

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner requests guidance on two issues involving the Brownfield Redevelopment Tax Credit under Tax Law § 21.

First, Petitioner asks what is the last date that the site preparation credit under Tax Law § 21(a)(2) may be claimed where a Certificate of Completion (“CoC”) was issued on December 19, 2013. We conclude that the last taxable year the site preparation credit may be claimed is the year ending December 31, 2018, for site preparation costs incurred by that date, because the site preparation credit may be claimed for up to five tax years after the year the CoC is issued.¹

Second, Petitioner asks whether certain costs constitute “site preparation costs” within the meaning of Tax Law § 21(b)(2). Specifically, Petitioner asks whether costs related to a “Phase II” development of the site, including removal and treatment of contaminated soil, complying with the CoC, complying with the Department of Environmental Conservation (“DEC”) site management plan required by the CoC, complying with the environmental easement required by the CoC, and other costs incurred by Petitioner for excavating the site for the construction of additional buildings and other structures, constitute site preparation costs.² We conclude that Petitioner’s Phase II costs for excavation and treatment of contaminated soil, as well as costs of complying with the CoC, may constitute site preparation costs that qualify for the site preparation credit as long as DEC does not determine that the proposed Phase II activities constitute a prohibited change of use or otherwise are found to violate the CoC or existing DEC approvals.

Facts

Petitioner is the subsidiary of a corporation that undertook the remediation of a brownfield site (the “Site” or “Property”). On June 28, 2011, the owner of the site entered into a brownfield cleanup agreement (“BCA”) under Environmental Conservation Law (“ECL”) § 27-1409 with the DEC.³ On December 19, 2013, DEC issued a CoC, as provided in ECL § 27-1419, to the owner as well as Petitioner.

¹ This conclusion is based on the assumption that the taxpayer has a January 1 – December 31 tax year and will not have any short tax years.

² The CoC, site management plan, and environmental easement shall hereafter be collectively referred to as simply “the CoC.”

³ The owner of the site is referred to herein as simply the “owner.”

Like nearly all brownfield sites that receive a CoC, the Site will remain subject to an environmental easement and a site management plan as required by ECL § 27-1419(2). The site management plan states that any further excavation on any portion of the Site will be subject to DEC oversight, and any soil removed from the Site must be treated and disposed of in accordance with DEC requirements.

The owner's "Phase I" redevelopment of the Site, the project that initially caused the owner to enter into a BCA, is the full interior rehabilitation of an existing affordable senior housing development. The renovated facility, which was placed in service in 2014, provides 145 rental apartments to low income seniors. Petitioner is now considering a "Phase II" redevelopment that would entail construction of several new buildings on vacant portions of the Site. These buildings would include an additional 175 affordable rental apartments for seniors, along with neighborhood-oriented commercial and community space.

Petitioner did not provide any documentation demonstrating that the activities associated with Phase II were considered by DEC as part of the BCA, CoC, or any other document associated with remediation and construction on the Site. Thus, it appears that there has been no review or consideration of Phase II as part of the Brownfield Cleanup Program process, but Phase II activities would be subject to the CoC.

Construction of Phase II would require the excavation and removal of a large volume of soil. Petitioner expects to incur significant costs associated with the excavation, removal, testing, treatment, and disposal of contaminated soil and any other adverse subsurface conditions that may come to light during the Phase II activities, including contaminated groundwater.

Analysis

The brownfield redevelopment tax credit is comprised of several discrete components authorized by Tax Law § 21⁴. At issue here is the "site preparation credit component" in Tax Law § 21(a)(2). Specifically, the issues are: (1) at what time does the five taxable years begin to run for purposes of Tax Law § 21(a)(2) and (b)(2)(ii); and (2) are the Phase II costs related to CoC compliance, and all Phase II costs relating to excavation, removal, treatment, and disposal of soil, eligible for the site preparation credit.

The site preparation credit component "...with respect to a site's qualification for a certificate of completion shall be allowed for the taxable year in which the effective date of the certificate of completion occurs. The credit component amount determined other than with respect to such qualification shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service for up to five taxable years after the issuance of such certificate of completion." Tax Law § 21(a)(2). New York State Department of Taxation and Finance Publication 300 clarifies that, for the portion of site preparation costs that

⁴ The project discussed in this option was issued a CoC on December 19, 2013, and, therefore, the amendments to the brownfield redevelopment tax credits signed into law on April 13, 2015, L.2015, c.56, Part BB, are not applicable. L.2015, c.56, Part BB, § 31.

are not incurred to prepare a site to qualify for the CoC, the credit "...is allowed for up to five tax years after the year the CoC is issued..." DTF Publication 300, p. 11.

Because the "five taxable years" period during which the site preparation improvement may be placed in service and the site preparation credit claimed begins the year immediately after the taxable year in which the CoC is issued, (in this case the taxable year 2013) the last taxable year Petitioner may claim the site preparation credit is the taxable year ending December 31, 2018.

Site preparation costs are defined as all amounts properly chargeable to a capital account: (1) that are paid or incurred in connection with a site's qualification for a CoC; and (2) all other site preparation costs paid or incurred in connection with preparing a site for the erection of a building or a component of a building, or otherwise to establish a site as usable for its industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes. Tax Law § 21(b)(2). Site preparation costs include work such as excavation, temporary electric wiring, scaffolding, demolition, fencing, and security. *Id.*

If the costs relating to treatment of contaminated soil and compliance with the CoC were associated with Phase I, i.e., the project for which the BCA and CoC were issued, there would be no question that those costs constitute site preparation costs that are eligible for the site preparation credit. However, Petitioner is seeking a determination regarding Phase II. It is not clear that the construction and related activities associated with Phase II were contemplated by, and within the scope of, the BCA and CoC.

The brownfield program requires that the DEC be notified in writing at least 60 days prior to any change of use at a brownfield site. ECL § 27-1425(1). This requirement is also contained in the BCA. The DEC shall then notify the applicant within 45 days if the proposed change in use is prohibited. ECL § 27-1425(2). "Change of use" includes the erection of any structure on a brownfield site, any activity that is likely to disrupt or expose contamination or to increase direct human exposure, and any other conduct that may tend to significantly interfere with an ongoing or completed remedial program at a brownfield site and the continued ability to implement the engineering and institutional controls associated with such site. ECL § 27-1425(3)(a). Pursuant to the BCA, the determination of whether a change of use has occurred is to be made by DEC. In the event that an applicant, or its successor or assignee, fails to comply with the BCA, the CoC may be modified or revoked by DEC. ECL § 27-1419; 6 NYCRR 375-1.9. A site is only eligible for tax credits under the brownfield program if a CoC has been issued. Tax Law § 21(b)(1). In other words, if DEC determines that the Phase II activities constitute a prohibited change of use or otherwise violate the BCA or CoC, the taxpayer may no longer be eligible for brownfield program tax credits.

The cost of treatment and removal of contaminated soil and compliance with the CoC associated with Phase II would qualify as site preparation costs only if the DEC does not determine that the Phase II activities constitute a prohibited change of use or otherwise violate the BCA or CoC. If the proposed Phase II activities do not constitute a prohibited change of use

or otherwise violate the BCA or CoC, then the costs relating to the excavation and treatment of contaminated soil, as well as compliance with the CoC, may constitute site preparation costs that are eligible for the site preparation credit component. Petitioner must continue to comply with all requirements of the BCA, CoC, and applicable law and regulations or risk being denied the brownfield tax credits, including the site preparation credit. *See e.g.* ECL § 27-1419(5).

DATED: November 3, 2020

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.