Phillips Lytle LLP

Earth Matters

December 2011
Issue Nine

AN ENVIRONMENT & ENERGY REPORT FROM PHILLIPS LYTLE

Stormwater Control on Construction Sites: How Did We Get Here? Where Are We Going?

In 1972, Congress passed the Federal Water Pollution Control Act Amendments, better known as the Clean Water Act ("CWA"), to reduce or eliminate widespread water pollution from uncontrolled discharges to our nation's rivers, lakes and streams. How Congress sought to accomplish this goal was explained in the landmark case *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1371-72 (D.C. Cir. 1977):

> The [CWA] sets up a permit program, the National Pollutant Discharge Elimination System (NPDES), as the primary means of enforcing the Act's effluent limitations . . . Section 402 . . . provides that under certain circumstances the EPA Administrator "may . . . issue a permit for the discharge of any pollutant" notwithstanding the general proscription of pollutant discharges found in § 301 of the Act. The discharge of a pollutant is defined in the [CWA] as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft."

These regulations not only govern the commonly considered pollutants, such as chemicals from a factory's outlet, but also regulate the dust and soil collected by stormwater as it runs across a subdivision that is under construction. To control the latter, the CWA required the EPA to enact stormwater discharge regulations in two phases. The first phase of regulations prohibited stormwater discharges from certain large municipalities and industrial sites and granted the agency "residual authority" to regulate specific stormwater discharges if the agency found that such discharges were a significant contributor of pollutants. The second phase of regulations governed stormwater discharges from municipal sewer systems and construction sites.

The CWA also granted States the ability to regulate stormwater discharges, and New York chose to enact its own regulatory system based, in large part, on the Federal program. Under New York's stormwater discharge program (called the State Pollution Discharge Elimination System (or "SPDES")), it is unlawful, without a written SPDES permit, to:

> Make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state, or increase or alter the content of the wastes discharged through an outlet or a point source into the waters of the state by a change in volume or physical, chemical or biological characteristics.

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As a result, in New York, developers (or their contractors) must first obtain a SPDES permit before excavation begins. Because of the one-acre threshold, most construction sites are subject to this permitting requirement.

Rather than issuing unique permits for every construction project, the Department of Environmental Conservation (DEC) allows developers and contractors in New York to obtain coverage under the Agency's General Permit For Stormwater Discharges from Construction Activity. The DEC's so-called "General Permit" requires a project sponsor to provide copies of the permit and underlying documentation to any requester and make available, for public inspection, all documentation related to the stormwater permit. The owner or operator must prepare and implement a stormwater pollution prevention plan ("SWPPP"), keep the local municipal separate storm sewer system ("MS4") authority informed of any changes to the SWPPP, and have regular site inspections for the project performed by a qualified inspector. A qualified inspector is a licensed professional engineer, a certified professional in erosion and sediment control, a registered landscape architect, or a person working under one of those professionals who has completed the DEC training course. At the conclusion of construction (or upon "site stabilization"), the owner or operator of the site also must obtain an acknowledgement from the MS4 that the owner or operator completed the stormwater control measures in conformity with the SWPPP and to the satisfaction of the MS4. Until the MS4 completes the MS4 acceptance letter, the owner or operator is unable to terminate the SPDES permit.

The DEC's General Permit also provides for the adoption of design measures found in the Agency's new Stormwater Management Design Manual ("2010 Design Manual"). In particular, the 2010 Design Manual places new emphasis on green infrastructure. The 2010 Design Manual promotes infiltration of rain water and groundwater recharge, rather than diverting the rain water through drains to sewers and eventually to ponds, lakes, rivers, or streams. The DEC's 2010 Design Manual encourages new projects to mimic preconstruction hydrology and discourages the addition of new stormwater sources and the increase of stormwater to the stormwater collection system.

This means developers may need to incorporate green infrastructure into their projects to ensure that predevelopment hydrology is preserved. This can be done by using "rain gardens" which allow rainwater to infiltrate and enter the groundwater system, or by

incorporating paver blocks (that allow rain to infiltrate) rather than impervious pavement (which forces runoff and requires the collection and storage of stormwater).

Overall, the 2010 Design Manual builds on 40 years of pollution prevention efforts and stormwater control measures and encourages new developments to avoid merely collecting and sending stormwater off-site to be treated. In doing so, the natural hydrology in the project area is preserved, and the limited capacity of wastewater treatment plants, which often are outdated and ill-equipped, are preserved. This also allows ground water to recharge and keeps streams and stormwater systems from overflowing and flooding. The winners in the development industry will be the ones who build these new measures into their site designs early in the planning stages and find ways to make these measures selling points to potential buyers.

If you have a question about stormwater control on construction sites, please contact Jennifer Dougherty, Associate in the Phillips Lytle Environmental Practice, at (716) 504-5789 or jdougherty@phillipslytle.com. ■

Spotlight

PHILLIPS LYTLE RECOGNIZED BY CHAMBERS USA 2011 FOR EXCELLENCE IN ENVIRONMENTAL LAW

Phillips Lytle LLP has been included in *Chambers USA 2011: America's Leading Lawyers for Business* for outstanding expertise in Environmental Law. Considered the most widely-used legal directory by in-house counsel for retaining outside counsel, *Chambers* is released annually by U.K. publisher Chambers and Partners, and is based on extensive independent research and interviews with firm clients and peer lawyers worldwide.

Chambers stated "Phillips Lytle continues to earn high praise for its comprehensive environmental practice" and its "wide range of experience includes environmental impact review, brownfields redevelopment, land use matters and toxic tort litigation." Client comments praised the Phillips Lytle environmental law team saying the "quality, cost efficient service exhibited by the environmental group is a reflection of overall excellence at the firm."

This marks the third year in a row *Chambers* has ranked the Phillips Lytle environmental practice for its exemplary work.

Buffalo Partners David P. Flynn and Morgan G. Graham were both cited for individual excellence.

Mr. Flynn was described as "responsive, good-natured and easy to work with." His advice centers on the core areas of regulatory compliance and brownfield redevelopment. He is the leader of the firm's nanotechnology department, and has extensive understanding of environmental concerns that arise from the commercialization of nano materials.

Mr. Graham was cited by the publication for his "impressive regulatory knowledge across renewable energy, greenhouse emissions and environmental due diligence." *Chambers* also stated he is particularly admired for his client-focused approach, stating, "He understands the goals and resolves matters in a cost-effective and responsible manner."

More information can be found at www.chambersandpartners.com.

DAVID P. FLYNN APPOINTED TO NATIONAL BROWNFIELD ASSOCIATION'S BOARD OF DIRECTORS

David P. Flynn, a partner with Phillips Lytle LLP was recently appointed to a one-year term on the National Brownfield Association's (NBA) board of directors. Mr. Flynn will also serve as president of the association's New York chapter.

The NBA is a Chicago-based non-profit, educational organization dedicated to stimulating the responsible redevelopment of brownfields. The NBA is the premier association for government, businesses and individuals involved in the sustainable redevelopment of brownfields, and connecting green building to brownfield sites.

Mr. Flynn concentrates his practice in the areas of environmental law and energy and heads up the firm's energy team. He is a member of the American Council On Renewable Energy's Leadership Council (ACORE) and an advisory board member of Incubators for Collaborating & Leveraging Energy and Nanotechnology (iCLEAN). He also serves as chairman of the Amherst Chamber of Commerce.

INSHIRAH A. MUHAMMAD JOINS ENVIRONMENTAL PRACTICE TEAM

Phillips Lytle proudly welcomes Inshirah A. Muhammad to its Environmental and Real Estate Practice Teams. Working out of the firm's New York City office, Inshirah concentrates her practice in the area of commercial real estate, including the leasing, acquisition, disposition, and financing of real estate properties and portfolios. She recently earned her LEED Green Associate certification as well.

Prior to joining Phillips Lytle, she was an Associate attorney at Lowenstein Sandler. Her impressive experience and credentials include assisting commercial clients in connection with the leasing, acquisition, and disposition of their real estate portfolios; representing numerous companies in their leasing of office and retail space throughout New Jersey and New York; and handling numerous entity formation and corporate organizational matters involving the acquisition, disposition, and financing of commercial real estate.

Inshirah graduated from Rutgers, The State University of New Jersey School of Law, in 2007 and Amherst College in 2002. While in law school, she served on the Editorial Board of *Rutgers Law Review* and she was selected to be a Teaching Associate in Rutgers' Legal Research & Writing Program.

You can see why we are thrilled to have her join us.

New Rule Against Perpetuities Court of Appeals Case

The infamous "Rule against Perpetuities" (the "Rule") dates back centuries. Despite its age, questions still arise concerning its application. A recent New York Court of Appeals case (*Bleecker St. Tenants Corp. v. Bleecker Jones LLC*, 16 N.Y.3d 272 (2011)) deals with the situation that arises when a series of lease renewal options extend many years into the future. In *Bleecker Street*, the Court held that lease renewal options in favor of a tenant in possession, which can extend for many decades, are not subject to the Rule and, therefore, will not be invalidated by the Rule.

The Rule – a prohibition against the remote vesting of property rights – was originally a creature of English common law and later American common law, before it was enacted as a statute in New York. New York's current version of the Rule, enacted in 1966, provides in relevant part that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." See New York Estates, Powers and Trusts Law § 9-1.1(b). If corporations, rather than natural persons, are involved and no measuring life is stated in the instrument, then the Rule applies without consideration for lives in being, and the property interest must vest within 21 years of the grant.

The purpose of the Rule is to avoid suspension of alienation or remote vesting of property rights for periods of time considered to be "socially undesirable." Historically, that happened when people gifted property to their heirs or beneficiaries through a will or trust, but placed restrictions on whether, when, or to whom, the property later could be sold. When a grantor deprives subsequent owners of the right to freely transfer property for an extended period of time, those subsequent owners tend to be reluctant to invest in the productive use and development of the property. By preventing current owners from restricting (beyond the Rule's time limits) the rights of subsequent owners to sell their property, the Rule encourages investment in, and maintenance, development and use of, the property.

The Court of Appeals previously decided that options to purchase property are subject to and must comply with the Rule. In *Symphony Space v. Pergola Props.*, 88 N.Y.2d 466 (1996), the Court explained that, with an option to purchase, the holder has "the power to compel the owner of the property to sell it whether the owner is willing to part with ownership or not." The *Symphony Space* court, however, held that certain options to purchase land are excluded from the Rule, even if the option lasts longer than 21 years. Those excluded options to purchase arise if the option: (1) originates in a lease; (2) is not exercisable after the lease expires; and (3) is incapable of separation from the lease. If an option to purchase satisfies these three criteria, then it is considered "appurtenant" to the lease and is not subject to the Rule, no matter how long the term of the lease might be or how far into the future the option may be exercised. The Court explained that options appurtenant to leases are excluded from the Rule because they promote investment in the leased premises by the tenant.

In *Symphony Space*, because the corporate tenant's option did not meet the three criteria necessary to be excluded from the Rule, the Court held that the option to purchase was not appurtenant to the lease and was invalid from its inception because the option could be exercised more than 21 years after it was granted.

In February of this year, the Court of Appeals turned to the question whether a lease renewal option is also subject to the Rule and, if so, whether a lease renewal option that is appurtenant to the underlying lease may escape the Rule. In *Bleecker Street*, the Court held that options to renew leases are not subject to the Rule, because the 1966 New York statute codified the American common law, which historically did not apply to options to renew leases. The Court further noted that the exclusion of lease renewal options from the effect of the Rule is appropriate because lease renewal options are inherently

appurtenant to the lease and do not grant the beneficiary the power to divest title to the property. Options to renew leases further the policy goals of the Rule because the tenant is assured of continuous possession of the property without interruption, thus encouraging the tenant's productive use of and investment in the property.

The decision in *Bleecker Street* was decided by the slimmest of margins, with concurring and dissenting opinions, both of which concluded that options to renew leases should be subject to the Rule. As a result, when drafting an option to renew a lease, the safest approach is to ensure that either: (1) the option must be exercised fewer than 21 years after one or more lives in being (or 21 years for corporate tenants); or (2) the option (i) arises in the underlying lease, (ii) must be exercised before the lease expires, and (iii) cannot be separated from the lease. By utilizing one of these strategies, the drafter will assure the option's enforceability.

If you have a question regarding the Rule against Perpetuities, contact Kevin M. Hogan, Partner and Team Leader in the Phillips Lytle Environmental Practice, at (716) 847-8331 or khogan@phillipslytle.com or contact Real Estate Partner Albert M. Mercury at (585) 238-2031 or amercury@phillipslytle.com. ■

Great Lakes Water Withdrawal: A Debate Ensues

Water withdrawal from the Great Lakes has received recent attention as the neighboring States impose varying restrictions on withdrawal of Great Lakes water. New York, for one, recently enacted legislation forbidding the withdrawal of more than 100,000 gallons of water per day from Lake Erie without first registering with the New York State Department of Environmental Conservation (NYSDEC). These withdrawals also are subject to an annual reporting of usage factors. Ohio, on the other hand, considered legislation which would allow unrestricted or unregistered withdrawals of up to 5 million gallons per day. Some believe such a high limit will spur economic development in Ohio, while others believe such a high limit will cause negative environmental impacts for the Great Lakes. Michigan has the most restrictive Great Lakes water withdrawal program, limiting withdrawals to 10,000 gallons per day without registration. The industries or operations affected by the legislation include power plants, high water usage manufacturers (e.g., cooling water usage), mining operations, oil and gas producers, municipal water systems, snow-making and golf course operations, and water bottlers.

The backdrop of the current debate is the Great Lakes – St. Lawrence River Basin Water Resources Compact, which all Great Lakes States and two Canadian Provinces signed in a cooperative effort to preserve and protect one of the world's largest sources of fresh water (18 percent). The compact left it to the States to determine how to regulate the withdrawal of waters within their boundaries, consistent with the principals underlying the compact. Herein lies the genesis of the debate.

For more information on Great Lakes water withdrawal, contact Morgan G. Graham, Partner in the Phillips Lytle Environment and Energy Practices, at (716) 847-7070 or mgraham@phillipslytle.com.

New Incentives Available for Redevelopment of Brownfields in New York City

New York City recently enacted the New York City Brownfield Cleanup Program ("NYC BCP"), the first municipal brownfield clean-up program in the United States. The NYC BCP, which is managed by the Mayor's Office of Environmental Remediation ("OER"), fills a gap in the New York State Brownfield Cleanup Program ("State BCP") by providing incentives to land owners and developers to clean up sites that contain light to moderate contamination (including historic fill) in the five boroughs of New York City. Unlike the State BCP, the NYC BCP does not offer tax credits to encourage cleanups. However, the NYC BCP does offer flexible financial assistance grants and provides a liability release from the City when a cleanup is complete.

All "Qualifying Brownfield Properties in the City of New York," which are those sites with the presence or likely presence of hazardous substances and petroleum, are eligible to participate in the NYC BCP. However, the following properties may not enroll in the NYC BCP: (1) sites already in the State BCP; (2) sites listed on the EPA National Priorities List or the New York State superfund equivalent; (3) permitted hazardous waste treatment, storage, or disposal facilities; and, (4) sites subject to cleanup orders and/or ongoing State or Federal enforcement

NYSDEC Begins Stressing its Existing Electronic

Since 2005, the New York State Department of Environmental Conservation's (NYSDEC) electronic reporting guidelines have required that documents submitted to the NYSDEC Division of Environmental Remediation (DER) "must include an electronic version" that complies with DER's electronic data deliverable ("EDD") requirements. Programs within DER's purview include the State Superfund Program, the Brownfield Cleanup Program (BCP), the Voluntary Cleanup Program (VCP), and the Spills Program. The NYSDEC's Part 375 regulations, which administer DER's BCP and State Superfund Programs, expressly require that all reports, including attachments and appendices, must be submitted in electronic format. Although these regulations do not apply to the Spills Program, a remedial party in the Spills Program may be obligated to comply with EDD requirements under a consent order or stipulation agreement with DER.

As many parties and consultants are aware, complying with the EDD requirements can be time-consuming and expensive, especially for sites with a substantial number of reports and lab data. These requirements include submitting reports in searchable PDF format and laboratory data in a format compatible with DER's information management system.

actions regarding solid/hazardous waste or petroleum.

Similarly, all parties are eligible to participate in the NYC BCP, except parties subject to (1) judicial or administrative proceedings regarding the investigation or remediation of contamination, or (2) an order requiring a party to investigate and remediate contamination at a site.

Prior to enrolling in the NYC BCP, applicants must submit a work sheet summarizing redevelopment plans and known environmental conditions for the site, and then attend a pre-application meeting with OER. After the pre-application meeting, the applicant will perform a remedial investigation and prepare a draft remedial work plan. The applicant then completes and submits an NYC BCP application form, along with the Remedial Investigation Report, the draft remedial work plan, and the program fee of $1,000. Templates for the NYC BCP application, work plan, and report are modeled after the State BCP documents and are available on the OER website.

The NYC BCP offers incentives to participants in the form of financial assistance grants and liability limitations from the City of New York. Grants are available for a variety of activities, including pre-development design studies, site investigations, and cleanups. Special grants are available for properties located in a Brownfield Opportunity Area ("BOA") and at sites that have received a Hazardous Materials Restrictive E-Designation from the City of New York. The grants are capped for each activity, with higher limits for "Preferred Community Development Projects," such as affordable housing developments, projects within a BOA that are redeveloped consistent with BOA plans, and redevelopments that provide amenities to local communities, such as open space or community health care facilities. The maximum grant award for a typical Qualifying Brownfield Property is $60,000, and the maximum grant for a Preferred Community Development Project is $100,000.

Upon the completion of a site cleanup under the NYC BCP, the City of New York acknowledges that the participant has no further environmental liability to the City with respect to the site, subject to certain reopeners. Maybe of greatest value to the party performing the cleanup, the liability limitation is assignable to successors who acquire, develop, or occupy the brownfield site. Unfortunately, the New York State Department of Environmental Conservation (NYSDEC) has decided that it will not grant a reciprocal liability release under the NYC BCP program, although the NYSDEC also agreed that, in general, sites cleaned up under the NYC BCP are considered "of no further interest," and it does not anticipate undertaking enforcement action as long as a site adheres to the requirements of the NYC BCP.

Many developers and owners of properties with low levels of contamination may derive substantial benefits from the NYC BCP. Phillips Lytle can help evaluate those benefits and steer potential enrollees through the entire process. If you would like more information, contact Michael C. Murphy, Environmental Associate, at (716) 504-5748 or mmurphy@phillipslytle.com. ■

Data Deliverable Requirements

DER staff recently began stressing to remedial parties and their consultants that compliance with EDD requirements is required. Remedial parties may even need to resubmit past reports in electronic format if they did not meet the EDD requirements. Parties and their consultants will want to consider the increased expense and timing necessary to satisfy the EDD requirements when negotiating Spills Program consent orders and stipulations and evaluating cost proposals and remediation budgets, especially at complex cleanup sites.

If you have any questions about electronic data deliverable requirements, contact Michael C. Murphy, Environmental Associate, at (716) 504-5748 or mmurphy@phillipslytle.com. ■

New SEQRA Environmental Assessment Forms Proposed by NYSDEC

For the first time in over 20 years, the New York State Department of Environmental Conservation (NYSDEC) has proposed substantive changes to its Environmental Assessment Forms (EAF), which are used by project developers and permitting agencies to assess potential adverse environmental impacts from projects as required by the New York State Environmental Quality Review Act (SEQRA). The new so-called "Short" and "Full" EAFs are currently in draft form and public comment ended this past April.

The existing EAFs are outdated, as they do not require information on many recent trends in project development, such as brownfields, "green" construction, energy efficiency, climate change, smart growth, pollution prevention, and environmental justice. Also, the current Short EAF requires the project sponsor to provide so little information as to be essentially meaningless for use by municipalities in particular, which may have environmental concerns specific to the community that are not reflected in the Short EAF. Given its purpose, however, the proposed Short EAF should supply enough information for the agency to make its decision and for the project sponsor to ensure that the record adequately justifies that decision.

The revamped Short and Full EAFs proposed by NYSDEC will require more information about environmental issues that are already included in the current EAF and additional information about environmental issues currently unrepresented in the EAFs. There also are new features that aim to increase ease of use of the forms, such as grouping similar questions under broad threshold questions and simplifying Part 2 of the Full EAF by providing for "yes" or "no" responses. Also, certain questions in Part 1 of the Full EAF will be easier and cheaper to answer through hyperlinks within the form to relevant spatial data.

The proposed Short EAF may be a better option for Unlisted actions because, while still a simplified version of the Full EAF, it provides enough information to be considered useful by reviewing agencies, particularly municipalities. The proposed Short EAF highlights issues of interest to municipalities, such as the need for public improvements and a sewer/water district extension. The current Short EAF is general and vague, and does not provide the specificity that would assist those agencies or project sponsors unfamiliar with identifying or assessing potential environmental impacts. As a result, the proposed Short EAF may lead to more Positive Declarations simply because more potential impacts are under consideration. Conversely, it also could result in more detailed findings in support of Negative Declarations that would be better able to withstand judicial scrutiny.

In the proposed Full EAF, the Planning and Zoning section of Part 1 is expanded to require more information about comprehensive plans, local waterfront revitalization plans, or other planning documents. With space for descriptive responses in these areas, the project sponsor has a valuable opportunity to describe the context of the project within surrounding development, demonstrate consistency with planning documents, and shape the initial perception of a project.

Part 1 of the proposed Full EAF also includes additional questions on brownfields, utilities, stormwater runoff, air emissions (including CO2), access to public transportation, local land use plans, environmental justice and energy efficiency and conservation. The requirement of environmental justice information is a significant departure from the current approach, based on NYSDEC's Commissioner Policy 29, which requires a public outreach process in delineated environmental justice areas for only those projects requiring SEQRA compliance by NYSDEC and major environmental permits such as air pollution control and state pollutant discharge elimination system permits, among others. Instead, the proposed Full EAF expands consideration of environmental justice concerns to all agencies and all projects, and incorporates federal environmental justice policy into SEQRA documents.

Providing this increased level of detail may be burdensome for many projects and result in project delays and additional expense. These new and expanded considerations will likely make EAFs more time-consuming and costly to prepare on the front end, particularly in terms of consultant and engineering fees to prepare the forms. Smaller projects that may have used the old Full EAF, however, may be able to switch to the Short EAF. Sponsors of larger, Type I projects likely will see the longer forms as an additional burden that may further discourage new development, particularly in addition to the current regulatory and tax climate in New York.

This article was prepared by Susan M. Marriott, Associate in the Environment and Energy Practices. If you have questions pertaining to environmental assessments, Susan can be reached at (716) 504-5778 or smarriott@phillipslytle.com. ■

New York State Creates Innovative Land Bank Program

This summer, New York Governor Andrew Cuomo signed into law the Land Bank Act (Chapter 257, L. 2011), authorizing towns, villages, cities and counties to create up to 10 "Land Banks" statewide, subject to approval by the Empire State Development Corporation (ESDC). The law states that the "primary focus" of Land Bank operations will be to acquire delinquent, vacant, abandoned and foreclosed properties to return such properties to productive use. The enabling legislation, however, grants Land Banks such broad powers that they are effectively allowed to function as a primary economic development tool for a municipality, in tandem with or as an alternative to industrial development agencies (IDAs) and local development corporations, albeit with certain unique limitations.

Land Banks are "Type C" not-for-profit corporations, created by local law or ordinance by and on behalf of any municipality (or more than one municipality jointly via cooperative agreement), and governed by a board of directors. While school districts are not specifically empowered to form a Land Bank, they may participate in their governance via an intergovernmental agreement.

Members of the board of directors, which may include municipal officials, are subject to the ethics rules generally imposed on state officials and employees, even though their service is without compensation. Any employees of the Land Bank are also subject to the same restrictions and requirements.

Land Banks are charged with creating a redevelopment plan to be approved by the authorizing municipality or municipalities. Land Banks may then acquire land by purchase or transfer from any entity, public or private (with the sale or transfer being exempt from the State Environmental Quality Review Act and other acquisition restrictions imposed on municipalities). So long as acquisition is consistent with the redevelopment plan, any private land within the sponsored municipality may be acquired by the Land Bank, even that which is not delinquent, tax foreclosed, vacant or abandoned. In addition, like IDAs, Land Banks possess a tax exemption for all real and personal property for which they hold title; they may issue tax-exempt revenue bonds, provided that usage and disposal of the property during and after the term of the bonds is consistent with federal law (and the statute provides a mechanism where municipal entities, including school districts, may pledge to the Land Bank, for a five-year period, 50% of any real property tax revenues collected on a specifically identified parcel); they may conclude agreements "for the distribution of revenues" with a school district and the sponsoring governmental unit (absent, however, any proportional sharing plan related to PILOTs to which IDAs are subject); they may collect rents, fees and charges for use of property and their services; and they may contract freely.

Land Banks possess some unique powers as well, particularly the right to "design, develop, construct, demolish, reconstruct, rehabilitate, renovate, relocate and otherwise improve real property" and to enter into partnerships, joint ventures and "other collaborative relationships" with public or private entities for the ownership, management, development and disposition of real property. Land Banks may also purchase real property liens, subject to buyback prior to foreclosure.

These broad powers make Land Banks a flexible yet potentially very effective tool in the New York economic development tool box. Land Banks, however, are explicitly subject to the reporting, acquisition and disposition requirements under the Public Authorities Accountability Act. In addition, Land Banks must maintain a timely and detailed inventory of the status of all parcels under their control, subject to civil enforcement and possible rescission of contracts. Finally, Land Bank contracting is also subject to the participation of minorities and women enshrined in Article 15-A of the Executive Law and to certain competitive bidding requirements.

Without question, the economic development powers available to municipalities in New York State have now been expanded to help these entities deal with the increasing challenges posed by underutilized or vacant lands within their borders. However, Land Banks, at least initially, will not be widely available; thus, municipalities need to diligently and quickly map out development strategies and appropriate governance to ensure quick approval of these entities by the State.

For more information, please contact Donald T. Ross, Special Counsel in the Phillips Lytle Energy Practice, at (518) 472-1224 x1255 or dross@phillipslytle.com or Adam S. Walters, Partner in the Environmental Practice, at (716) 847-7023 or awalters@phillipslytle.com. ■

Environmental Due Diligence for Prospective Tenants of Commercial Properties

Many prospective purchasers of commercial properties are familiar with the need to perform environmental due diligence studies, including Phase I and Phase II Environmental Site Assessments (ESAs), in order to avail themselves of the so-called Innocent Landowner, Contiguous Property Owner, and Bona Fide Purchaser Defenses (the "Innocent Purchaser Defenses") under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). However, the titles of these Innocent Purchaser Defenses are misnomers because other parties beyond "Property Owners," "Landowners," and "Purchasers" may benefit from these statutory exceptions to CERCLA liability. Specifically, prospective lessees and other tenants need to consider whether to perform environmental due diligence assessments prior to entering into leases, in part so they also can avail themselves of CERCLA's defenses.

CERCLA specifically provides that the current "owner and operator" of a facility are liable for cleanup costs. Strict liability is imposed under CERCLA, meaning that liability is imposed on "owners" and "operators" without regard to fault. As a result, many prospective purchasers of commercial property are aware that they may be liable for cleaning up pre-existing contamination at a site, even if they did not contribute to the contamination, unless they qualify for one of CERCLA's Innocent Purchaser Defenses. A common prerequisite to each of the Innocent Purchaser Defenses is that the prospective purchaser must make an "all appropriate inquiry" into the previous ownership and uses of the property prior to its acquisition. Thus, a prospective purchaser often performs a Phase I ESA (and a Phase II ESA, if recommended) as part of its due diligence activities prior to acquiring a commercial property. Whether a prospective purchaser will have the right to perform a Phase II under its purchase and sale agreement is sometimes heavily negotiated with the seller. It is not unusual for a seller to take the position that a Phase II cannot be performed without the seller's prior written consent. If the seller does not consent, the purchaser will likely have preserved a right to terminate the purchase and sale agreement under a negotiated due diligence provision.

Prospective tenants and lessees, on the other hand, may not recognize the importance of performing similar due diligence activities prior to entering into a lease. In certain situations, however, courts have held that current tenants can be liable as "owners" or "operators"

Federal and State Incentives Encourage "Green Retrofit" of Existing Buildings

The federal Energy-Efficient Commercial Buildings Tax Deduction has been a primary driver in the recent updating of many existing buildings to achieve energy efficiency. Green retrofit is the term commonly used to describe such projects today.

Depending on the technology involved and the energy reduction achieved, a building owner may receive an incentive from between $0.30 and 1.80/SF. (Eligible projects include interior lighting, HVAC and hot water systems, or the "building envelope.") Tenants also are eligible to receive the deduction to the extent that they undertake construction of the project. In the case of any public or government-owned buildings, the designer or contractor may be eligible for the deduction. Work would need to be completed by December 31, 2013.

The benefits provided through the tax deduction may also be combined with other tax incentives, such as the Historic Preservation Tax Credit (which can and frequently is sold to other taxpayers via syndication), or with the many grant and low-interest loan programs available through the New York State Energy Research and Development Authority (NYSERDA).

Another well-known incentive with which the deduction has been integrated nationally has been the state and municipality-driven Property Assessed Clean Energy Program or PACE. New York State's Property Assessed Clean Energy Program, enacted in 2009, allows municipalities to use federal stimulus funds to make loans to eligible residential and commercial property owners for energy efficient

under CERCLA for cleaning up pre-existing contamination, even when the tenants have not contributed to the contamination. Factors that courts considered when determining "operator" liability for current lessees included: (1) whether the current lessee generated or stored hazardous substances at the leasehold during the term of the lease; and (2) whether the current lessee exercised actual control or responsibility of the contaminated area. Additionally, courts also have held that lessees can be liable as "owners" under CERCLA (1) when the lessee subleased the property and maintained substantial control over the contaminated property; (2) in sale-leaseback arrangements when the former owner/lessee retained most rights of ownership with respect to the new title owner; and (3) in extremely long-term leases, when, pursuant to the lease, the lessee retained indicia of ownership such that the lessee is the *de facto* owner.

Fortunately for tenants, however, courts have held that, despite their titles, the Innocent Purchaser Defenses also apply to tenants and lessees. In fact, CERCLA defines a "bona fide prospective purchaser" as "a person (or a tenant of a person) that acquires ownership of a facility." For this reason, like the prospective purchaser, the prospective tenant or lessee should consider performing an "all appropriate inquiry" (by performing a Phase I ESA and possibly a Phase II ESA), in order to qualify for the Innocent Purchaser Defenses.

Based on these court decisions, it would be prudent for many prospective tenants and lessees of commercial properties to perform due diligence activities to the same degree that is customary for the purchase of commercial properties and, similar to purchase and sale agreements, include a due diligence provision in the lease that allows the tenant to investigate the environmental condition of the property, including the right to terminate the lease prior to the end of the due diligence period if the results of the investigation are unacceptable to the tenant, in the tenant's sole discretion. The lease could also provide how any necessary remediation would be undertaken (and who would do it) in the event that contamination is found and the tenant chooses not to terminate the lease. If no termination right is afforded to the tenant under the lease, the lease must address how remediation will be done. To the extent that a tenant is prevented from using and occupying all or any portion of the property during remediation, the lease should also address how this will impact the tenant's obligations under the lease (including the obligation to pay rent). The bottom line is: the CERCLA Innocent Purchaser Defenses are not just for property owners and purchasers.

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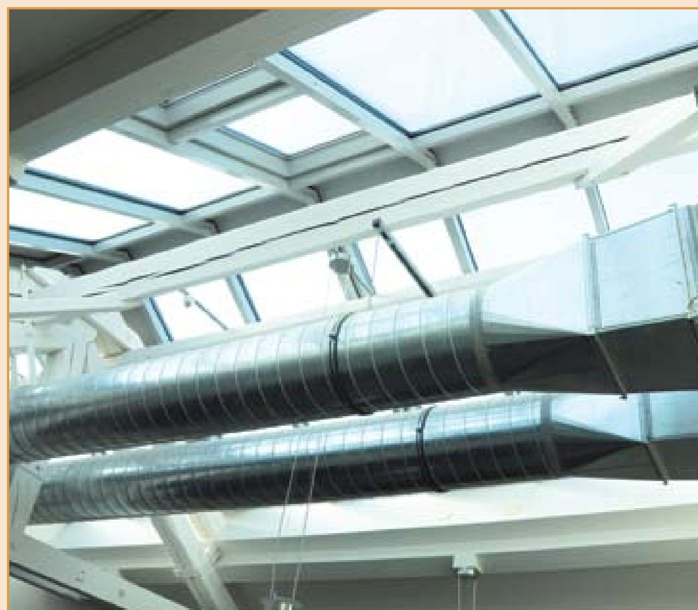
improvements and for repayment of the loans through property tax assessments. Due to implementation issues – existing mortgage lenders objecting to the new "higher priority" government liens – most PACE programs nationwide have been suspended. However, extensive lobbying in Washington and Albany may result in needed changes which would revitalize the program. Cities across the country have developed a program for commercial buildings only; programs recently drawing national attention in Sacramento and Denver ultimately involve the packaging of payment streams from PACE-derived increased assessments into bonds.

Phillips Lytle has expertise across the many disciplines necessary to maximize these "green" incentives. For further information, please contact Donald T. Ross, Special Counsel, at (518) 472-1224 or dross@phillipslytle.com. ■



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