

NEW YORK LEGISLATURE ADOPTS SWEEPING NEW BROWNFIELD LEGISLATION

New York State has just adopted long-anticipated legislation that refinances, reforms and expands the State's existing Superfund program and creates a controversial new Brownfield Cleanup Program ("BCP"). The BCP is designed to encourage the cleanup and redevelopment of inactive and/or abandoned contaminated properties. The Superfund amendments provide funding while dramatically expanding the scope of the program.

The legislation is extraordinarily complex -- the Brownfield Cleanup Act (the "Act") portion alone is more than 30 pages -- and introduces an entirely new statutory program governing the remediation of State brownfield sites. The ultimate scope and details of the BCP's various components will not become entirely clear until the New York State Department of Environmental Conservation ("DEC") implements it through the promulgation of regulations. Moreover, although the Act states that it is to be effective immediately, and contains no grandfathering provisions,

DEC has already indicated that volunteers in the current Voluntary Cleanup Program ("VCP") will be offered the option of remaining in that program or participating in the BCP. Although the extent to which DEC will implement procedural and/or substantive components of the BCP immediately -- or shortly after enactment -- is yet to be determined, the agency has indicated that a draft Interim Guidance will be released in the next month or so.

Although this Article focuses on the BCP, there are important relationships between that program and the State Superfund program. Thus, the most significant of both the new Superfund and Brownfield programs' elements are outlined below. Due to the Act's magnitude and complexity, however, this article cannot describe in detail every aspect of the new BCP. The following summary is intended to be just that: a summary. Readers should consult the Act itself, with the advice of legal counsel and environmental consultants, for a thorough analysis of its specifics.

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The Key State Superfund Program Provisions

With respect to the State Superfund program, which ran out of funds for the remediation of new sites on March 31, 2001, the Act both reauthorizes the program and introduces a number of substantial changes. The legislation appropriates \$168 million for the program, to be financed with a combination of State General Fund monies (including \$120 million to be made available on an annual basis), bonds to be issued by the Environmental Facilities Corporation, and fees from industry and business. The most significant changes to the Superfund program include:

- Expanding the definition of the term "hazardous waste," which was formerly fairly narrow in scope, to include "hazardous substances" as defined under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," a.k.a., federal Superfund). Petroleum and nuclear waste are excluded from the expanded definition. This expansion will increase the number and types of sites that are eligible for State Superfund cleanups. Importantly, this new and expanded definition of "hazardous waste" applies to the new BCP, thus potentially placing what were traditionally brownfield sites under the aegis of the Superfund program.
- Adding new defenses to liability to match those available under CERCLA, including the relatively new "innocent purchaser" defense available to purchasers who conduct certain prescribed due diligence before purchasing sites later determined to be contaminated with hazardous waste. Certain liability relief would also be extended to municipalities, industrial development authorities and lenders who participate in hazardous site remediation.
- Financial incentives for landowners to undertake the remediation of inactive hazardous waste sites, such as tax credits, restoration projects and grants.
- Increased opportunities for public participation in site cleanup decisions, including provisions for technical assistance grants available to community groups and municipalities.

The Key Brownfield Cleanup Act Provisions

The Brownfield Cleanup Act, which is to be incorporated in the new Title 15 of the Environmental Conservation Law, will significantly alter the State's efforts to address brownfield remediation. Until now, persons looking for the State's imprimatur on the remediation of brownfield sites have proceeded through DEC's VCP -- an ad hoc creature of administrative "common law" without statutorily-defined standards or parameters.

The Act now codifies the VCP process by creating a new BCP for the remediation of sites contaminated by petroleum or "hazardous waste" (as newly defined under the amended State Superfund). The Legislature's intent in enacting these provisions is to reduce the uncertainty that can hamper brownfield redevelopment by increasing the consistency and predictability of the BCP implementation.

Any real property that is contaminated by hazardous waste or petroleum is eligible for participation in the BCP except for sites: listed on the federal National Priorities List; subject to State or federal enforcement or corrective actions under the federal Resource Conservation and Recovery Act or cleanup orders under the New York State Navigation Law; or already listed on the State Inactive Hazardous Waste Disposal Site Registry (the "Registry") as a Class 1 or 2 site. However, until July 1, 2005, Class 1 or 2 Registry sites may be included in the BCP if owned by a "Volunteer" (a new term of art discussed below). Once a BCP application has been made for a previously unlisted site, DEC will not list it on any spill report or on the Registry so long as the BCP applicant acts in good faith and remains in the BCP.

The key aspects of the BCP include:

- Differentiation between **types of BCP applicants**. Throughout its process, the BCP imposes different site investigation and remediation requirements on different types of Brownfield Site Cleanup Agreement "applicants". A "Participant" is an applicant who owned or operated the brownfield at the time of disposal of the contaminating substances, or who is otherwise responsible under "applicable principles" of statutory or common law (i.e., other than by mere post-contamination ownership). A "Volunteer" is any applicant other than a "Participant," including a person who would be liable solely by reason of owning or operating the site after disposal. The BCP gives Volunteers more leniency in remedial investigation and remedial alternatives selection than it does Participants. For example, Volunteers must develop remedial work plans that address only contamination within the boundaries of the site, whereas Participants must also include a program to remediate contamination that has migrated off-site.

THE LEGISLATION IS EXTRAORDINARILY COMPLEX - THE BROWNFIELD CLEANUP ACT (THE "ACT") PORTION ALONE IS MORE THAN 30 PAGES - AND INTRODUCES AN ENTIRELY NEW STATUTORY PROGRAM GOVERNING THE REMEDIATION OF STATE BROWNFIELD SITES. THE ULTIMATE SCOPE AND DETAILS OF THE BCP'S VARIOUS COMPONENTS WILL NOT BECOME ENTIRELY CLEAR UNTIL THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ("DEC") IMPLEMENTS IT THROUGH THE PROMULGATION OF REGULATIONS.

- Differentiation between **significant threat sites and non-significant threat sites**. The BCP applies different requirements depending on whether a site is deemed to be a "significant threat site" or a "non-significant threat site". These include differences in remedy selection from among the alternatives explored and the extent of public participation throughout the BCP process. In order for DEC to make a "significant threat" determination, the BCP requires that all applicants undertake a site investigation that includes a "qualitative exposure assessment" regarding contamination emanating from the site. The assessment must consider the potential for exposure to humans as well as fish and wildlife, taking into account the reasonably anticipated use of affected off-site areas. Applying standards used in the Superfund program, DEC uses the final investigation report with the exposure assessment to make its determination. For significant threat sites, DEC will select the remedy rather than the applicant.
- A **"multi-track" remedial approach** under which different cleanup levels are required depending on the future use of the site. DEC, in consultation with the New York State Department of Health, is to promulgate regulations setting forth criteria for the following four remedial tracks:
 - **Track 1: Unrestricted Use** - requires a cleanup level that will allow the site to be used for any purpose without restriction and without reliance on the long-term employment of engineering or institutional controls for soil contamination. Volunteers may implement a Track 1 remedial program for the remediation of groundwater using institutional or engineering controls, but only after the bulk reduction of groundwater contamination to asymptotic levels.
 - **Track 2: Restricted Use Employing Certain Types of Controls** - may include restrictions on the use of the site and/or reliance on the long-term employment of institutional and/or

engineering controls to achieve groundwater remediation objectives. However, the remediation must still achieve contaminant-specific soil cleanup objectives to be developed by DEC (see below) without the use of such controls.

- **Track 3: Restricted Use Meeting Site-Specific Objectives** - must achieve contaminant-specific soil cleanup objectives; however, site-specific data may be used to determine the applicable objectives. Groundwater may be addressed through institutional and/or engineering controls.
- **Track 4: Restricted Use** - must achieve a cleanup level that will be protective of the site's current, intended or reasonably anticipated residential, commercial or industrial use with restrictions and with reliance on the long-term employment of institutional and/or engineering controls.

The BCP requires DEC to develop soil cleanup objectives for use in these tracks, which will be set forth in three generic soil cleanup tables: (i) unrestricted, (ii) commercial, and (iii) industrial. DEC has indicated that it may use the existing Technical Assistance Guidance Memorandum #4046 as a starting point -- but not necessarily an end point -- for these tables.

- **A hierarchy of remedial measures** regardless of the proposed track. The BCP imposes a clear hierarchy of remedies that apply to all applicants and all remedial tracks. Ranked from most preferable to least preferable, these remedial strategies are: (i) removal and/or treatment of contaminants, or, if not entirely possible, then to the "greatest extent feasible"; (ii) containment of contaminants following source removal and/or treatment; (iii) elimination of exposure pathways; and (iv) "as a measure of last resort," treatment of the source at the point of exposure (e.g., wellhead treatment or management of volatile contamination within buildings). In addition, the BCP requires applicants to explore plume stabilization for all remedies. For an applicant to obtain approval of a remedial work plan that does not rely on removal or treatment of contaminants at the source, the BCP places the burden of proof on the applicant to demonstrate to DEC why the most preferred remedial measure cannot be undertaken at that particular site.
- **A required analysis and selection of remedial alternatives.** In what is essentially a scaled down Superfund "feasibility study", the BCP requires remedial work plans to include an analysis of alternatives to the proposed remedy. The scope of this analysis differs depending on the Track proposed for a site. For Track 1 sites, no alternative other than the one being proposed must be examined because Track 1 requires remediation to standards for unrestricted use. For Track 2, 3 and 4 sites, applicants must develop and evaluate at least two remedial alternatives, one of which would achieve a Track 1 level cleanup. For sites that DEC has determined to constitute a significant threat, DEC "shall select the remedy" from an approved alternatives analysis based on the remedial measure hierarchy set forth above, an approach similar to the Record of Decision process under the Superfund program. For non-significant threat sites, the applicant may select the remedy from an approved alternatives analysis using the same hierarchy, except that DEC may require that the applicant develop and evaluate a Track 2 alternative based on certain specified criteria and may ultimately require that the applicant implement this alternative.
- Requirement for recorded **environmental easements.** The BCP requires that any remedy that employs use restrictions, engineering or institutional controls, or continued operation and maintenance requirements must incorporate these measures in an environmental easement. Such easements must be recorded by the title owner of the

brownfield site (who may or may not be the applicant) for the benefit of the State (acting through DEC). When a local government receives an application for a building permit or other land use approval for the site, it must notify and refer the application to DEC, which must in turn determine if the application is consistent with the environmental easement.

- **Expanded public participation mandates.** The expanded public participation requirements of the BCP include:
 - Public notice and comment periods (i) for the application to participate in the BCP; (ii) prior to DEC's finalizing a remedial investigation work plan; (iii) prior to DEC's approving the remedial investigation report; (iv) prior to DEC's finalizing a remedial work plan; (v) before physical remedial activity is commenced; (vi) before DEC approval of a final engineering report; and (vii) within 10 days of DEC's issuance of a Certificate of Completion for a site that will employ institutional or engineering controls. In addition, the DEC must hold a public meeting if requested by the "affected community" prior to finalizing a remedial work plan for significant threat sites; for other sites the agency may hold such a meeting.
 - DEC has indicated that it plans to integrate these elements to the extent practicable, so that the overall time frames for the BCP are comparable to those for the existing VCP.
 - For significant threat sites, DEC may require an applicant to provide Technical Assistance Grants of up to \$50,000 for municipalities and community groups.
- Identification of **review times that DEC must seek to achieve**, such as for review of the application, the investigation work plan, the remedial investigation report and the remedial work plan. Although the time periods for review are not mandatory, they afford some additional predictability in the time frames to be expected for DEC review in various elements of the BCP.
- Expanded **release and contribution protection.** The Act provides applicants with a release from liability to the State following issuance by DEC of a Certificate of Completion for a remediated brownfield site. This applies to any cause of action arising from the presence of any hazardous waste that was the subject of the cleanup

ALTHOUGH THE PRECISE SCOPE AND IMPACT OF THE NEW BCP WILL NOT BE KNOWN UNTIL DEC HAS PROMULGATED IMPLEMENTING REGULATIONS, ALREADY THERE IS SIGNIFICANT CONCERN AMONG THE REGULATED COMMUNITY THAT THE NEW LEGISLATION, THOUGH PURPORTEDLY INTENDED TO PROMOTE THE CLEANUP OF CONTAMINATED SITES, WILL HAVE THE UNINTENDED OPPOSITE EFFECT.

agreement, with the exception of liability for natural resource damages. Of course, there are several standard statutory "reopeners" that DEC may invoke, including, for example, non-compliance by the applicant with the terms of the cleanup agreement, or a finding by DEC that a change in "standard, factor, or criteria upon which the remedial action plan" was based renders the BCP implemented at the site "no longer protective of public health or the environment." But, perhaps

most notably, the Act creates a new "reopener" based on "the failure of an applicant to make substantial progress toward completion of its proposed development of the site within three years" or if "the applicant engages in unreasonable delay and fails to complete its proposed development of the site within a reasonable time, considering the size, scope and nature of the development."

This "sunset reopener" makes an applicant's coordination of the BCP with other potentially lengthy government processes that apply to its project -- such as the State Environmental Quality Review Act -- more important than was previously the case. In addition, another reopener is a change in use, which appears by the legislative language to include a mere transfer of title as opposed to a meaningful change in site use.

- **Tax Credits** (with an estimated annual value of \$135 million) to provide tax incentives for qualified properties that have been issued a completion certification. In addition, the Act defines a category of economically depressed areas denominated as Environmental or En-Zones, eligible for the maximum tax incentives. The goal is to facilitate the redevelopment of brownfield properties by offering a variety of tax credits including:
 - A **brownfield redevelopment tax credit**, which applies to the cost of : (i) remediation or site preparation; (ii) investment in real property or other investment in tangible depreciable property to redevelop the site; and (iii) groundwater remediation.
 - A **real property tax credit** for increased real property taxes or payments in lieu of taxes that are attributed to the remediation or redevelopment of qualifies properties. To qualify for credit, the redevelopment must result in an increase of average annual employment of at least 25 full-time employees. The amount of the real property tax credit is equal to 25 percent of the product of the eligible taxes and a specified employment factor, except that if the property is located in an En-Zone, the real property tax credit is equal to the product of the employment factor and 100% of the eligible real property taxes. The maximum value of the real property tax credit is the product of \$10,000 and the average number of full-time employees during the taxable year.
 - An **environmental insurance tax credit** applicable to policies purchased in connection with qualified properties, equal to the lesser of \$30,000 or 50% of the premium paid.
- A **Brownfield opportunity planning grants** available to municipalities and community-based organizations to plan for the redevelopment of brownfields within certain targeted economically distressed urban areas. Enhancement of the 1996 Clean Water/Clean Air Bond Act **Municipal Brownfields Program** is achieved by increasing the State's share of cleanup costs from 75% to 90% of on-site costs, and 100% of off-site costs. In addition, municipalities would be afforded relief from liability while conducting site investigations of contaminated properties they acquire, and would be permitted to use federal or other State funds to pay their share of cleanup costs.
- Creation of a **geographic database** to collect information from the State's soil and groundwater contamination programs.
- A review of **groundwater policy** over the next three years to develop a long-term strategy for groundwater remediation.

CONCLUSION

Although the precise scope and impact of the new BCP will not be known until DEC has promulgated implementing regulations, already there is significant concern among the regulated community that the new legislation, though purportedly intended to promote the cleanup of contaminated sites, will have the unintended opposite effect. Specifically, members of the development community fear that the Act will transform the brownfields program into something more akin to Superfund than a voluntary program. With its codified hierarchy of remedies, increased burden of proof on applicants to show why the most preferred (and most onerous) remedy cannot be utilized, and directive that DEC select the remedy for sites deemed to pose a significant threat to the environment, developers' ardor for assuming the responsibility for redeveloping abandoned brownfields may be chilled rather than stoked. Further, the legislation's provisions for increased public participation, while they may be helpful to selecting the appropriate remedy, could elongate the cleanup process, providing a further disincentive to voluntarily undertake the remediation of brownfield sites.

On the other hand, the Act provides economic incentives that could prove a catalyst for Brownfield remediation and provides enhanced liability relief. It may also afford enhanced predictability, both in terms of the time for DEC review of the necessary documentation and the extent of the cleanup needed for particular uses. However, there is a cost associated with the enhanced predictability of specified cleanup levels because they will be predicated upon health risks that are very stringent. It is unclear whether these benefits will be sufficient to offset the concerns about the statutory burdens. Finally, it remains to be seen whether financing institutions will increasingly require that developers of brownfields enter into the BCP in order to protect their investments.

In sum, the extent to which the regulated community will accept the invitation to participate in the BCP is unclear. What is clear, however, is that the degree of participation -- and thus the ultimate success of the BCP -- will depend to a large extent on DEC's approach to and efficiency in effectuating it. If the agency can use the new legislation as a springboard to rectify dissatisfaction with aspects of the existing VCP, then the new BCP should be viewed by the regulated community in a favorable light. If, however, the new program exacerbates the problems with the existing VCP, and adds new elements of concern, the likelihood of a successful BCP will diminish and the Act will serve to discourage, rather than encourage, redevelopment of brownfield sites.

SPR

CHALLENGING A POSITIVE DECLARATION: POSSIBLE AND/OR PRACTICAL?

On June 5 of this year, the New York State Court of Appeals issued its decision in *Gordon v. Rush*,¹ which suggests that a positive declaration issued pursuant to the State Environmental Quality Review Act ("SEQRA"), which requires the preparation of an Environmental Impact Statement ("EIS") before a project may move forward through the administrative approval process, may be immediately challengeable in court. This article reviews the decision and assesses the potential impact it may have in future litigation under SEQRA. While the decision, at first blush, could be perceived as a boon for applicants seeking discretionary governmental approvals who do not wish to undergo the EIS process, it is not clear that its holding is applicable to all possible challenges to positive declarations; nor is it clear that such challenges, even where allowed by the courts, will be worthwhile to project applicants seeking the most expedient culmination of the approval process.

Judicial Review : Final Versus Non-Final

New York's procedural rules, as well as the doctrine of ripeness, prohibit judicial review of an administrative determination that is "non-final."² In the Court's most recent pronouncement prior to *Gordon* on finality and ripeness in the environmental permitting context, *Essex County v. Zagata*,³ it held that the considerations determining ripeness and finality are one and the same:

Administrative actions as a rule are not final 'unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.' ... '[A] pragmatic evaluation [must be made] of whether the "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury."'... There must additionally be a finding that the injury purportedly inflicted by the agency may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'⁴

Under SEQRA, when a project requiring discretionary approvals is first proposed, one of the agencies with approval jurisdiction is designated as "lead agency" for SEQRA review. That agency is initially responsible for arriving at a "determination of significance" -- that is, whether the project may or may not have significant adverse environmental impacts. If the lead agency determines that the project will not have any significant impacts, it issues a negative declaration and all of the "involved" agencies can go on to grant or deny approvals based on applicable

permitting requirements. If the lead agency determines that the project may have a significant impact, it must issue a positive declaration, essentially requiring that a Draft EIS ("DEIS") be prepared. The EIS process may result in a project denial, either for SEQRA-related or other reasons, project modifications to further mitigate identified impacts, or an approval of the project as originally proposed.

Several cases in the Third and Fourth Departments as well as the Southern District of New York (as affirmed by the Second Circuit), decided after Essex County, held that positive declarations were not "final determinations" reviewable in an Article 78 proceeding.⁵ These holdings were based on the reasoning that even after issuing a positive declaration an agency can still ultimately approve the project, thus ameliorating the injury of requiring preparation of a DEIS.⁶ Thus, at least in the Third and Fourth Departments, a project applicant that disagreed with the lead agency's determination that the subject project may have significant adverse impacts could not challenge that determination unless and until the sought approval was ultimately denied. The upshot was that positive declarations could not really be challenged on the merits, because once a DEIS had already been prepared, the issue of requiring it was effectively moot.

The Gordon Case

Gordon came up on appeal through the Second Department, which had not yet had occasion to explicitly rule on this issue. The case also did not involve a challenge to a positive declaration based on the substance of the lead agency's determination. Rather, in Gordon, the petitioners argued that the agency that had issued positive declarations with respect to their proposals to protect their shoreline properties with bulkheads did not have the authority to conduct SEQRA review at all. The New York State Department of Environmental Conservation ("DEC") had previously issued negative declarations for the same project, but the other agency, the Southampton Coastal Erosion Hazard Area Board of Review (the "CEHA Board"), took the position that the DEC's review had not been "coordinated" and that therefore it was entitled to issue its own determination of significance. The petitioners argued successfully that the review was coordinated, and thus the DEC's determination, as that of the sole lead agency, was binding on all other agencies.

The CEHA Board further argued that its positive declaration was nonfinal and therefore the proceeding was premature. The Second Department affirmed the Supreme Court's holding that the positive declaration created a justiciable controversy.⁷ On appeal, the Court of Appeals affirmed, basing its holding on the Essex County test. It held, "the decision of the Board clearly imposes an obligation on petitioners because the issuance of the positive declaration requires them to prepare and submit a DEIS. Conducting a 'pragmatic evaluation' of these facts and circumstances, the obligation to prepare a DEIS imposes an actual injury on petitioners as the process may require considerable time and expense."⁸

This language suggests that any challenge to a positive declaration is ripe for review, because any positive declaration will mean that the applicant must prepare a DEIS, thus, according to the Court, incurring an "actual injury." However, the Court went on to equivocate:

The Board would like us to adopt a bright-line rule, adopted by some appellate courts, that a positive declaration requiring a DEIS is merely a step in the agency decisionmaking process, and as such is not final or ripe for review. Here, the Board issued its own positive declaration for the project after the DEC had previously conducted a coordinated review resulting in a negative declaration, in which the Board had an opportunity but failed to participate. Certainly in this circumstance the bright-line rule advanced by the Board would be inappropriate.⁹

Thus, the Court's reasoning would seem to allow all challenges to positive declarations; however, the fact that it specifically relied on the unusual circumstances of this case in arriving at its decision suggests that the holding may be more limited. It is at this point an open question whether Gordon will open the doors to challenging positive declarations on their merits, where the authority of the lead agency to conduct SEQRA review is not in question. Certainly, the Gordon opinion provides some authority one might use in defending against a motion to dismiss on the basis of prematurity.

SOURCES: CHALLENGING A POSITIVE DECLARATION: POSSIBLE AND/OR PRACTICAL?

1 100 N.Y.2d 236, 762 N.Y.S.2d 18 (2003).

2 Civil Practice Law and Rules § 7801(1); Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 505 N.Y.S.2d 24, 29-30, 479 U.S. 985 (1986).

3 91 N.Y.2d 447, 672 N.Y.S.2d 281 (1998).

4 672 N.Y.S.2d at 284 (citations omitted).

5 See Brierwood Village, Inc. v. Town of Hamburg Planning Board, 277 A.D.2d 1051, 715 N.Y.S.2d 351 (4th Dept. 2000); Sour Mountain Realty Inc. v. New York State Department of Environmental Conservation, 260 A.D.2d 920, 688 N.Y.S.2d 842, 845 (3d Dept. 1999); PVS Chemicals, Inc. v. New York State Department of Environmental Conservation, 256 A.D.2d 1241, 682 N.Y.S.2d 787 (4th Dept. 1998); Rochester Telephone Mobile Communications v. Ober, 251 A.D.2d 1053, 674 N.Y.S.2d 189 (4th Dept. 1998); New York SMSA Ltd. Partnership v. Town of Riverhead Town Board, 118 F.Supp.2d 333 (E.D.N.Y. 2000), *aff'd*, 45 Fed. Appx. 24 (2d Cir. 2002).

6 See, e.g., Rochester Telephone, 674 N.Y.S.2d at 190.

7 299 A.D.2d 20, 745 N.Y.S.2d 183, 191 (2d Dept. 2002).

8 762 N.Y.S.2d at 22.

9 *Id.* (citation omitted; emphasis added).

Post-Gordon: Attack Of The Killer Applicants?

The larger question presented by this decision is, assuming one can commence an Article 78 proceeding immediately upon issuance of a positive declaration, is that an expedient course for an applicant to take? One drawback to pursuing litigation rather than simply preparing a DEIS is that the former route may simply prolong the inevitable. While an applicant may sincerely believe that its proposal would have no significant environmental impacts, a court may only annul a contrary agency determination if it finds that it is arbitrary and capricious. Because of this deferential standard which strongly favors the agency, an applicant may well go through the expensive and time-consuming process of litigation to wind up where it started, having to prepare a DEIS.

Thus, it is unlikely that Gordon will result in a flood of substantive challenges to positive declarations because more often than not preparation of a DEIS will be a simpler, faster, and more politically savvy alternative to litigation (even if successful in annulling a positive declaration, the applicant will still have to seek the underlying approval from the agency it has just battled in court). On the other hand, in some cases the applicant will suspect that the agency it is dealing with has political motivations to stretch out the approval process as much as possible in order to thwart the project. It is those cases where the DEIS process itself could become a needless morass of drafting and redrafting, making litigation a preferable option. It is also in those cases where a challenge might have greater viability, if the agency's bad faith is evident.

SPR

Court Gives Go Ahead For Cooper Union's Redevelopment Proposal

SPR successfully defended a proceeding that sought to annul approvals received by Cooper Union for the Advancement of Science and Art, a private, tuition-free school established in 1859. The challenge sought to block Cooper Union's redevelopment plan, which is designed to improve and modernize its educational facilities in downtown Manhattan. The petitioners claimed that the City approvals did not comply with New York City's zoning laws, and that the EIS had improperly "segmented" the redevelopment project from the proposed development of another parcel owned by Cooper Union. New York State Justice Sheila Abdus-Salaam dismissed petitioners' claims in their entirety, finding that the City had properly studied the impact of the redevelopment plan on public facilities in the vicinity of the project and otherwise complied with the City's zoning procedures. The court also found that there had been no improper segmentation, because the EIS considered impacts from the other parcel owned by Cooper Union. David Paget and Steven C. Russo represented Cooper Union.

SPR Ensures New School Opens On Time

The firm succeeded in representing a developer of a turn-key school project for the New York City Department of Education that resulted in the opening this September of the state-of-the-art New York City Information Technology High School in what was an abandoned manufacturing plant and warehouse in Long Island City, Queens. By providing the developer with representation and guidance in the Voluntary Cleanup Program process, the firm ensured that the work plans for remediation and redevelopment of this site met with the exacting standards of both the State Department of Environmental Conservation and the State Department of Health, while also ensuring that the redevelopment project remained on schedule to accept students for the 2003-04 school year.

SPR Wins Dismissal of Lawsuit Seeking To Block Travel Center

A Supreme Court Justice in Orange County dismissed as untimely a challenge to the approval of zoning changes permitting SPR client, Pilot Corporation, to develop a travel center off of Interstate 84 in Newburgh, New York. The petitioners argued that the town's adoption of new zoning rules that petitioners alleged did not comply with the notice requirements required by town law constituted a continuing violation and thus were not subject to the Article 78 four-month statute of limitations. The New York State Supreme Court disagreed, finding that the challenge was time-barred and lacked merit in any event. David Paget and Steven C. Russo represented Pilot Corporation.

Court Dismisses Student's Claim For Reinstatement As Time-Barred

A New York Supreme Court Justice agreed with SPR's argument that a graduate student's claim for reinstatement was subject to the four-month statute of limitations applicable to the review of academic determinations by educational institutions. Accordingly, the court dismissed plaintiff's claims for reinstatement, which plaintiff had fashioned as breach of contract claims, as time-barred when they were brought almost six years after the student's termination. Daniel Riesel and Steven C. Russo represented Yeshiva University in this litigation.

SPR Helps Bring New Development To The Gowanus Canal

The firm also recently obtained from the State a final Voluntary Cleanup Program Release and Covenant Not To Sue for a major development being built on the Gowanus Canal in Brooklyn. This is one of the first final Release documents in this Region issued under the State's program. As a result, this former Coal Gassification site, long fallen into disuse, will soon be opened by a nationally known retail home improvement company to serve customers from Brooklyn, Queens and Manhattan.

SPR Retained To Represent Javits Center

David Paget and Steven Barshov have been retained as environmental counsel in connection with the Javits Center's proposed large scale expansion. The project is the largest of its kind in New York City and would enable the the Center to serve large conventions and trade shows that cannot now be accommodated in the metropolitan area.

Summer Newsletter Update

Please note that after we went to press one of the cases discussed in "Fighting City Hall," Home Depot, U.S.A. v. Dunn, was reversed by the Appellate Division, Second Department. 305 A.D.2d 459 (2d Dept. 2003).

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LEGAL TRENDS AND ANALYSIS