STATE OF NEW YORK

7210

2021-2022 Regular Sessions

IN SENATE

June 7, 2021

Introduced by Sens. KENNEDY, KAMINSKY -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the environmental conservation law and the tax law, in relation to eligibility for participation in the brownfield cleanup program, assignment of the brownfield redevelopment tax credits and brownfield opportunity areas; and to amend part H of chapter 1 of the laws of 2003, amending the tax law relating to brownfield redevelopment tax credits, remediated brownfield credit for real property taxes for qualified sites and environmental remediation insurance credits, in relation to tax credits for certain sites

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 29 of section 27-1405 of the environmental conservation law, as added by section 2 of part BB of chapter 56 of the laws of 2015, is amended and a new subdivision 32 is added to read as follows:

29. "Affordable housing project" **shall mean either (a) a project as** shall be defined in regulation by the department, after consultation with the division of housing and community renewal, which shall at a minimum, establish the percentage of units in the project that must be below a defined percentage of the area median income**; or (b) a project situated on a brownfield site that is the subject of a determination by a state or local government housing agency that all or a portion of the project or site will qualify for benefits, including but not limited to real property taxation exemptions, under an affordable housing program which defines a percentage of residential rental or home ownership dwelling units to be dedicated to tenants or home owners at a defined maximum percentage or percentages of area median income based on the occupants' households annual gross income. For purposes of this subdivision, "area median income" shall mean the area median income for the primary metropolitan statistical area or for the county if located**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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outside a metropolitan statistical area, as determined by the United States department of housing and urban development or its successor for a family of four, as adjusted for family size.

32. "Conforming BOA site" shall mean a site located within an area designated by the secretary of state as a brownfield opportunity area pursuant to section nine hundred seventy-r of the general municipal law and for which the secretary of state has issued an affirmative conformance determination pursuant to subdivision ten of section nine hundred seventy-r of the general municipal law.

§ 2. Subdivision 1-a of section 27-1407 of the environmental conservation law, as added by section 3 of part BB of chapter 56 of the laws of 2015, is amended to read as follows:

1-a. If the person is also seeking a determination that the site is eligible for the tangible property credit component of the brownfield redevelopment tax credit pursuant to paragraph three of subdivision (a) of section twenty-one of the tax law for a site located in a city having a population of one million or more, such person shall submit information sufficient to demonstrate that: (a) at least half of the site area is located in an environmental zone as defined in section twenty-one of the tax law; (b) the property is upside down or underutilized; or (c) the project is an affordable housing project as described in paragraph (a) of subdivision twenty-nine of section 27-1405 of this title. An applicant may request an eligibility determination for tangible property credits at any time from application until the site receives a certificate of completion [~~pursuant to section 27-1419 of this title except for sites seeking eligibility under the underutilized category~~]. Notwithstanding the foregoing, a site located in a city having a population of one million or more and which is a conforming BOA site or which is described in paragraph (b) of subdivision twenty-nine of section 27-1405 of this title, shall also be eligible for the tangible property credit component of the brownfield redevelopment tax credit pursuant to paragraph three of subdivision (a) of section twenty-one of the tax law.

Sites are not eligible for tangible property tax credits if: (a) the contamination from ground water or soil vapor is solely emanating from property other than the site subject to the present application; or (b) the department has determined that the property has previously been remediated pursuant to titles nine, thirteen and fourteen of this article, title five of article fifty-six of this chapter and article twelve of the navigation law such that it may be developed for its then intended use.

§ 3. Subparagraph (i) of paragraph 3 of subdivision (a) of section 21 of the tax law, as amended by section 1 of part AA of chapter 58 of the laws of 2021, is amended to read as follows:

(i) The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property and may include any related party service fee paid; provided that in determining the cost or other basis of such property, the taxpayer shall exclude the acquisition cost of any item of property with respect to which a credit under this section was allowable to another taxpayer. A related party service fee shall be allowed only in the calculation of the tangible property credit component and shall not be allowed in the calculation of the site preparation credit component or the on-site groundwater remediation credit compo-

nent. The portion of the tangible property credit component which is attributable to related party service fees shall be allowed only as follows: (A) in the taxable year in which the qualified tangible property described in subparagraph (iii) of this paragraph is placed in service, for that portion of the related party service fees which have been earned and actually paid to the related party on or before the last day of such taxable year; and (B) with respect to any other taxable year for which the tangible property credit component may be claimed under this subparagraph and in which the amount of any additional related party service fees are actually paid by the taxpayer to the related party, the tangible property credit component for such amount shall be allowed in such taxable year. The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is first placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer, or for the taxable year in which the certificate of completion is issued if the qualified tangible property is placed in service prior to the issuance of the certificate of completion. This credit component shall only be allowed for up to one hundred twenty months after the date of the issuance of such certificate of completion[~~, provided, however, that for qualified sites to which a certificate of completion is issued on or after March twentieth, two thousand ten, but prior to January first, two thousand twelve, the commissioner may extend the credit component for up to one hundred forty-four months after the date of such issuance, if the commissioner, in consultation with the commissioner of environmental conservation, determines that the requirements for the credit would have been met if not for the restrictions related to the state disaster emergency declared pursuant to executive order 202 of 2020 or any extension thereof or subsequent executive order issued in response to the novel coronavirus (COVID-19) pandemic~~]; provided, however, with respect to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer before July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, this credit component shall only be allowed for up to one hundred eighty months after the date of the issuance of such certificate of completion; provided, however, with respect to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer on or after July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, or which received such notice of acceptance prior to that date but is eligible for the brownfield redevelopment tax credits as if the site was accepted into the brownfield cleanup program after that date as provided in section thirty-three of chapter fifty-six of the laws of two thousand fifteen, this credit component shall only be allowed for up to one hundred eighty months after the date of the issuance of such certificate of completion.

§ 4. Paragraph 2 of subdivision (a) of section 21 of the tax law, as amended by section 1 of part H of chapter 577 of the laws of 2004, is amended to read as follows:

(2) Site preparation credit component. The site preparation credit component shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site. The credit component amount so determined 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**, provided, however, that for any qualified site to which a certificate of completion is issued on or after March twentieth, two thousand fifteen the site preparation credit component for such costs shall be allowed for up to seven taxable years after the certificate of completion; and provided further that the credit component amount for any costs necessary for compliance with the certificate of completion or subsequent modifications thereof or the remedial program defined in such certificate which were paid or incurred but not included in the calculation of a credit allowed under this section in any taxable year beginning prior to January first, two thousand twenty-one, shall be allowed for the taxpayer's first taxable year beginning on or after January first, two thousand twenty-one, and the credit component amount for any such costs paid or incurred in any taxable year beginning on or after January first, two thousand twenty-one shall be allowed in the taxable year such costs are paid or incurred for up to seven taxable years after the issuance of the certificate of completion**.

§ 5. Paragraph 2 of subdivision (b) of section 21 of the tax law, as amended by section 23 of part BB of chapter 56 of the laws of 2015, is amended to read as follows:

(2) Site preparation costs. The term "site preparation costs" shall mean all amounts properly chargeable to a capital account, which are paid or incurred which are necessary to implement a site's investigation, remediation, or qualification for a certificate of completion, and shall include costs of: excavation; demolition; activities undertaken under the oversight of the department of labor or in accordance with standards established by the department of health to remediate and dispose of regulated materials including asbestos, lead or polychlorinated biphenyls; environmental consulting; engineering; legal costs; transportation, disposal, treatment or containment of contaminated soil; remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent off-site migration of contamination from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring, scaffolding, and security facilities until such time as the certificate of completion has been issued. Site preparation shall include all costs paid or incurred within sixty months after the last day of the tax year in which the certificate of completion is issued that are necessary for compliance with the certificate of completion or subsequent modifications thereof, or the remedial program defined in such certificate of completion including but not limited to institutional controls, engineering controls, an approved site management plan, and an environmental easement with respect to the qualified site**; provided, however, with respect to any qualified site for which the department of environmental conservation has issued a**

notice to the taxpayer on or after July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law, site preparation shall include all costs paid or incurred within eighty-four months after the last day of the tax year in which the certificate of completion is issued that are necessary for compliance with the certificate of completion or subsequent modifications thereof, or the remedial program defined in such certificate of completion including but not limited to institutional controls, engineering controls, an approved site management plan, and an environmental easement with respect to the qualified site. Site preparation cost shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site.

§ 6. Subdivision (b) of section 21 of the tax law is amended by adding a new paragraph 7 to read as follows:

(7) Certain environmental zones (EN-Zones). An "environmental zone" shall mean, with respect to any qualified site for which the department of environmental conservation has issued a notice to the taxpayer on or after July first, two thousand fifteen or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision thirty of section 27-1405 of the environmental conservation law, whichever shall be later, that its request for participation has been accepted under subdivision six of section 27-1407 of the environmental conservation law:

(A) an area designated as such by the commissioner of labor. Such areas shall be census tracts that satisfy either of the following criteria:

(i) areas that have both:

(I) a poverty rate of at least twenty percent based on the most recent five year American Community Survey; and

(II) an unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five year American Community Survey, or;

(ii) areas that have a poverty rate of at least two times the poverty rate for the county in which the areas are located based on the most recent five year American Community Survey.

(iii) Such designation shall be made and a list of all such environmental zones shall be established by the commissioner of labor based on the most recent American Community Survey, or its successor.

(B) an area designated by the commissioner of the department of environmental conservation to be a potential environmental justice area.

(i) "Potential environmental justice area" means a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies and which are shown on maps created by the department of environmental conservation.

(ii) "Minority community" means a census block group, or contiguous area with multiple census block groups, having a minority population equal to or greater than 51.1 percent in an urban area and 33.8 percent in a rural area of the total population.

(iii) "Minority population" means a population that is identified or recognized by the United States Census Bureau as Hispanic, African-American or Black, Asian and Pacific Islander or American Indian.

(iv) "Low-income community" means a census block group, or contiguous area with multiple census block groups, having a low-income population equal to or greater than 23.59 percent of the total population.

(v) "Low-income population" means a population having an annual income that is less than the poverty threshold, as such thresholds are established by the United States Census Bureau.

(vi) "Census block group" means a unit for the United States census used for reporting. Census block groups generally contain between two hundred fifty and five hundred housing units.

(vii) "Urban area" means all territory, population, and housing units located in urbanized areas and in places of two thousand five hundred or more inhabitants outside of an urbanized area. An urbanized area is a continuously built-up area with a population of fifty thousand or more.

(viii) "Rural area" means territory, population, and housing units that are not classified as an urban area. The determination whether a site is located in an environmental zone pursuant to this subdivision shall be based on the date the department of environmental conservation issued a notice to the taxpayer that its request for participation in the brownfield cleanup program has been deemed complete pursuant to subdivision three of section 27-1407 of the environmental conservation law; provided, however, if the area in which a site is located is designated an environmental zone subsequent to the issuance of such notice and before qualified tangible property as defined in paragraph three of this subdivision is placed in service, then the site shall be deemed located in an environmental zone.

§ 7. Section 31 of part H of chapter 1 of the laws of 2003, amending the tax law relating to brownfield redevelopment tax credits, remediated brownfield credit for real property taxes for qualified sites and environmental remediation insurance credits, as amended by section 32 of part BB of chapter 56 of the laws of 2015, is amended to read as follows:

§ 31. The tax credits allowed under section 22 or 23 of the tax law and the corresponding provisions in articles 9, 9-A, 22 and 33 of the tax law, as added by the provisions of sections one through twenty-nine of this act, shall not be applicable to any site accepted into the brownfield cleanup program on and after July 1, 2015 or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision 30 of section 27-1405 of the environmental conservation law, whichever shall be later. The tax credits allowed under section 21 of the tax law and the corresponding provisions in articles 9, 9-A, 22 and 33 of the tax law, as added by the provisions of sections one through twenty-nine of this act, shall not be applicable to any site accepted into the brownfield cleanup program after December 31, [~~2022~~] 2027, provided, however that any sites accepted on or before December 31, [~~2022~~] 2027 must have received the certificate of completion required to qualify for any of such credits on or before [~~March~~] December 31, [~~2026~~] 2031.

§ 8. A site which is in a potential environmental justice area, as defined in clause (i) of subparagraph (B) of paragraph 7 of subdivision (b) of section 21 of the tax law, as of the effective date of this act shall be deemed to be in an environmental zone from and after January 1, 2021 for all purposes including but not limited to the site's eligibility for the tangible property credit component under subdivision 1-a of

section 27-1407 of the environmental conservation law and the calculation of the brownfield redevelopment tax credit pursuant to section 21 of the tax law as amended by this act for all taxable years beginning on or after January 1, 2021.

§ 9. This act shall take effect immediately; provided, however:

(a) The amendments made by sections one and two of this act shall apply to sites for which the department of environmental conservation has issued a notice to the applicant that its request for participation has been accepted under subdivision 6 of section 27-1407 of the environmental conservation law, regardless of the date of such notice; provided, however, that the amendments made by section two of this act regarding eligibility for the tangible property credit component of the brownfield redevelopment tax credit under paragraph 3 of subdivision (a) of section 21 of the tax law shall apply to taxable years beginning on and after January 1, 2021; and

(b) a site which is in a potential environmental justice area as of such effective date shall be deemed to be in an environmental zone from and after January 1, 2021 for all purposes including but not limited to the site's eligibility for the tangible property credit component under subdivision 1-a of section 27-1407 of the environmental conservation law and the calculation of the brownfield redevelopment tax credit pursuant to section 21 of the tax law as amended by this act for all taxable years beginning on and after January 1, 2021.