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Brownfield program fuels Buffalo growth

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For supporters of the Brownfield Cleanup Program, there was a collective sigh of relief when the state budget agreement included a bill to extend tax credits in Upstate for an additional 10 years.

Steven Ricca, a partner at Jaeckle Fleischmann & Mugel, said the refundable tax credit program that helps provide the means to redevelop contaminated properties, has been critical to the city of Buffalo's revitalization. Supporters were able to help convince Gov. Andrew Cuomo and the state Legislature that there was a positive return on investment with this program.

"That's huge that the program's been extended for another 10 years," said Ricca, an attorney who has worked with the local development advisory council as part of the Buffalo Niagara Partnership, addressing legislative reform initiatives including brownfields. "One need only look at the skyline in the city of Buffalo to see what is happening because of the program."

The program has been transformational in Buffalo because the area seemed to embrace it, according to attorney Marc Romanowski of the newly formed Hopkins Sorgi & Romanowski. It allowed developers to take properties that they may have previously shied away from because of environmental liabilities and turn them into economic tools.

"In the right circumstances, it's not only a tool that relieves clients from liability for environmental contamination on a parcel, it also creates an economic incentive for them to take on the burden," said Romanowski, a council member with the Buffalo Niagara Partnership. "It's fueling a large part of the development we see, especially in the urban core of the city. Some of our biggest signature projects have benefited from the brownfield program."

According to the Partnership, the region has had more success stories from using the program than any other Upstate community. The program has resulted in more than 4,200 new jobs and $700 million in new development in Western New York.

Phillips Lytle partner David Flynn said it’s one of the most effective economic tools the city has seen in recent times. Flynn would know, considering the building that Phillips Lytle has called home for nearly two years, One Canalside, is one of the most well-known success stories of the program.

“Just about every significant project that’s occurring, whether it be down on Canalside or at the medical campus, there’s a brownfield component to it,” said Flynn, leader of the firm’s energy, environment, Marcellus shale and nanotechnology teams. “It’s been very effective in driving incentives to projects that are transformative for the region.”

Whether it’s residential, manufacturing, hotels or medical buildings, many recent projects have been part of the program, said Paul Meosky, a partner at Hodgson Russ and the environment and energy practice leader. Some of the projects would go on even without the tax credits, but he said it helped spur further redevelopment.

“From an outsider’s perspective, it seems like all of Western New York is one big brownfield,” said Joseph Endres, a Hodgson Russ attorney who assists the tax credit aspect of the program. “I see this program as being very important to Western New York’s development.”

Romanowski said he has been pleasantly surprised by the appeal of the program in the new budget. And while the New York City metro area was hit with restrictions, he said the program in Upstate was not only preserved but improved.

The definition of a brownfield site, which is intended to provide tax relief for projects that many times wouldn’t have happened otherwise, also became more concrete. That’s good news for potential developers, said Jeffrey Stravino, a partner at Hodgson Russ who focuses on business and environmental litigation. It’s the second major revision since the program was introduced in 2003; the other change came in 2008, Endres added.

Once a property meets the definition of a brownfield, tax benefits are awarded as a percentage of two major cost categories, Ricca said. A tax credit of 28 percent to 50 percent is provided to a project for the cleanup costs. Ten percent to 24 percent of development costs also can be recovered. Tax credits are based on the level of cleanup and if it occurs in a low-income Brownfield Opportunity Area, as well as whether it creates manufacturing or affordable housing.

Upstate projects in municipalities with less than 1 million people are now automatically qualified for tangible property tax credits, which help drive development and reuse of the Brownfield site once it goes through remediation. With this element of the tax credit extended, the program allows for recouping much of the remaining portion of out-of-pocket expenses for the remediation, Meosky said.

“It would either be a key component of financing the project or is something that is most welcome because the developer of a site can then spend more money on the scope or the amenities associated with the project. Either way, it’s been real helpful,” said Meosky, who has worked on two local, high-profile Brownfield projects, and has several more now in the works. “Without having that, I don’t think the program would be very viable.”

The program also provides certainty for “sick buildings” with asbestos, lead based paint and PCBs, which are now more clearly eligible to be counted toward recouping costs associated to site preparation and abating contaminated materials.

Previously, the only way a developer could recover for those costs was if the building was torn down. Now, the program allows for recovering the cleanup cost even if the building is kept in place. Romanowski said he can see the Trico building as a local project that would benefit and move forward because of this new element in the law.

That type of remediation comes with huge costs, said Ricca, a partner in Jaeckle Fleischmann’s environmental, advanced manufacturing and economic and land development practice groups. His law firm is housed in the Avant Building, which underwent a significant asbestos abatement to the tune of $10 million.

In addition, the new legislation creates a Brownfield EZ cleanup initiative, which is for projects that include remediation for a piece of property that may need a modest cleanup and an official sign off that the work has been done. No tax credit is awarded but the project receives the benefit of a release of liability from the state as part of a more streamlined process, Flynn said.

The 10-year program extension is one of the more important parts of the legislation. New project applicants now have until the end of 2022 and developers can go until the end of 2025 to complete cleanup and construction work. It would also grandfather certain projects into the program. The process of beginning a project to

receiving a certificate of completion sometimes takes several years, Stravino said.

Before the new legislation passed, the project pipeline was beginning to dry up because the end of 2015 deadline was fast approaching. Flynn said. Since, the market has responded accordingly, with more projects coming to the surface of late, he added.

“Going from concept to remediation and redevelopment, it can be a three- or four-year process, especially if it’s a large project,” Flynn said. “I think the certainty that the 10 years brings to the project is helpful for the real estate community, the development community and the community at large. I think that it ensures that this important vehicle for economic development will continue to deliver benefits for the region.”

To qualify as a brownfield under the new law, a developer must show that contamination is present by generating analytical data, according to Ricca. A Phase II investigation of the property takes a soil sample to see if the contamination exceeds the levels that would apply to the proposed use, whether it be residential, commercial or industrial. He warns clients that they must first get into the program before considering those issues and should have a clear understanding of the eligibility requirements.

While the revisions to the program present some further opportunities, the legislation, as a whole, restricts the amount of money the state will pay out, said Endres. A big part of that is in the limitations put into place in and around New York City, where there were alleged abuses and where the program is less needed. The result is the creation of a two-tier program separating Upstate and Downstate.

“The extension of the program is affirmation of the fact that those certain abuses have not occurred in small cities like Buffalo,” said Ricca, adding that the hefty tax credits being handed out in New York City, due to higher costs in that area, skewed the results.

While the DEC is the agency encouraging the remediation around the state and touting the program’s ability to revitalize neighborhoods, submitting a tax return to receive the credits starts a new process which goes through the Department of Taxation and Finance, according to Endres. He said that agency is interested in protecting the state and not overpaying in credits for a given project.

Thanks to less ambiguity in the new legislation, Endres said there are fewer opportunities for a taxpayer to go into the program with good intentions and do what they thought they were supposed to, only to “get the rug pulled out from under them.”

“From my perspective, these are good restrictions,” he said. “They eliminate a lot of uncertainty or issues that came up when you deal with the tax credits, say, two years after all of the remediation work is done. It should make the administration of the program less of a headache.”

At any given time, Flynn said he’ll be working with several projects in the program that are in one aspect or another of the process. As projects work their way through the system, there is a supply of others on the horizon, he added. In particular, he is seeing increased activity in renewable energy projects, especially solar energy, which is a hot market in itself in New York state given other, current incentives and benefits being offered.

Romanowski said he would have seen several projects become stagnant or never even have happened without the extension of the legislation. Many times, incentives can be a determining factor in whether a developer decides to go ahead with a project.

“I give this analogy frequently: Ten years ago, I would have clients calling me and asking what to do with this contaminated parcel. ‘It’s an anchor around our neck.’ Now I have clients calling me to ask if I can find them something with some contamination on it. It’s an incredible change,” Romanowski said.