its application to include the four Sites in the BCP was complete. The public comment period expired on August

6, 2004, and the “best efforts” deadline for DEC to accept or reject the applications was passed on August 15, 2004.

Subsequently, on April 14, 2005, DEC delivered a final Cleanup Agreement for the Sites to East River, and, on November 17, DEC reconfirmed to East River that the four Sites were eligible for the BCP. On December 13, 2006, East River executed the Cleanup Agreement and delivered it into escrow and so advised DEC. The Cleanup Agreement was put into escrow because of pending litigation not relevant to this proceeding. Following the termination of such litigation on April 23, 2007, the escrow agent, as instructed under the terms of the escrow, delivered the executed Cleanup Agreement to DEC. DEC did not execute the Cleanup Agreement and almost six months later, on October 9, 2007, issued the Determination which denied the Sites’ inclusion in the BCP. This proceeding was thereafter commenced on December 21, 2007, or well within the four-month period for commencing a proceeding under CPLR Article 78 to challenge the Determination.

During the pendency of this proceeding, East River withdrew its objection to DEC’s exclusion of the 685 Site from the BCP. Accordingly, this proceeding now and this Decision and Order relates only to that part of the Determination which excluded the 616, 700 and 708 Sites from the BCP.

DEC's principal defense to the Petition is that DEC has construed the statutory eligibility criteria of "complicated" to include a "but-for" test, i.e., that DEC could consider whether remediation would have occurred without the benefits of the BCP, and for such reason exclude such site from the BCP. DEC's position that it applied such standard in rendering the Determination. East River contends that the statute neither includes nor allows a "but-for" test to be imposed and that any site where its redevelopment or reuse is "complicated" by the presence of contaminants, and which is not excluded by other limitations here not relevant, is entitled to participate in the BCP as of right.

At oral argument the parties concurred that the issue before this Court is whether DEC's imposition of a "but-for" test to determine the eligibility of a site for inclusion in the BCP was arbitrary and capricious and in violation of law or whether it was not.

Whether the Statute imposes such a test or whether DEC may impose such a test under the authority of the statute is an issue of statutory construction. While it is clear from a review of the statutory scheme for the BCP, that the BCP was designed to be an "entitlement" like program – that is, one where if a party qualified – it received benefits, if it did not, it received none, the parties do not agree on how the eligibility criteria are to be construed.

McKinney’s New York Statutes (“NY Statutes”) provides a guide for the construction and interpretation of New York statutes. While NY Statutes does not constitute “law” in that NY Statutes was not enacted into law by the Legislature² and is thus not expressly binding on this Court, NY Statutes is, however, commonly cited and generally followed by New York courts.³ This Court will similarly follow NY Statutes as a guide to the resolution of the issues here. In addition to construing ECL Title 14 per se, this Court must also address issues of administrative law as DEC, the agency primarily responsible for the administration of the BCP, is not only a party to this proceeding, but has also itself construed the very provision in controversy here.

This Court will also consider precedents relevant to the issue, including those that directly relate to the very question before the Court, as well as those that are analogous. The Court must also consider whether such precedents are binding or are to be given “respectful consideration” (see NY Statutes §72(b)) and, in the latter case, to accord such respectful consideration to such unbinding precedent.

² “This volume [NY Statutes] contains a textual treatise on the construction and legal interpretation of the statutes enacted by the Legislature and contained in the consolidated Laws” NY Statutes, Explanation, p. iii.

³ See, e.g., People v. Cruz, 48 NY2d 419 (1979); Eaton v. NY City Conciliation and Appeals Bd., 56 NY2d 340 (1982); People v. Munoz, 207 AD2d 418 (2d Dep’t 1994), app. den., 84 NY2d 938 (1994).

Finally, this Court will also consider the legislative history of the BCP and how that may effect its construction.

I. The Text of the BCP

Any analysis of the meaning of a statute must begin (but need not end) with the text of the statute itself. Here, three aspects of the text, ECL Title 14, as enacted in 2003, are relevant. First, Title 14 itself contains no language expressly enacting a “but-for” test for eligibility. Second, Title 14 contains a definition of brownfield in an uncommon definitional locution under New York Law. Third, Title 14 authorizes DEC to administer the BCP.

As there is no explicit “but-for” test in Title 14, authority for the Determination which imposed a “but-for” test may only derive from either the definition of “Brownfield Site,” the DEC’s authorization to administer the BCP or from some principal of statutory construction that requires or allows the Court to look past the text of the statute itself. This Court will address all three possibilities.

A. Definition of “Brownfield Site.”

The BCP definition of Brownfield Site set forth in ECL §27-1405(2) is any real property where “the development or reuse of which may be complicated” by contaminants. Under the statutory scheme, where a site qualifies under this definition, an entitlement to benefits arises once proper procedural steps are taken

under the statute. The term “may be complicated” is an unusual locution in New York Law.⁴ While in the absence of context, it may be possible to argue that “but-for” is a component of “complicated,” the source of the “may be complicated” language negates any such construction.

The Bill Jacket for Laws 2003, ch.1 is silent on the origin of the term “complicated” in this context. However, from the history surrounding the adoption of the BCP, it is clear that the term was adopted from Federal environmental law. The Federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) 42 USCA, the principal Federal environmental statute in force in 2003, uses the same term in its definition of a “brownfield.” Such Federal definition of brownfield, now in 42 USCA §9601(3)(A), was added by the 2002 amendments to CERCLA. The Report on the United States Senate report on the bill which enacted these amendments noted that the definition of a brownfield was drafted to be consistent with the Federal Environmental Protection Agency’s (“EPA”) traditional working definition of a brownfield, which as early as 1997, defined a brownfield as an “abandoned, idle or underused industrial or commercial site where expansion or redevelopment is complicated by real or perceived contamination that can add cost,

⁴ East River has pointed out a few other New York statutes which use the term, but they are far afield from the ECL or the issues here. Such instances are:

time or uncertainty to a redevelopment project.”

When the Legislature adopted the BCP, it rejected competing definitions of “brownfield” proposed in draft bills respectively introduced in the Senate and Assembly, which had respectively sought to broaden or restrict eligibility of environmentally impacted sites to brownfield status. Cf. Proposed EPL §27-1205(s) in Assembly Intro 7507 of 2003 with Proposed EPL §27-1401(2) in Senate Intro 7686-A of 2002. This legislative history illustrates that part of the compromises which enabled the BCP to be enacted resulted from the Senate and Assembly resolving their differences on the definition of brownfields by adopting the then available CERCLA definition which was between the proposed expansive Senate Definition and the proposed restricted assembly definition. At oral argument the parties concurred that the Federal CERCLA language is the source of the definition of brownfield in EPL.

The fact that the quite different Senate and Assembly approaches were resolved by the adoption of the CERCLA definition is compelling evidence that the Legislature had clearly focused on the issue and that the language as finally adopted was not inadvertent. Further, the fact that the definition selected arose from a “settlement” between the two legislative houses evinces a strong legislative intent that the compromise reached should stand and not be subject to material variance by DEC

interpretation or regulation, as it would make no sense for either house to agree to a compromise solution where such compromise could be countermanded by DEC. Thus the fact of the compromise is compelling evidence of a legislative intent that the statutory definition was intended to be effective and binding unless and until it was changed by further action of the Legislature.

Accordingly, “complicated” must be construed as having the same meaning it has under CERCLA, and thus under the Federal EPA working definition of a brownfield, where “complicated” means where contamination “can add cost, time or uncertainty to a redevelopment project.”

B. Rulemaking authority

While ECL Title 14 contains no separate provision granting rule-making powers to the DEC, ECL §3-0301(2)(m) grants DEC a general power “to adopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purpose of this chapter.”

Apparently under this authority, DEC adopted and modified regulations relating to the BCP. 6 NYSCR R Subpart 375-3. The current regulations, effective as of December 13, 2006, include a definition of sites eligible for the BCP under §375-3.3.

While it is axiomatic that a Court must give substantial deference to an

agency's construction of a statute when such statute is primarily to be implemented by such agency, such deference is not without limitation. This Court must also address whether DEC's determination has exceeded the authority granted to DEC under law.

While in "this state construction of the laws is a function of the courts and it may not be exercised by the ...Executive." NY Statutes §71. Accordingly, any DEC power to issue regulations may not contravene the construction put upon the BCP by the courts. Thus, to the extent the "but for" concept represents an administrative determination not adopted by the Courts as being supported by Title 14, DEC's interposition of such requirement does not bind this Court, or any other court, and is null and void.

C. NY Statutes also recognizes that under certain special circumstances a court may look beyond the explicit language of the text of a statute to determine the meaning in applying such statute to a case before it. NY Statutes §362.

These instances, however, presuppose some inherent difficulty in the language of the statute that may render the statute absurd, inoperative or violative of some Federal or State constitutional principle, or have an impact diametrically opposed to the statutes' stated intent. None of these circumstances are present here. At most is the concern of DEC is that the BCP program may prove to be more expensive than

the present executive branch of the Government may wish it to be. While program costs are a proper matter for the Legislature and Executive to address by law or budgetary action, it is not a matter for the courts by “construction” to set the proper expenditure formula or tax credits available for the program.. To the extent that the BCP is a “tax statute” in that the controversy here relates principally to the eligibility of East River for certain tax credits, NY Statutes §313 makes it clear that such tax statutes are “to be interpreted as the ordinary person reading them may be led to expect them to be” and, in the event of doubt, to construe matters in favor of the taxpayer. Under neither principle, may the Court read in a “but for” test for eligibility to the BCP.

Thus, this Court finds that the BCP language does not raise issues that would permit or require the Court to depart from an analysis and interpretation of the text of the statute and a consideration of precedent.

II. Precedent

Four Supreme Court decisions which directly address DEC’s power to reject applicants to the BCP and to establish standards to do so have been brought to this Court’s attention. These cases are 377 Greenwich LLC., v. DEC, 14 Misc.3d 417 (Sup. Ct. NY County 2006) (Hereafter “377 Greenwich”), DestiNY, supra, and HLP Properties, LLC., v. DEC, No. 115969/2007 (N.Y. Sup. Ct. NY County 2008)

