MANUFACTURING ACTIVITIES GENERATE MORE BROWNFIELD TAX CREDITS

Hodgson Russ Brownfield Redevelopment Alert
September 29, 2020

A new advisory opinion was recently posted to the website of the NYS Department of Taxation and Finance detailing the operation of the Brownfield Tax Credit Program ("BTCP"). This opinion concludes that mixed-use buildings with more than 50% of the square footage used for manufacturing activities will qualify for a higher BTCP cap.

As a quick reminder and overview, the BTCP is one of the state's more lucrative tax incentive programs. At the risk of oversimplification, the BTCP provides refundable tax credits for the rehabilitation and development of contaminated sites in the state. In other words, costs paid for remediating a contaminated site, and then developing the site, can kick off refundable tax credits.

The tax credits for remediating the site can equal up to 50% of the costs incurred to clean the site, and the tax credits for building on the site can equal up to 24% of the site's development costs (subject to a cap, which is the topic of the Tax Department's advisory opinion). Thus, the BTCP can generate significant economic benefits and is often the difference between whether a site is redeveloped or remains contaminated and unproductive. According to the state's Fiscal Year 2021 Annual Report on New York State Tax Expenditures, the state anticipates paying approximately $130 million pursuant to the BTCP. This would make the BTCP the fourth most lucrative tax credit program administered by the state (behind only the Film and Commercial Tax Credits ($427 million), the Excelsior Jobs Program Tax Credits ($161 million) and the Investment Tax Credit ($142 million)).

The question addressed in the Tax Department's advisory opinion is whether a mixed-use property where manufacturing activities will be conducted on a portion of the property is subject to the BTCP's higher development credit cap. While there is no cap on the credits that can be generated from costs paid to clean the property, the credits generated from costs paid for developing the site are subject to a cap. For non-manufacturing properties, the cap is equal to the lesser of thirty-five million dollars or three times the sum of the costs paid to remediate the site. But for properties "to be used primarily for manufacturing activities," the cap is equal to the lesser of forty-five million dollars or six times the sum of the costs paid to remediate the site. So this "manufacturing activities" designation can have a significant impact on the available development credits.

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The problem facing the taxpayer was the fact that the phrase "to be used primarily for manufacturing activities" was not defined anywhere in the statute. In this case, the taxpayer indicated that it was developing an 80,000 square foot mixed-use building, of which 50,000 square feet would be used for manufacturing activities. Thus, the taxpayer asked whether these facts would qualify the project for the higher development credit cap. The Tax Department looked to various authority, primarily in the existing sales and use tax regulations, to define "primarily" to mean "50 percent or more." Consequently, the project's square footage allocation served to satisfy the requirement and the Tax Department concluded that the higher cap was applicable.

Given the nuanced nature of the BTCP, it is important to work with experienced counsel to ensure that program requirements are satisfied and tax credit benefits are maximized. If you have any questions about the BTCP or brownfield projects generally, please contact Joseph Endres (716.848.1504), or a member of our Brownfield Redevelopment Practice.

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