
Pennsylvania DEP Confirms that Qualified Opportunity Zones in Pennsylvania May Also Offer Environmental Incentives for Redevelopment

By Joseph R. Brendel / Feb 25, 2019

There has been a great deal of attention recently to the tax advantages available for investing in Qualified Opportunity Zones (“QOZs”) established by the Tax Cuts and Jobs Act of 2017. QOZs are intended to spur investment in low income communities nationwide through tax benefits, particularly capital gain deferral. Millions of dollars are expected to flow into QOZ investment funds as investors await the finalization of the proposed regulations issued by the Treasury Department and the Internal Revenue Service in October, 2018.[1] A public hearing on the proposed rules originally scheduled for January 10, 2019 was postponed until February 14, 2019 because of the government shutdown. The administration plans to hold another public meeting in the coming months before finalizing the rules.[2]

While the real estate development community has focused primarily on the tax incentives available for investment in QOZs, there also may be significant opportunities for limiting environmental risks associated with redevelopment of QOZs. The designated opportunity zones often are located in financially distressed areas that typically have legacy environmental issues from shuttered manufacturing facilities, refineries, etc. Therefore, investment in those QOZ areas also requires thorough environmental due diligence and addressing site contamination through state voluntary cleanup programs to protect the investors from exposure to potentially significant environmental liabilities.

State voluntary cleanup programs are also designed to provide incentives to encourage the redevelopment of financially distressed “brownfield” areas. An excellent example is Pennsylvania’s award-winning Land Recycling Program created by the Land Recycling and Environmental Remediation Standards Act (“Act 2”)[3] and administered by the Pennsylvania Department of Environmental Protection (“DEP”). Act 2 allows a remediator of impacted property the flexibility to choose from among several remediation standards to obtain statutory cleanup liability protection. Section 501 of Act 2[4] provides that persons demonstrating attainment with the background, statewide health or site-specific remediation standards, or a combination of those standards, are protected from further liability for cleanup of site contamination identified in final reports submitted to and approved by the DEP.

For properties located within a “Special Industrial Area,” Sections 305 and 502 of Act 2[5] provide an alternative, more streamlined approach for demonstrating attainment of a remediation standard that is focused on characterizing the contamination within the property boundary and addressing immediate, direct or imminent threats to human health or the environment. Act 2 does not contain a definition of “Special Industrial Area.” Instead, Section 305 of Act 2 refers to property used for industrial activities[6] where there is no financially viable responsible person to clean up the contamination or for land located within “enterprise zones” designated pursuant to the requirements of the Pennsylvania Department of Community and Economic Development (“DCED”).[7] For example, the DCED has for years encouraged development in underdeveloped and underutilized areas designated as an “Enterprise Zone,” “Keystone Opportunity Zone” or “Keystone Innovation Zone” through incentives such as the elimination of specific state and local taxes for specified time periods.

On June 14, 2018, the DCED designated 300 tracts in Pennsylvania as QOZs pursuant to the Tax Cuts and Jobs Act of 2017. The DEP recently confirmed that properties located within these designated QOZs also qualify as “enterprise zones” for purposes of the applicability of the Special Industrial Area approach under Section 305 of Act 2.

There are several benefits to proceeding under Act 2’s Special Industrial Area approach. First, the procedural steps to obtain liability protection are streamlined. The person proposing remediation of a Special Industrial Area retains an environmental professional to perform an investigation of the property and to prepare a Baseline Environmental Report (“BER”) containing the findings of that investigation. Act 2 liability protection for the owner of a Special Industrial Area is conferred upon the signing of a Consent Order and Agreement (“COA”) with the DEP following the DEP’s acceptance of the BER. Because the liability relief only applies to concerns identified in the BER and COA, it is crucial that the remediator perform a comprehensive assessment of the property.

Section 502 of Act 2 provides that the cleanup liabilities for the person undertaking the reuse of the property are limited to remediation of any immediate, direct or imminent threats to public health or the environment, such as waste in containers, waste piles, etc., which would prevent the property from being occupied for its “Intended Purpose” (as specified in the COA), and such person shall not be held responsible for the remediation of any other contamination identified in the BER except to the extent caused or exacerbated by that person.[8] Therefore, it is important that the Intended Purpose be drafted as broadly as possible in the COA so as to incorporate any planned uses by prospective purchasers of the property.

Significantly, the remediator is not responsible for the off-site migration of contamination from the property as documented in the BER provided that the remediator did not cause or contribute to the off-site contamination. Thus while the BER should document if contamination is migrating from the property, the remediator is not responsible for fully delineating the extent of the off-site contamination or for remediating that contamination.

The benefits associated with remediating Special Industrial Area property in Pennsylvania demonstrate that there can be significant advantages beyond the tax incentives available under the Tax Cuts and Jobs Act for redeveloping environmentally-impacted QOZs that were formerly used for industrial purposes. Redevelopers in other states should investigate whether the voluntary cleanup programs in those states offer similar remediation and liability

protection advantages for properties located in QOZs.

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[1] 83 *Fed Reg.* 54279 (October 29, 2018).

[2] <https://www.bisnow.com/national/news/capital-markets/opportunity-zone-experts-voice-concerns-over-programs-rules-suggest-fixes-in-irs-hearing-97528>

[3] 35 P.S. § 6026.101, *et seq.*

[4] 35 P.S. § 6026.501.

[5] 35 P.S. §§ 6026.305 and 6026.502.

[6] "Industrial Activity" is broadly defined under Act 2 as "Commercial, manufacturing, public utility, mining or any other activity done to further either the development, manufacturing or distribution of goods and services, intermediate and final products and solid waste created during such activities, including, but not limited to, administration of business activities, research and development, warehousing, shipping, transport, remanufacturing, stockpiling of raw materials, storage, repair and maintenance of commercial machinery and equipment and solid waste management." 35 P.S. § 6026.103.

[7] Formerly the Department of Community Affairs. See 71 P.S. § 1709.301.

[8] 35 P.S. § 6026.502.