



Environmental Law Alert

► This Alert will highlight a recent decision on brownfield eligibility.

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► FOURTH DEPARTMENT LIMITS DEC DISCRETION ON BROWNFIELD ELIGIBILITY

On June 5, 2009, the Appellate Division, Fourth Department, issued a decision in *Destiny USA Development, LLC vs. New York State Department of Environmental Conservation* which limits the DEC's ability to exclude projects from the New York Brownfield Cleanup Program ("BCP") on the basis of DEC's own guidance and guidance factors. In so doing, the Fourth Department signaled its willingness to overturn DEC determinations which exclude development projects from the BCP based on a categorical application of its own internal guidance criteria without regard to the relevant facts.

By way of background, petitioners commenced this Article 78 proceeding to annul that part of a DEC determination denying the application of Destiny USA Development, LLC ("Destiny") for inclusion of certain parcels in the BCP. After an Onondaga County Supreme Court (a) annulled the determination of the DEC; (b) "declared" that the DEC's promulgated "guidance" and "guide factors" were null and void; (c) found that the DEC's determination violated the state and federal constitutions; and (d) ordered the DEC to include the "entire project site" in the BCP, the DEC appealed to the Fourth Department.



Destiny had applied to have 17 parcels located in a formerly industrial area of the Syracuse waterfront admitted into the BCP as part of its development of an international resort and tourism destination known as Destiny USA. The DEC admitted only six of those parcels into the BCP.

On appeal, the Fourth Department noted at the outset the well-established principle that "where...the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." Where, however, the

question is one of purely statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, agency determinations must be accorded much less weight. Indeed, the Fourth Department found that agency determinations "that conflict with the clear wording of a statute are entitled to little or no weight" whatsoever.

Before the Fourth Department, the DEC argued that the parcels failed to meet the definition of a brownfield site, and thus were statutorily ineligible for participation in the BCP. Because the Court found that the determination of the DEC was based on its own interpretation of the relevant BCP statutes as well as the application of its own internal "guidance" and "guide factors" – rather than on a factual determination within the expertise of the DEC – the Court found that the determination of the DEC with respect to those parcels was not entitled to deference by the Court.

The Fourth Department agreed with the lower court that the DEC's refusal to include certain parcels in the BCP was arbitrary and capricious. Rather than addressing site-specific factual complications to redevelopment, the DEC



Avant Building - Suite 1200, 200 Delaware Ave.
Buffalo, New York 14202
On the web: www.damonmorey.com (716) 856-5500

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relied upon its self-promulgated “guidance” and “guide factors” which require, among other things, consideration of whether a parcel is “idled, abandoned or underutilized” and a comparison of the established remediation cost “to the anticipated value of the proposed site as redeveloped or reused.”

The Court concluded that an application of such categorical limitations without a fact-specific analysis contravenes the broadly worded definition of a brownfield site set forth in ECL 27-1405(2), which requires that redevelopment only be potentially “complicated” by the presence of a contamination. Similarly, the Court found that the DEC’s analysis of the comparative cost of remediation to the total project cost was unwarranted.

Concluding, the Court found that the DEC’s categorical application of its “guidance” and “guide factors” as a precondition to admission into the BCP both conflicts with the intent of the New York Legislature and constitutes an impermissible “attempt to legislate.”

Although it found the DEC’s determination to be arbitrary and capricious, the Fourth Department also said that the Supreme Court erred by “declaring” the DEC’s “guidance” and “guide factors” null and void. Instead, the Court found that these documents are “explanatory and advisory, to be followed under appropriate conditions.” Therefore, the DEC retains the discretion to apply its “guidance” and “guide factors.” *Destiny USA* illustrates that the DEC’s discretion is not without limits, however, and this decision could significantly limit the DEC’s discretion to exclude parcels from the BCP in the future.

While *Destiny USA* may be welcomed by developers in New York State, time will tell what effect, if any, the decision’s limitation on the DEC’s authority to reduce access to state brownfield tax benefits will have going forward, as well as on the New York State budget at a time of great financial distress.

The Authors



John T. Kolaga is Special Counsel and Chair of the firm’s Environmental Practice Group. He has practiced environmental law and environmental-related litigation in state and federal courts for more than twenty years.

(716) 858-3760 jkolaga@damonmorey.com



Christopher D. Ahlers is an Environmental Associate with substantial experience with federal and state environmental laws and regulations, environmental auditing, due diligence investigations, remediation, and environmental litigation.

(716) 858-3729 cahlers@damonmorey.com