

# **Brownfields: County Considerations and Opportunities**

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# **BROWNFIELDS COUNTY CONSIDERATIONS AND OPPORTUNITIES**

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## **Canalside Buffalo**



# New York City High Line Park



*Before*



*After*

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 Lippes  
Mathias  
ARCHITECTS

# Tulsa, OK Guthrie Green

**Brownfield Site Before Renewal**



**Guthrie Green After Renewal**



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# The Basics

## o 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."

## o Considerations

- ❖ Benefits
- ❖ Challenges
- ❖ Roles
- ❖ Some Nuts and Bolts

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# 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

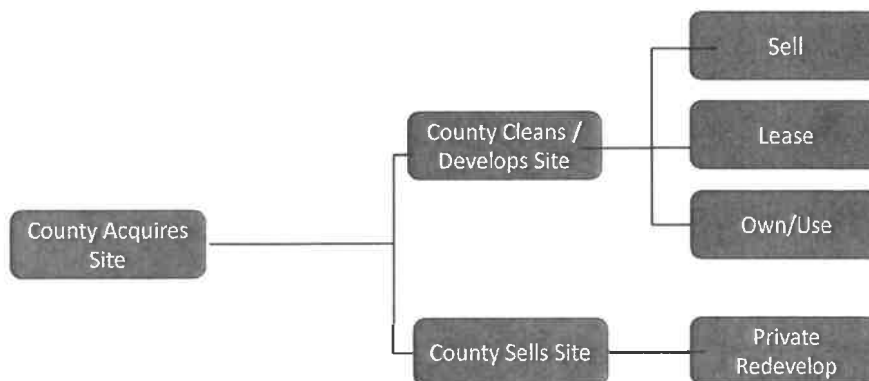
- Economic Growth
- Attract Investment
- Increased Tax Base / Revenue
- Increased Property Values
- Leverage Private Investment
- Remove Blight
- Control Land Use

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# Potential Brownfield Challenges

- Financial (Increased Costs; Difficult to Estimate)
- Remediation Considerations (Time; Cost; Regulatory)
- Uncertainties (Demand; Infrastructure Conditions; Contamination)
- Securing Financing
- Liability (Owner/ Operator of Site)

# Potential Brownfield Scenario: “Public”



# Overview: Environmental Liability

- **Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) (CERCLA)**
  - ❖ Allows Federal government to assess and/or clean up contaminated sites
  - ❖ Liability scheme allowing EPA to order certain parties to conduct or pay for the cleanups
  
- **Inactive Hazardous Waste Disposal Sites laws (ECL Article 27, Title 13 and Public Health Law §§1389-a, et seq.) (NYS Superfund Law)**
  - ❖ Allows NYSDEC to order and implement cleanups (using State Superfund money with cost recovery) if site presents a “significant threat to the environment”
  
- **New York Oil Spill Law (Navigation Law Article 12)**
  - ❖ Liability for “any person who has discharged petroleum”

**\*\*\* Liability is STRICT, JOINT & SEVERAL, and RETROACTIVE\*\*\***

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# Potentially Responsible Parties (PRPs)

- **CERCLA (§ 107(a))**
  - ❖ Current or Past Owner or Operator
  - ❖ Arranger for hazardous waste disposal or treatment, or transport for disposal or treatment
  
- **NY Superfund Law (6 N.Y.C.R.R. §375-2.2(i))**
  - ❖ Current or Past Owner or Operator
  - ❖ Generator or Transporter of contaminants disposed at a site
  - ❖ Arranger for contaminant transportation or disposal
  - ❖ Any other person responsible under statutory or common-law liability pursuant to ECL 27-1313(4) and/or CERCLA

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## CERCLA Liability Protections When Local Governments Acquire Contaminated Properties

- o Exemption for local government from the definition of “owner or operator” when functioning as a “sovereign” (CERCLA § 101(20)(D))
- o Exemption from “owner or operator” liability for knowingly acquiring a contaminated property; must achieve and maintain status as bona fide prospective purchaser (CERCLA §§ 101(40) and 107(r)(1)).
- o Liability protection to parties that acquire contaminated property and meet certain third-party defense requirements and innocent landowner criteria (CERCLA §§ 107(b)(3) and 101(35)(A)).

**\*\*The method or type of property acquisition by a local government will play a critical role in the application of CERCLA liability protections \*\***

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## CERCLA Liability Protections When Local Governments Acquire Contaminated Property

- o “Unit of State or Local Government”
- o “Function[ing] as a Sovereign”
- o “Caused or contributed to the Release . . . Of a hazardous substance”

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## NYS Protections When Local Governments Acquire Contaminated Property

### o Municipal exemption (ECL § 27-1323)-

*“(a) For the purposes of this title no public corporation shall incur any liability from any statutory claims of the state as an owner or operator of a site, or a person responsible for the disposal of a hazardous waste at such site, if such public corporation acquired such site involuntarily, and such public corporation retained such site without participating in the development of such site.*

*“(b) This exemption shall not apply to any public corporation that has caused or contributed to the release or threatened release of a hazardous waste from or onto the site, or to any public corporation that generated, transported, or disposed of, arranged for, or that caused the generation, transportation, or disposal of hazardous waste, from or onto the site.”*

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## NYS Protections When Local Governments Acquire Contaminated Property

o “Public corporation”

o “Involuntary”

o “Participating in development”

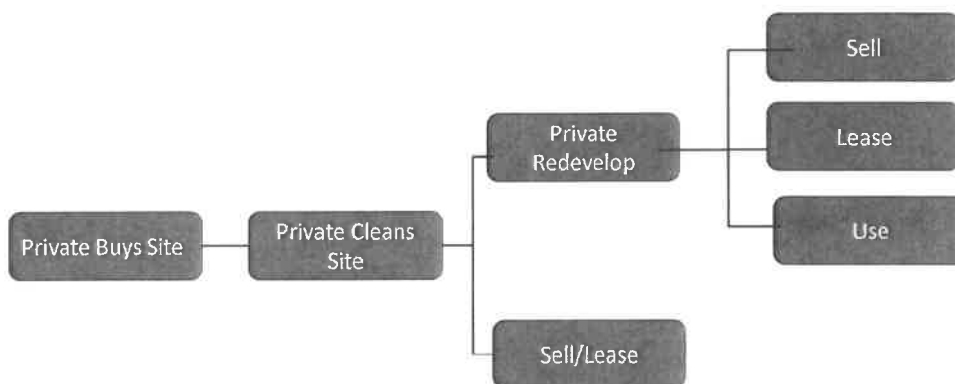
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## Brownfield Program Cleanup Protections

- NY ECL § 27-1323- “Without participating in development” - Improvements or environmental investigation/remediation, not part of a remedial program or for site safety
- CERCLA § 128(b)- Liability protection known as the “enforcement bar” to parties conducting or that have completed a cleanup in compliance with a state response program

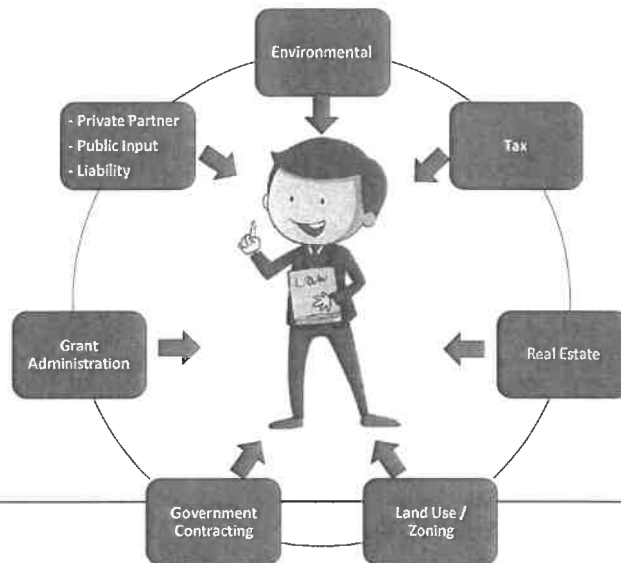
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## Potential Brownfield Scenario: “Private”



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## Why Does a County Attorney Care?



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## Brownfield Cleanup Program

- Brownfields- Properties where contaminants are present at levels exceeding established standards based on the reasonably anticipated use of the property; exceptions apply associated with existing cleanups or enforcement actions and certain properties in New York City.
- Goal of BCP- Encourage private-sector cleanups of brownfields (vs. developing on green fields) and promoting their redevelopment as a means to revitalize economically blighted communities.
- Incentives- Removes barriers to redevelopment, provides financial incentives (via tax credits) and provides liability protections.
- BCP is administered by NYSDEC

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# NY Brownfield Cleanup Program Process

- Owner/prospective purchaser conducts Due Diligence to determine BCP feasibility.
- BCP Application filed with NYSDEC
- NYSDEC makes eligibility determination (i.e., to accept or deny application)
- The Applicant signs Brownfield Cleanup Agreement (BCA)– i.e., agrees to undertake remedial activities under NYSDEC oversight.
  - ❖ Volunteer- Applicant who is not liable for disposal of hazardous waste or discharge of petroleum at the site.
  - ❖ Participant- An applicant who was an owner or operator at the time of disposal of hazardous waste or discharge of petroleum, or who otherwise failed to take reasonable care to stop continuing releases or prevent further releases.
- Applicant receives a Certificate of Completion (COC)- Determination that the remedial action have been achieved.
  - ❖ Applicant receives a limitation of liability to the State for contamination identified by the remedial program.
  - ❖ Applicant is eligible to apply for BCP tax credits.

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# Brownfield Cleanup Program Process

- Work Plan- All environmental investigation and cleanup activity must be performed in accordance with Work Plan approved by DEC.
- Citizen Involvement- NYSDEC requires opportunities for citizen involvement and will encourage consultation with the public early in the process; a Citizen Participation Plan provides details on the citizen participation activities during a BCP project
- Remedy- Will be based upon characterization of nature and extent of contamination on the site and qualitative exposure assessment.
  - ❖ Participant- Remedy must address contamination on-site and contamination that has migrated off-site.
  - ❖ Volunteer- Remedy must address contamination on-site and prevent further migration of contamination off-site.
- Different cleanup tracks based upon restriction levels on future property use (Tracks 1-4)

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## Brownfield Cleanup Program Incentives

- o Financial Incentive is BCP Tax credits
- o Three types of tax credits.
  - ❖ Site Preparation Cost- All costs necessary to make the property ready for development. The amount of the Site Preparation tax credit that may be claimed depends on the level of cleanup and ranges from 28% to 50% of the costs.
  - ❖ Post-COC groundwater monitoring costs at the same percentage of the Site Preparation tax credit. This credit may be claimed annually for the five year period following the issuance of the COC.
  - ❖ Qualified tangible property (QTP) tax credit which ranges from 10% to 24% of the value of the improvements constructed on the brownfield site subject to a cap of \$35MM or 3 times the Site Prep costs (whichever is less). BCP applicants have ten years from the issuance of the COC to put the building into service and claim the tangible property tax credit.
- o BCP tax credits are refundable; if the tax credit exceeds the applicant's tax liability, the tax credit is treated as a tax overpayment and the state pays that amount back to applicant.

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## Real Estate Considerations: 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.”

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# **Intergovernmental Relations:**

## **The Relationship Between the DA's Office and County Attorney's Office**

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## Areas of Our Relationship

- Raise the Age
- Subsequent Civil Actions
- Prosecutor's Misconduct

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## CPL §722

### Proceedings Against Adolescent Offenders & Juvenile Offenders; Establishment of Youth Part & Related Procedures

1. Establishment of the Youth Part: CPL § 722.10
  - ❖ Superior Court Criminal Part with *Exclusive Jurisdiction* for Youth charged with FELONY offenses, ages 13-17
  - ❖ Exclusive jurisdictions in all proceedings relating to Adolescent Offenders & Juvenile Offenders
  - ❖ Specially trained Family Court judges
2. Creation of Adolescent Offender & Procedures § CPL 1.20(44)
  - ❖ New Category: Adolescent Offender – 16 or 17 year old charged with a felonies offense
  - ❖ Increased the Age of Responsibility, Penal Law § 30 amended
    - ❖ Misdemeanors: Ages 12-17, FCA 301.2
3. Enhanced Protections for Adolescent Offenders
  - ❖ Housing, In custody procedures/notifications, Police Interview procedures

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# Terminology

- **Youth Part:** Criminal Superior Court for Adolescent (AOs) & Juvenile Offenders (JOs)
- **Adolescent Offender (AO):** 16 or 17 year old charge with a Felony Offense. CPL §722; CPL § 1.20(44); PL § 30.00(1)
- **Juvenile Offender (JO):** 13-15 year old charged with an enumerated violent felony. CPL § 1.20(44); PL §10.00(18), PL §30
- **Juvenile Delinquent:** 12-17 year old charged with a Misdemeanor, non-violent felony or designated felony. FCA § 301.2

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# Felony: Adolescent Offender

- 16 or 17 year old charged with a Felony Offense = AO
- Youth Part has exclusive jurisdiction
- Presumption is removal to Family Court with exceptions
- If remain in YP, treated as an Adult until Sentencing

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## Felony: Juvenile Offender

- 13-15 Year Old charged with enumerated Felony Offenses – PL §10.00(18), CPL §1.20(42)
- 13 year old:
  - ❖ Only can be charged with Murder in the Second Degree, PL 125.25 (1) & (2); Sexually Motivated Felony, PL § 130.91

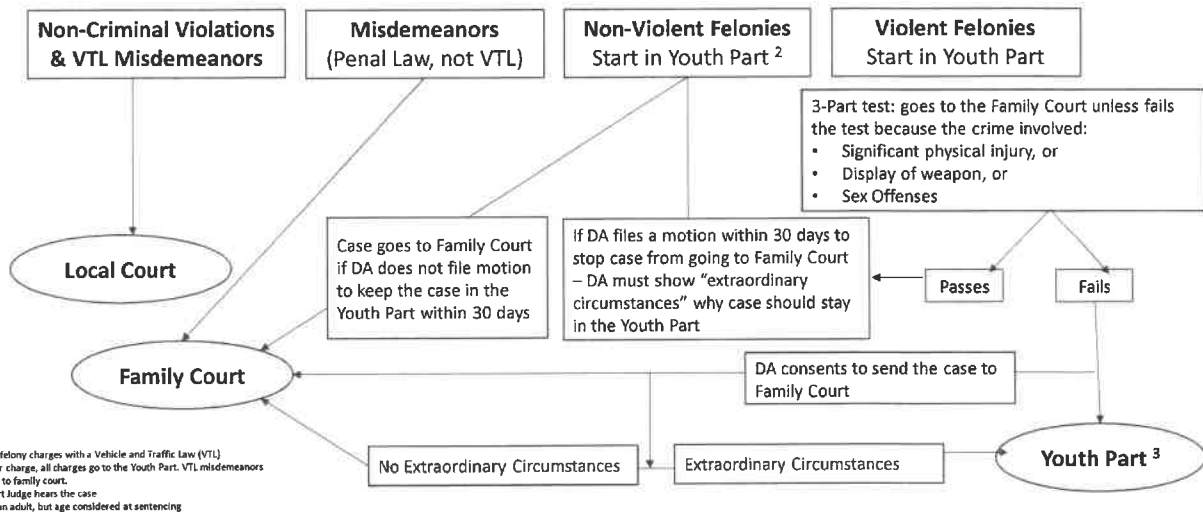
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## Juvenile Offenders: 14 & 15

- 14 & 15 Year Olds:
  - ❖ Felony Murder PL § 125.25(3) (where the underlying offense is JO offense)
  - ❖ Manslaughter 1<sup>st</sup> PL § 125.20
  - ❖ Kidnapping 1<sup>st</sup> PL 135.25
  - ❖ Arson 1<sup>st</sup> PL § 150.20, Arson 2<sup>nd</sup> PL 150.15
  - ❖ Rape 1<sup>st</sup> PL § 120.35(1,2), Criminal Sexual Act 1<sup>st</sup> PL § 130.50(1,2); Aggravated Sexual Abuse 1<sup>st</sup> PL 130.70
  - ❖ Burglary 1<sup>st</sup> § PL 140.30; Burglary 2<sup>nd</sup> 140.25(1)
  - ❖ Robbery 1<sup>st</sup> § PL 160.15; Robbery 2<sup>nd</sup> 160.10(2) [injury or displays]
  - ❖ **CPW 2<sup>nd</sup> 265.03 ONLY on School Grounds**
- No Attempts except:
  - ❖ Attempted Murder 2<sup>nd</sup>
  - ❖ Attempted Kidnapping 1<sup>st</sup>

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# Raise the Age Flowchart



# Misdemeanors & Violations: Juvenile Delinquent

- o 16 or 17 Year Old Misdemeanor Arrests
  - ❖ Juvenile Delinquency Matter under the Family Court Act, FCA § 301.2
    - ❖ County Attorneys Office handles Prosecution
  - ❖ Prosecuted in Family Court exclusively
  - ❖ No longer criminally responsible; subject to an adjudication
  - ❖ Arrest 1<sup>st</sup> processed by Adjustment Services (Probation Department)
  - ❖ Violations & VTLs handled in local City, Town or Village Justice Court

# Removal of Juvenile Offenders CPL § 722.22

## ○ CPL § 722.22(1): Motion in the Interest of Justice

- ❖ Felony Complaint or Post Indictment
- ❖ Any party including the Court on its own motion
- ❖ Factors CPL § 722.22(2)(a)-(i)

## ○ CPL § 722.22(1)(b): Post Indictment Motion to Remove

- ❖ Charge: Murder 2<sup>nd</sup>, Rape 1<sup>st</sup>, Criminal Sex Act 1<sup>st</sup> or Armed Felony:
  - ❖ Requires People's consent; and
  - ❖ Court shall make a Finding of one or more factor:
    - (1) mitigating circumstances that bear directly upon the manner in which the crime was committed;
    - (2) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor
    - (3) Deficiencies in proof of the crime; AND,
    - (4) after consideration of the factors set forth in CPL 722.22(2), the court determined that removal of the action to the family court would be in the interests of justice.

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