

Brownfield Redevelopment

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Brownfield Redevelopment

A Primer on Opportunities, challenges, and Legal Considerations

Presented to: The County Attorneys' Association of the State of New York
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Presented by: *Jennifer C. Persico*

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Litigation Team Co-Leader

- > Extensive experience in business disputes and commercial litigation matters, including contract claims on behalf of both plaintiffs and defendants.
- > Assisting municipalities in defending 1983 claims, resolving land use issues, drafting local laws and governance issues.
- > Experience in resolving complex disputes on behalf of her clients using both litigation and non-litigation methods.
- > Named one of the Legal Elite of WNY by Business First of Buffalo

Presented by: *Ian A. Shavitz*

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Partner/Team Leader, Environment & Energy

- > 20 years of experience counseling and advocating for clients on environmental and land use issues associated with developing large-scale infrastructure, energy, and commercial projects.
- > Securing federal, state and local governmental permits and approvals; advising sellers, purchasers, lenders, and investors on environmental issues associated with corporate, real estate and energy transactions; and advocating for favorable policy decisions and legislation before Congress.
- > Clients have included corporations, municipalities, developers, investors, state and local governments, private equity funds, and Indian tribes.

Overview of Presentation

> The Basics

- What are Brownfields?
- Municipal and Private Party Roles
- Why a County Attorney Should Care
- Brownfield Redevelopment Process
- Benefits and Challenges

> NYSDEC Brownfield Cleanup Program

> The Real Estate Transaction

Canalside Buffalo



Brownfield Site Before Renewal



Guthrie Green After Renewal



New York City High Line Park



Before



After

The Basics

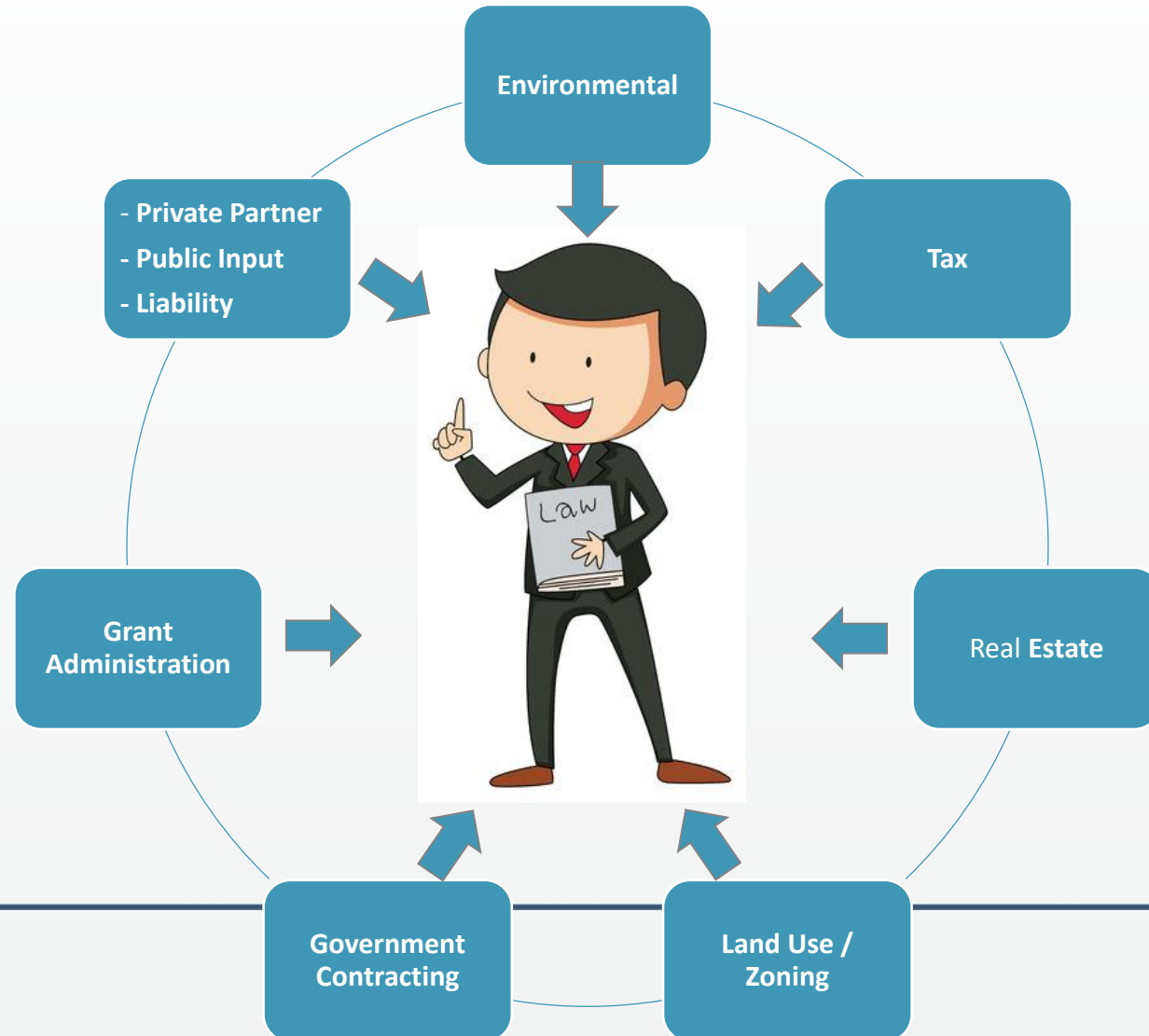
> What is a Brownfield

- EPA: “A brownfield is a property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”

> What is the Municipality's Role

- Assess / Remediate Site
- Provide Financial Incentive
- Dictate Property uPses
- Property Owner
- Property Developer
- Seller / Buyer

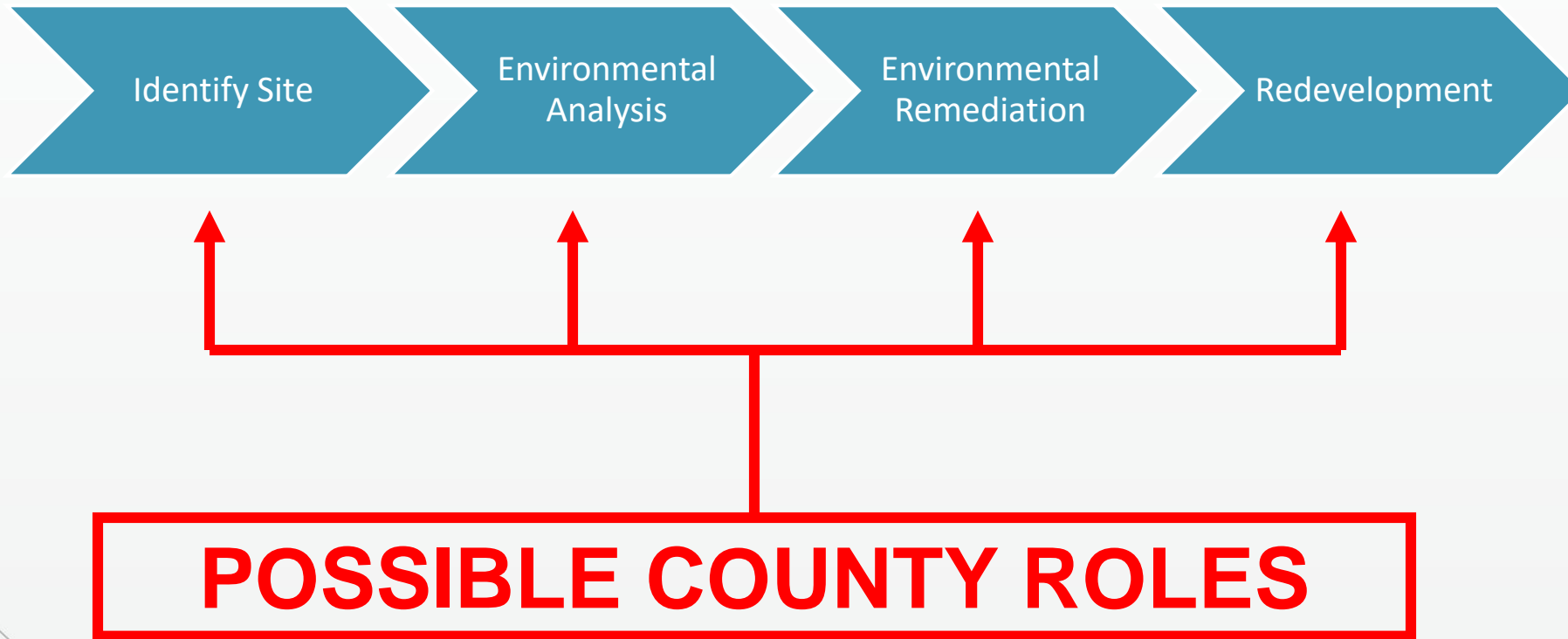
Why Does a County Attorney Care?



Brownfield Redevelopment Process

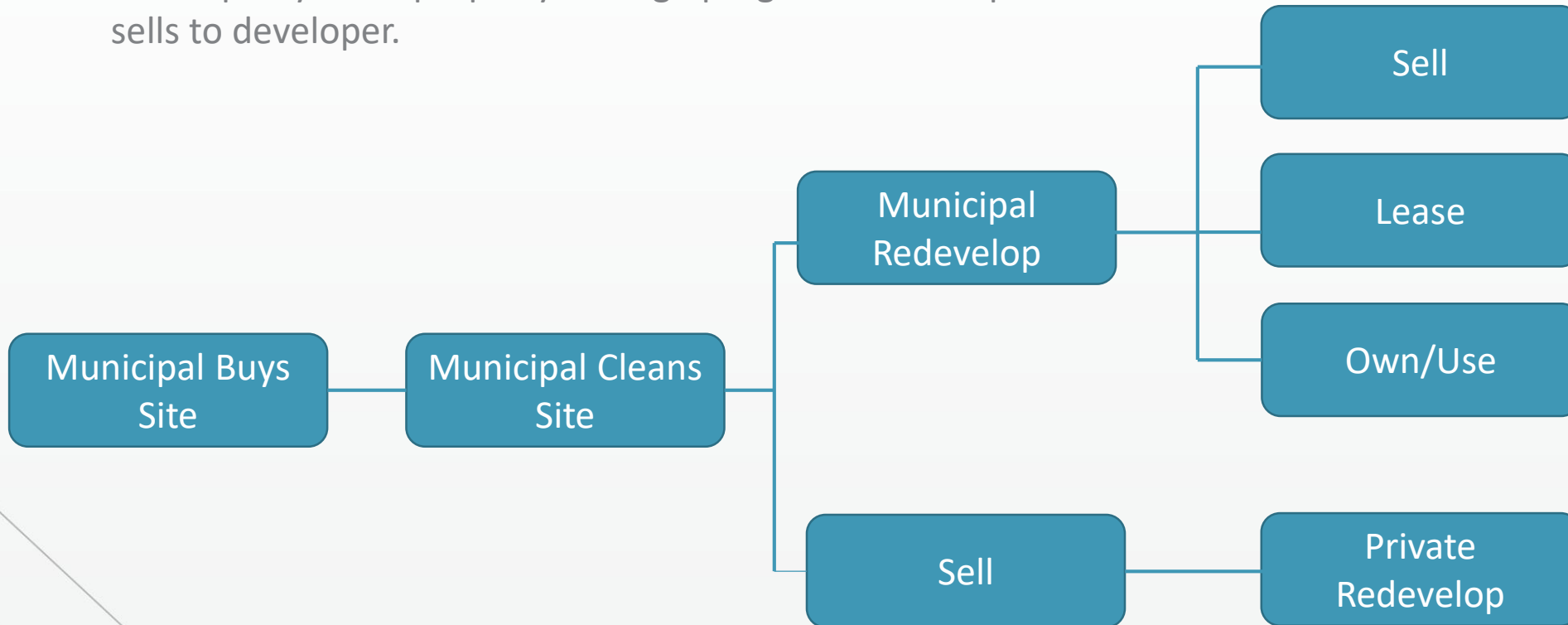


Brownfield Redevelopment Process



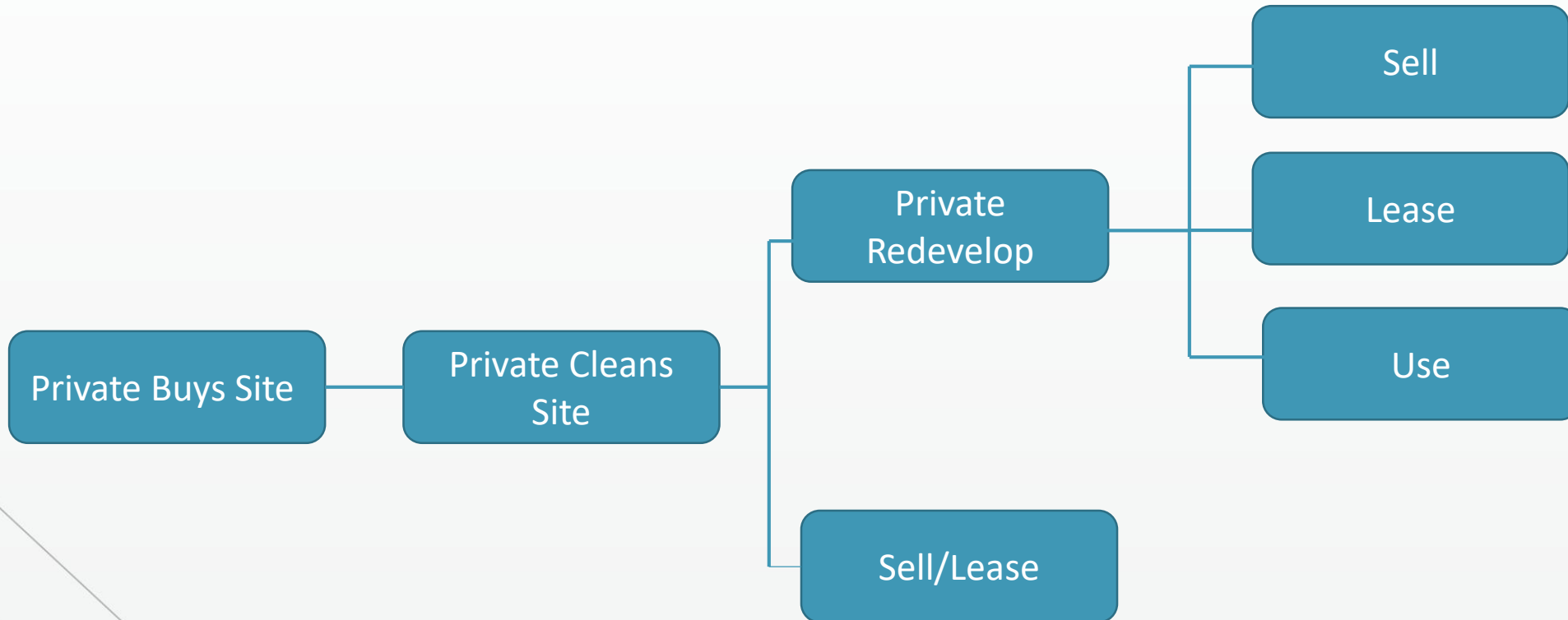
Municipal and Private Party Roles

Municipality takes property through program then keeps or sells to developer.



Municipal and Private Party Roles

Private developer takes property through program.



Benefits of Brownfield Redevelopment

DEVELOPER

- Tax Incentives
- Financial Incentives
- Liability Protection
- Reduced Costs
- Prime Location
- PPP Opportunity
- Reduced Risks

ENVIRONMENTAL

- Water Quality
- Reduced Greenfield Development
- Contamination Remediation
- Regulatory Oversight
- Environmental Justice

SOCIAL

- Neighborhood Revitalization
- Increased Property Values
- Attract New Businesses / Residents to Area
- Remove Blight
- Improved QOL

MUNICIPALITY

- | | |
|--------------------------------|-------------------------------|
| • Economic Growth | • Leverage Private Investment |
| • Attract Investment | • Remove Blight |
| • Increased Tax Base / Revenue | • Control Land Use |
| • Increased Property Values | |

Brownfield Redevelopment Challenges

> Financial

- Increased Costs
- Difficult to Estimate

> Liability (Owner / Operator of Site)

> Remediation Considerations

- Time
- Cost
- Regulatory Involvement

Brownfield Redevelopment Challenges (Cont'd.)

> Uncertainties

- Market Demand
- Infrastructure Conditions
- Contamination

> Securing Financing

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Senior Environmental Advisor

- > Advises clients on contamination issues, cleanup requirements, and cost-effective remedial strategies under state and federal Superfund and brownfields programs.
- > 32-year career with the New York State Department of Environmental Conservation, where he spent the majority serving as the Regional Remediation Engineer for Western New York.
- > Served as an adjunct professor for the University at Buffalo, where he taught courses on hazardous waste remediation and environmental engineering design.

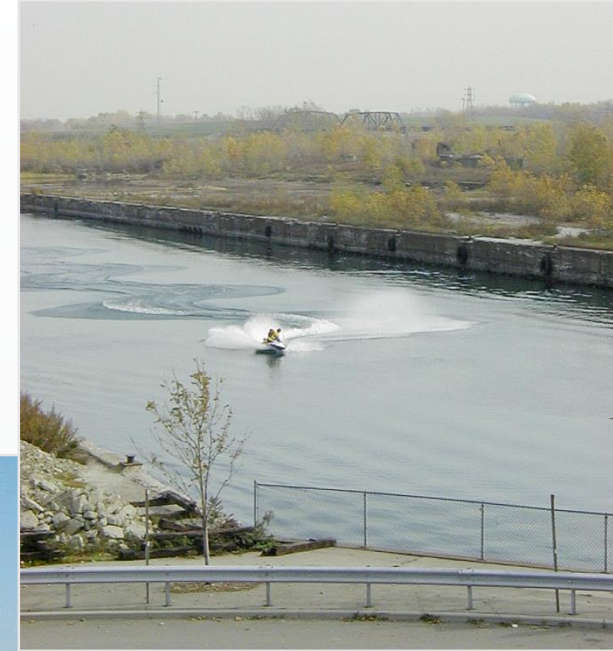
Brownfield Cleanup Program Summary



Brownfield Cleanup Program (BCP)

- > Protective and predictable cleanups
 - Use-based
- > Investigations and cleanups conducted under DEC oversight
- > Certificate of Completion
 - Liability release
 - Tax incentives







Site Assessment Process Terms

- > Phase 1
- > Site Characterization
- > All Appropriate Inquiry (AAI)
- > Phase II
- > ASTM

Phase II Assessments

> Analysis of:

- soil
- sediment
- soil vapor
- groundwater

> Risk Assessment

The Deal

- > Order on Consent
- > Brownfield Cleanup Agreement
- > State Assistance Contract

All Programs Follow a Process

> Site Investigation Work Plan

- Define Nature & Extent of Contamination
- Identify Affected Media
 - Soil
 - Groundwater
 - Vapor

Alternatives Analysis

> Hierarchy

- Protection of Health & Environment
- Source removal
- Groundwater protection/control
- Treatment

Land Use

- > Current use & development patterns
- > Zoning
- > Brownfield Opportunity Area (BOA)
- > Master Plans, LWRP
- > Environmental Justice
- > Federal/State Land use designation
- > Floodplains
- > Groundwater vulnerability

Citizen Participation Requirements

- > Site is listed or reclassified
- > Interim Remedial Measures
- > Beginning/End of Site Investigations/Alternative Analysis
- > Remedy Selection
- > Construction
- > Certificate of Completion

Certificate of Completion

- > Issued after Final Engineering Report
- > Release of Liability

Site Preparation & Remediation Tax Credits

Cleanup Track	Unrestricted	Residential	Commercial	Industrial
Track 1 (Unrestricted)	50%	NA	NA	NA
Track 2 (Look-up SCOs) (No IC/ECs)	NA	40%	33%	27%
Track 3 (Site-specific SCOs) (No IC/ECs)	NA	40%	33%	27%
Track 4 (IC/ECs)	NA	28%	25%	22%

Tangible Tax Credits

Baseline	10%
Plus the sum of the following:	
Environmental Zone	5%
Track 1 Cleanup	5%
Brownfield Opportunity Area	5%
Affordable Housing	5%
Manufacturing	5%
Maximum %	24%
Cap – non-manufacturing	\$35M or 3x Site Prep
Cap - Manufacturing	\$45M or 6x Site Prep

South Ogden St. Charter School



New South Buffalo Charter School: Fall 2014

South Ogden Street School

Cost Comparison

Brownfield

Environmental	\$1.2MM
Legal/NYSDEC	\$75K
Development	\$23MM
Tax Credits	(\$2.7MM)
Net Cost	\$21.6M

Non-Brownfield

Environmental	\$500K
Legal/NYSDEC	\$15K
Development	\$23MM
Tax Credit	\$0
Net Cost	\$23.5M

Net BCP Equity = **\$1.9MM**

*Equally Important: Liability Release &
NYSDEC/NYSDOH Approval*

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Real Estate | Senior Associate

- > Experienced commercial real estate lawyer representing owners, landlords, tenants, buyers, sellers, borrowers, lenders, and investors in purchases, sales, leases, financing, title and due diligence matters.
- > Structures and negotiates all phases of real estate development projects throughout New York State and the country, and across many classes of property (vacant, improved, brownfields, etc.) for multiple uses including office, medical, residential, retail, manufacturing, warehouse, industrial and renewable energy.
- > Represents individuals, small businesses, not-for-profit organizations, and national/international companies.

The Real Estate Transaction

- > Environmental Easement
- > Transaction Components: Pre-BCA Sites
- > Transaction Components: BCA Sites
- > Transaction Components: Purchase and Sale Agreement Terms

Environmental Easement

“[T]he Purposes of this Environmental Easement are: to convey to Grantee real property rights and interests that will run with the land in perpetuity in order to provide an effective and enforceable means of encouraging the reuse and redevelopment of this Controlled Property at a level that has been determined to be safe for a specific use while ensuring the performance of operation, maintenance, and/or monitoring requirements; and to ensure the restriction of future uses of the land that are inconsistent with the above-stated purpose.”

(Section 1 – Purposes Clause)

Environmental Easement

Run With The Land In Perpetuity

- > Easement is recorded with the County Clerk (Book of Deeds)
- > Can only be released by the DEC
- > All subsequent property conveyance documents must include reference to the Environmental Easement
 - Deeds
 - Easements and Rights of Way
 - Leases and Licenses

Environmental Easement

Enforceable Means

- > Enforceable by Grantor, Grantee, or any affected local government
 - Includes “every municipality in which land subject to an environmental easement is located”
- > Enforceable against the owner of the Property, any lessees, and any person using the land.
 - If there is a violation of the Environmental Easement, the DEC can revoke the Certificate of Completion

Environmental Easement

Ensuring The Performance of Operation, Maintenance and/or Monitoring Requirements

- > Engineered structures that must be maintained
- > Requires adherence to the Site Management Plan

Environmental Easement

Ensure The Restriction of Future Uses

- > Residual contamination at levels determined safe for some uses, but not all uses
 - Industrial, Commercial, Restricted Residential, Residential
- > Sets forth both permitted and prohibited uses
 - Groundwater use restrictions
 - Soil management restrictions

Transaction Components: Pre-BCA

- > Buyer: Thorough due diligence (180 days), including a Phase II, to ascertain site conditions, level of contamination and remediation expense
 - Seller: Know nothing
- > Will need a sense of the end user (different cleanup standards)
- > Timing on development; the current program ends March 31, 2026 and incentives may be modified if extended
- > Buyer: Contract contingency for reasonable assurances property will be admitted into BCP
 - Seller: Don't want to bind property to BCA before closing

Transaction Components: Site in BCA

- > Want to have an independent environmental consultant review site documents to understand extent of management costs and use restrictions
- > Accountants to assess tax credits within development scope
- > Buyer will need to be added to the BCA via Amendment
 - 60 days notice before closing

Transaction Components: Purchase and Sale Agreement Terms

- > Eligible tax credits properly allocated between the parties
- > Obligation to obtain Certificate of Completion
- > Buyer (and Buyer party) obligations under BCA and SMP
- > Post-Closing obligations and indemnities
- > Memorialize obligations in deed and other conveyance documents
- > Binding on successors in interest



Questions?



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List of References

NYSDEC DER-32 Brownfield Cleanup Program Applications and Agreements

https://www.dec.ny.gov/docs/remediation_hudson_pdf/der32.pdf

NYSDEC Brownfield Cleanup Program Citizen Participation Plan (Example)

<https://www.dec.ny.gov/data/DecDocs/C360198/Application.BCP.C360198.2020-01-01.Citizen%20Participation%20Plan.pdf>

NYSDEC Brownfield Redevelopment Toolbox

https://www.dec.ny.gov/docs/remediation_hudson_pdf/bftoolbox.pdf

EPA Anatomy of Brownfields Redevelopment

https://www.epa.gov/sites/production/files/2015-09/documents/anat_bf_redev_101106.pdf

New York State Environmental Conservation Law Article 71 Title 36 (Environmental Easement)

<https://codes.findlaw.com/ny/environmental-conservation-law/#!tid=N609F52D59768461B9E2827072C91EDE2>

New York State Environmental Conservation Law Article 27 Title 14 (Brownfield Cleanup Program)

<https://codes.findlaw.com/ny/environmental-conservation-law/#!tid=N807A352C48BB40F3A300917CFC66B558>

New York State Regulations 6 NYCRR Part 375-3 (Brownfield Cleanup Program)

[https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ide14c1c0b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ide14c1c0b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))

NYSDEC Brownfield Cleanup Program website

<https://www.dec.ny.gov/chemical/8450.html>

NYSDEC Environmental Easement Checklist

<https://www.dec.ny.gov/chemical/65118.html>

NYSDEC Sample Environmental Easement

https://www.dec.ny.gov/docs/remediation_hudson_pdf/easement.pdf