At a Motion Term of the Supreme Court of the State of New York, County of Onondaga held in and for the County of Onondaga, at the Onondaga County Courthouse, Syracuse, New York, on the 7th day of May, 2008.

PRESENT: HON. JOHN C. CHERUNDOLO, J.S.C., Acting

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

DESTINY USA DEVELOPMENT, LLC and PYRAMID COMPANY OF ONONDAGA,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York,

- against -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ALEXANDER B. GRANNIS, as Commissioner of the New York State Department of Environmental Conservation,

Respondents.

Index No. 08-1015
RJI No. 33-08-0459

MEMORANDUM DECISION AND ORDER

This Article 78 proceeding comes to this Court pursuant to the Notice of Verified Petition, dated February 5, 2008, and the Verified Petition, dated February 5, 2008. The petitioner seeks multiple redress with regard to an October 5, 2007 determination by the respondent with a number of real estate parcels, which are the subject of potential development of the petitioner. Specifically, the petitioner seeks to: (a) annul, vacate and set aside the October 5, 2007 DEC determination denying the inclusion of Destiny's

"Carousel Parcel" in the Brownfield Cleanup Program; (b) annulling, vacating and setting aside the October 5, 2007 DEC determination denying inclusion of certain portions of the Destiny's "Oil City Parcel" in the Brownfield Cleanup Program; (c) directing the Department of Environmental Conservation to include the project site, including both the "Carousel Parcel" and the "Oil City Parcel" in the Brownfield Cleanup Program ("BCP"); (d) declaring the Department of Environmental Conservation's use of un-promulgated "Guide Factors" as act in excess of jurisdiction, null, void, and of no force and effect; and (e) declaring the Department of Environmental Conservation's determination in this matter with regard to the subject parcels as unconstitutional as applied to the petitioner, in violation of the Equal Protection Clause of the State and Federal Constitutions, and otherwise declaring such determination null, void, and of no force and effect and reversed.

In other words, the petitioner seeks to have certain parcels that it hopes to develop included in the BCP, and in so doing, seeks to have the Court order the October 5, 2007 determination to be null and void, and to have that determination vacated and reversed.

Subsequent to the initiation of this Article 78 proceeding, this matter came on for oral argument on May 7, 2008. At that time, petitioner and respondent fully argued all of the issues dealing with the Article 78 proceeding. This decision arises out of that Verified Petition, Notice of Petition, the full record of the argument of May 7, 2008, and all other actions and proceedings.

I - THE SUBJECT PROPERTY

The property which forms the basis of this Article 78 proceeding consists of approximately 152 acres of contaminated property [1] located in an area of the City of Syracuse known as the "Syracuse Lakefront".

The petitioner plan to develop a host of contaminated properties into a unique international resort for tourism, and a unique destination that incorporates a mix of commercial, entertainment recreation, retail and tourist related uses. [2]

The project site is located to the south and east of Onondaga Lake in the City of Syracuse, and is bordered by Onondaga Lake to the northwest, and the New York State Barge Canal and the Onondaga County Metropolitan Sewage Treatment Plant to the west and southwest. The property is bordered by Interstate Route 81 to the northeast and east, Bear Street and vacant industrial land to the south and southeast, and Park Street on the north. The property is separated through approximately the middle of the property by Hiawatha Boulevard, a major east-west thoroughfare that traverses through the north side of the City of Syracuse. To the south of Hiawatha Boulevard is the former "Oil City", a series of plots of land comprising approximately 72 acres (the "Oil City

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[1] While the parties argued whether or not some of the property was in fact contaminated in the papers initially submitted to this Court, attorneys for the DEC admitted that there is no contest about the contamination of the property at oral argument. That admission seems clearly substantiated through the myriad of reports submitted to this Court, and it is clear from the documentation submitted to this Court that all of the property is "contaminated", as that word is defined under the Brownfield Cleanup Program Statute. This Court thus finds no question of fact concerning the contamination of the property and finds the parcels are, in fact, "contaminated" as that word is defined by the BCP statute.

[2] The property and the project is known as "DestiNY USA".

Parcel"). This property formerly housed petroleum bulk storage and distribution facilities and other industrial properties all located south of Hiawatha Boulevard and east of the Barge Canal. North of Hiawatha Boulevard there is approximately 80 acres (the "Carousel Parcel").

II - PAST HISTORY OF THE PROPERTY

The "Carousel Parcel" was originally a salt marsh used in connection with salt mining and production in the early 1900's, and then a disposal site for mixed fill up until approximately 1930. Portions of the "Carousel Parcel" were also used for disposal of waste from Solvay Process Company from approximately 1907 through 1910, and then again from 1924 through 1930. Immediately prior to the development of Carousel Center Mall (a major shopping mall developed at 1988 to 1990), the "Carousel Parcel" was the site of the Marley Scrap Yard (a scrap metal junk yard), Clark Concrete (a concrete batch plant), Amerada Hess (a petroleum bulk storage facility), and a rail yard. Because of these uses, it is clear that the property became grossly contaminated over years of use.

The "Oil City Parcel" was the site of dozens above-ground major petroleum bulk storage tanks served by underground pipelines and related facilities. The "Oil City Parcel" also served as a dumping ground for Allied Chemical Waste Materials and other heavy industrial uses.

The combined properties - as a whole - were eyesores to all who traveled in and through the City of Syracuse for a century and beyond. The property is located at the very gateway to the City of Syracuse from the north, and anyone traveling upon Route 81 (or Route 11, the older main north-south thoroughfare - Salina Street) for those years

when the property was used for mixed commercial and industrial uses, was greeted by eyesores of mass proportions.

To the west and northwest of the 152 acre parcel stands Onondaga Lake. Onondaga Lake has a storied history of being perhaps one of the most polluted and contaminated lakes in the world. In addition to the contamination entering the lake from groundwater emanating from the subject properties, a number of large commercial and industrial uses on the west side of the lake existed for many years, dumping severe contamination into the lake, making the lake uninhabitable from a human standpoint, and an unhealthy pool of hazardous chemicals making it a potential danger to the residents of the County of Onondaga and the City of Syracuse. [3] In the late 1980's and early 1990's [4], the predecessor in interest to the petitioner in this case voluntarily

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[3] This Court takes judicial notice of the multiple clean-water actions that have been commenced against the County of Onondaga and the multiple industrial users of that lake over the years and that there have been concerted efforts by politicians, local residents, DEC and others to clean up the pollution present in Onondaga Lake. The Court also takes judicial notice of multiple efforts of the Federal, State and Local Governments that have committed hundreds of millions of dollars in funds in an attempt to relieve and remediate the contamination from the lake so as to make the lake usable to the residents of Onondaga County and the City of Syracuse. These clean-up activities continue to date.

[4] It should be noted that the Brownfield Cleanup Program was created in 2003 by the addition of Title 14 to Article 27 of the New York State Environmental Conservation Law. Subsequent regulations governing its implementation were promulgated in December, 2006 (6 N.Y.C.R.R. Part 375). It becomes important in this Court's determination, that much of the activity concerning the initial development, initial cleanup activity, and initial agreements all occurred before the effective date of the BCP statute. The application in this case was interposed long before the implementation of the regulations governing the statute in December, 2006. This is, to the knowledge of this jurist, the first decision of its kind subsequent to the adoption of the regulations in December, 2006. The Court addresses the significance of these events later in this Decision.

assumed the responsibility to address the contamination on the "Carousel Parcel" so that it could build the Carousel Center Shopping Mall on the that land. This involved, among other things, the collection and treatment of all surface and ground water that came into contact with soils during the construction, management, and capping of contaminated soils and the construction and operation of a containment cell ("Clark Containment Cell") to manage hazardous waste and contaminants found on portions of the property. These activities were conducted under the direct supervision and oversight of the DEC, and all material was handled in accordance with the DEC's requirements, environmental laws, rules, regulations and procedures in effect at the time of the remediation and construction.

It is generally agreed in this case that subject to the DEC's oversight, and with the DEC's approval, some 600,000 cubic yards of contaminated soil and debris on the "Carousel Parcel" were excavated, graded, and subsequently capped by an impervious surface to be used for parking. It is the very same soil now that must be excavated, remediated or removed in order to redevelop, expand, and otherwise develop this parcel into "DestiNY USA".

There remains considerable of contaminated material, soil, and groundwater surrounding the existing Carousel Center Shopping Mall under the impervious parking,

driveway surfaces and the mall structure itself. The entire "Carousel Parcel" [5] was included in the application for participation and inclusion in the BCP.

The "Oil City Parcel" is comprised of approximately 14 separate tax parcels formerly owned by major oil companies, including, among others, CITGO, Exxon Mobil, Sun Atlantic, and others. [6] Petroleum and hazardous substances, including soils contaminated by petroleum, metals, volatile organic compounds, solvent waste, and PCB's among other contaminants are present throughout the "Oil City Parcel" as a result of these prior industrial uses and activities.

It is undisputed that ground water throughout the "Oil City Parcel" is also known to be contaminated as a result of these prior industrial uses. Some remedial action has already been conducted on the "Oil City Parcel". Several of the prior owners entered into agreements with the DEC whereby they agreed to implement pre-arranged work plans to address certain identified contamination of the soils and groundwater. DestiNY USA in June, 2005 entered into an agreement with DEC with regard to "Oil City Parcels" as well. However, the agreed upon remediation in each of the instances was to standards that were premised on the property remaining vacant and/or in Destiny's circumstance, use the land for use as temporary parking lots. DEC acknowledges that

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[5] What is noteworthy is that at a time prior to the October 5, 2007 determination of the DEC and in its supporting papers to this Court, the petitioner sought to withdraw that part of the application for BCP inclusion into the BCP that deals with that portion of the "Carousel Parcel" that lies directly beneath the footprint of the building that comprises Carousel Center Shopping Mall. To the extent that such withdrawal was not made clear before oral argument, it was clearly expressed at that time, and the Court will treat that part of the application withdrawn.

[6] Amerada Hess had a bulk storage petroleum facility located north of Hiawatha Boulevard and was part and parcel of the "Carousel Parcel".

additional remediation will be required should the redevelopment and reuse of the property, as proposed, be undertaken to develop DestiNY USA.

This Court will not seek to identify, in this Decision, each of the contaminants that have been identified in the numerous reports submitted to this Court, except to say that volatile organic compounds (VOC's), semi-volatile organic compounds (SVOC's), chlorinated solvents, Solvay Process waste materials (Solvay waste), petroleum, PCB's, metals, petroleum and its extracts, trichloroethylene, and multiple other solvents and contaminated soils, among others, from all of the various industrial enterprises that had existed through the years are present within the soils, and groundwater throughout the multiple parcels. The DEC has made it clear that any development activity on the Destiny site must be conducted under DEC supervision and in accordance with DEC directives due to the multiple contaminants that continue to exist on the site and in the ground water.

These prior industrial uses of the property, the known extensive environmental contamination, and the high risk and costs associated with the development of such property have continued to frustrate any thought of redeveloping the various parcels through standard development procedures. The property today continues to be grossly contaminated. Also, the property today continues to be under the guide of DEC imposed stipulations which govern current interim remediation activities. Those remediation activities are geared toward preserving the property as vacant land and/or land beneath the mall structure and impervious parking areas surrounding the mall. For the "Carousel Parcel" itself, when the vast amounts of contaminated soil were moved and redirected on the property, a "bowl-like" configuration was designed and constructed,

with the mall building itself at the bottom of the bowl, and the contaminated soil circling the bowl. Indeed, the road that completely encircles the mall property is known as "Circle Road" and the road traverses all the way around the property at the top of the bowl, all around (and presumably over) contaminated soil.

With regard to the "Oil City Parcels", these sites have been defined by the petitioner as "A Poster Child" for Brownfield cleanup. Indeed, the property remains today vacant. [7] The property today continues to be an eyesore to the general public, a detriment to builders of any type of kind, and has caused significant deterioration in and around the area of the immediate North and Northwest part of the City of Syracuse in the area where these Brownfields exist. Indeed, surrounding the Brownfields of "Oil City" are vacant lands and multiple vacant buildings that had been utilized for commercial and industrial uses in the past, all of which seriously detracts from any potential development in the area. Indeed, this area, is a "Poster Child" Brownfield.

[7] It should be clarified that the property remains vacant, except for a stipulation entered into between DestiNY USA Development, LLC and the Department of Environmental Conservation, dated June 23, 2005, that allowed Destiny to, under the auspicious, stipulation and agreement with DEC to again encapsulate certain portions of the "Oil City" parcel with asphalt and other impervious parking lot materials, all under the stipulation and watchful eye of the DEC. The terms of this stipulation and the understanding between petitioner and respondent surrounding it, became extremely important in assessing the legitimacy of the petitioner's contentions in this case that the "Oil City" parcels should be included in the BCP. This stipulation was made between the parties to this action five (5) days before the application was submitted by petitioner for inclusion into the BCP. Impervious surfaces have been placed on top of the contaminated soil of these "Oil City" parcels, to allow for parking during construction. That was the purpose of the stipulation.

III - THE PLANNED DEVELOPMENT AND USE OF THE PROPERTY

During the late 1980's and into the early 1990's, Pyramid Development Corporation undertook to develop the Carousel Center Shopping Mall on the parcel that is now known as the "Carousel Parcel". The petitioner in this action, DestiNY USA, a grandchild of Pyramid Development Corporation (the original mall developer) proposed to redevelop the Brownfield site, and expand the Carousel Parcel, and while doing so in combination, create "DestiNY USA". DestiNY USA is designed to be a major research, retail, entertainment, dining, hospitality and tourism venue. This proposed development will include the expansion of the existing Carousel Center Shopping Mall into the surrounding contaminated parking areas that surround the mall. DestiNY USA is being designed to serve as a living laboratory and showcase for development and implementation of state-of-the-art technology in the areas of renewable energy resources, sustainable design, homeland security, information systems, retail and other sales, among others.

DestiNY USA is a joint effort with the City of Syracuse Industrial Development Agency ("SIDA"), and through the years has gained the full support of the City of Syracuse, the County of Onondaga, the State of New York and the federal government. [8]

[8] It should be noted that Destiny's bid for acceptance by the City of Syracuse, County of Onondaga, and other federal and state governments has not been an easy road. Multiple lawsuits have ensued at multiple levels over the course of years dealing with different development issues of Destiny, not only at the government level, but also with multiple tenants and others. A number of these lawsuits continue, but many have been resolved. To the extent that such differences were initially very clearly existing between Destiny and the City of Syracuse and Onondaga County, many of those outstanding issues have been resolved. Many have threatened the very existence and ongoing viability of the project. This Court is personally familiar with many of those, as

The Destiny project has gained current support at just about every level by every federal, state and local government and their respective agencies. [9]

The project itself has been designated as a New York State Empowerment Zone, and the developer has been designated to receive "green bonds" for Brownfield redevelopment under the Job Creation Act of 2004. It has been said that Destiny, when finally built, will be one of the largest construction and development projects in the United States.

From its initial conception, the project was designed with environmental concerns in mind. The developers, SIDA, and local governments have chosen to redevelop a blighted area, eliminate and/or remediate extensive "Brownfield", preserve green fields, and at the same time, create a development of unparralled significance in a locality that heretofore has been financially depressed. Petitioner contends that DestiNY USA will be built according to the United State Green Building Council Leed Standards, and will employ "green" principles in its construction and operation - thus potentially doing away completely with the need for fossil fuel use for its operation.

The project has been noted to be of unprecedented significance to local, county and state economies. Studies done by the developer at the request of local governments

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some of those actions have been before this Court, and multiple others continue to exist. In short, the development of a project the scale of Destiny is not a project for the weak of heart. Continuous and ongoing roadblocks have been put before Destiny and its developers, making the development of Destiny an ongoing work of compromise, collaboration, and at times conflict. This Court takes judicial notice of such actions.

[9] Obviously, this is not the case with regard to the Department of Environmental Conservation and the BCP request made by DestiNY USA concerning the subject properties that have not been included in the BCP

have reported that it is expected to attract billions of visitors to the area annually, and bring billions of dollars of commerce to the City of Syracuse, County of Onondaga, and to Central New York generally. The development is designed to create a multitude of construction jobs and permanent onsite full-time positions. Conservative estimates expect the first phase of Destiny to yield more than six hundred million dollars ($600,000,000.00) annually in economic activity to the benefit of state and local governments and the residents of the Central New York area. Future phases of the project may include multiple hotels, research, commercial and recreational development, all of which is estimated to yield thousands, if not tens of thousands full-time positions and create annual economic activity estimated to add nearly three billion ($3,000,000,000.00) dollars to the local economy. Petitioner asserts that DestiNY USA will provide a critically necessary stimulus to Central New York economy, which has seen the departure of numerous, crucial long-standing employers, the closure of multiple manufacturing facilities, and the loss of thousands of jobs over the past several decades. Nothing in the horizon, either currently in construction or planned, has the significance that Destiny may bring to the Central New York area.

Petitioner asserts that DestiNY USA and its expansive vision relies on economic development incentives, many of which have been already assured. The petitioner asserts that among those that are necessary for the ongoing viability of the project is inclusion into the BCP with the tax credits and limitations of liability provided through that program.

The affidavit of Bruce A. Keenan (lead partner in the expansion of Carousel Center) asserts that for most of the last two decades, Destiny has endeavored to work in

partnership with a number of public agencies, including the State of New York, the City of Syracuse, the Syracuse Industrial Agency, and the County of Onondaga to transform the Syracuse lakefront area into a vital retail, commercial and tourism destination ... "(and) ... (while) ... we are willing to take on this challenge, (it) cannot (be done) without significant private, public partnering". [10]

IV - THE APPLICATION PROCESS

The BCP was created in 2003 by the addition of Title 14 to Article 27 of the Environmental Conservation Law. It is undisputed that the BCP was intended to address some of the unintended consequences that resulted from federal and state laws, passed decades earlier, to protect public health and the environment from inactive hazardous waste sites. It is equally undisputed that in the late 1970's, Congress recognized that past industrial and commercial operations in the United States had left a legacy of sites contaminated with the byproducts of those operations, especially toxic chemicals, and that these contaminated sites pose significant risks to the public health and the environment. As the respondent points out, the Love Canal site in Niagara Falls, New York was perhaps the most notorious of these sites.

The previous broad liability imposed by both federal and state legislation resulted in the abandonment of numerous contaminated properties, often concentrated in urban areas, leaving them undeveloped or underdeveloped in favor of uncontaminated sites (Greenfields) in outlying areas. This has contributed to development sprawl and economic decline in urban areas. The abandoned and underdeveloped sites came to be

[10] This excerpt taken, with liberties, from the affidavit of Bruce A. Keenan, dated April 24, 2008, submitted with the petitioner's papers in this matter.

known as “Brownfields”. The City of Syracuse shares today the effects of this outgrowth of sprawl, with numerous underdeveloped properties, vacant lots, dilapidated structures, and a dwindling number of residents and businesses.

The BCP [11] has been charged by the legislature with the duty to facilitate the remediation of parcels contaminated by hazardous waste. The BCP furnishes a state policy, clearly outlined and stated in the statute itself, that provides funding, tax credits and limited liability for the cleanup of Brownfield areas. “Brownfields” are defined by the statute as “any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous waste, petroleum, pollutant, or contaminant” [ECL § 27-1405(2)].

Section 27-1403 of the Environmental Conservation Law sets forth a declaration of policy with regard to the statute. That section, clearly provides as follows:

> *It is therefore declared that, to advance the policy of the State of New York to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well-being, it is appropriate to adopt this Act to encourage persons to voluntarily remediate Brownfield sites for reuse and redevelopment by establishing within the Department a statutory program to encourage clean up and redevelopment of Brownfield sites. All remedies shall be fully protective of public health and the environment ...* (ECL § 27-1403, *supra*)

This far-reaching policy goal was the culmination of Governor George Patacki’s Program Bill (introduced as S5274-A of 2001) and an Assembly Bill (known as A-8722). Looking at the legislature history and the history of two bills, the legislature determined

[11] The complete Brownfield Cleanup law is found at ECL §§ 27-1401 to 27-1431.

that in order to be eligible for BCP inclusion, there must exist the presence or potential presence of contamination, which complicates the redevelopment of the site. [See ECL § 27-1405(2)]. In order to effectuate the statute, the DEC was delegated the authority to accept applications on behalf of those entities seeking inclusion into the BCP, and to otherwise carry out the mandates of the statute.

The application process is a relatively simple. In this case, the application of the petitioner was submitted June 28, 2005. [12] That application lists seventeen (17) separate tax parcels to be included in the application, together with portions of Hiawatha Boulevard, Solar Street, New York State Barge Canal lands, and frontage along Interstate Route I81 right-of-way. [13] The initial application in this case listed not only the properties to be included, but also listed the prior consent stipulations that had been entered into by the various entities. The application also included substantial engineering details dealing with the contamination and set forth multiple reasons why development would be complicated because of the contamination in this case. The application was deemed complete by the DEC on July 18, 2005 as evidenced by a letter of Kelly A. Lewandowski, PE to the petitioner, dated that same day. [14]

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[12] A full and complete copy of the Brownfield application of the petitioner is found as item number 1 of the Return in this case.

[13] The entire list of properties to be included in the BCP are attached to the application as Attachment "1". (Return Item #1)

[14] This letter evidencing completeness of the application is found at Return item # 2.

The Lewandowski letter of July 18, 2005, not only evidences the completeness of the application, but again sets forth the stated purpose of the statute, in pertinent part, as follows:

> *... the BCP is a cooperative approach between the department, lenders, developers and current and prospective owners. The program fosters private sector remediation of Brownfields and reduces development pressures on green fields.*

The request for participation (the application) is subject to ECL § 27-1407. The letter of July 18, 2005 was written pursuant to ECL § 27-1407(3). Pursuant to that section, the department is required ("shall notify") to confirm the completeness or incompleteness of the application within ten days after receiving the request.

Once the application is deemed to be complete, there are a number of notifications required to be made by the DEC to further determine eligibility. Those notifications are set forth in ECL § 27-1407(4) and (5). The requirement of § 27-1407(6) requires the DEC to use all best efforts to expeditiously notify the applicant within forty-five (45) days after receiving the application whether the request has been accepted or rejected. [15] By November 3, 2005, all obstacles that had previously limited notification,

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[15] It should be noted, in the instant case, there was a delay of publication and notification that was caused by ongoing lawsuits by and between DestiNY USA and the City of Syracuse, SIDA, and others. The Court takes judicial notice of those lawsuits as they occurred, in conjunction with multiple other lawsuits that were pending at or about the time of the application. In other words, the fact that Destiny would be going forward, as a development, was in serious question at the time that the initial application was made, and subsequent thereto. Some lawsuits continue, but those that dealt with problems of notification were subsequently resolved, and the process continued. While the statute requires DEC to use its best efforts to make determinations within forty-five (45) days, in this case, such determinations were not made until twenty-seven (27) months after the application was complete. The Court has scoured the record to determine why the DEC took so long to make its decisions in this case.

publication and comment, had been resolved, and the parties then went forward with the public comment period required by the statute. No negative comments were received from any of the participating agencies, governments or others to whom notifications were sent.

Subsequently, the DEC issued a letter, dated December 29, 2006 (some eighteen (18) months after the DEC declared the application complete). [16] At that time, the DEC indicated that it considered denial of participation in the BCP to the following parcels: 561 Solar Street to Barge Canal; 551 Solar Street to Barge Canal; 541 Solar Street to Barge Canal; 531 Solar Street to Barge Canal; 300 Bear Street West and Solar Street; 311 Hiawatha Boulevard and Solar Street; 502 Solar Street; and 550 Solar Street. In so doing, the DEC relied upon the fact that each individual parcel was subject to enforcement actions pursuant to ECL § 27-1405.2. [17] At the same time, the DEC determined to include or make eligible for participation in the BCP the following parcels: 401 West Hiawatha Boulevard; 108 Bear Street West; 200 Bear Street West; 198

Indeed, the record is devoid of any rationale, excuse, purpose or reason why there was such an extensive delay.

[16] See Return item # 8.

[17] No doubt, the DEC was relying upon § 27-1405(2)(e), which disqualifies any property that is subject to any other ongoing state or federal environmental enforcement action related to the contamination which is at or emanating from the site subject to the present application. This denial is again confirmed in the October 5, 2007 denial, which clearly sets forth that provision for denial (see Return item # 10). This disqualification was clearly stated by DEC representatives not once, but twice. Leading up to oral argument and at oral argument, the respondent has tried to back away from this reasoning, citing it as a misstatement or other sort of typographical error.

Bear Street West; 250 Bear Street West; and 540 Solar Street. [18] Thus, the DEC made the determination some nineteen (19) months following the initial application that eight "Oil City" properties would not eligible for participation in the BCP. [19]

At the same time, in December, 2006, the DEC sought to get additional information from Destiny with regard to how the contamination or the potential presence of contamination complicated the development or reuse of the property dealing with the "Carousel Parcel" (that property north of Hiawatha Boulevard). The DEC specifically notes the department's eligibility guidance, and questions the estimated cost in comparison to the anticipated value of the proposed site as redeveloped or reused. The DEC also asked for additional information at that time with regard to plans for cleanup, removal, and disposal of contaminated material at that site, indicating that at that present time (December 29, 2006), the department did not have enough information available with regard to that part of the request dealing with parcels north of Hiawatha Boulevard.

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[18] It is noteworthy that the DEC determined these six (6) parcels should be included in the BCP, without applying any of the "guidance" factors that the DEC applied to the "Carousel Parcel" upon which it based its disqualification of these parcels. The lack of a "the cost of remediation versus cost of project" assessment, (such as they have included as "guidance") is telling with regard to these parcels. Also, the stage of development "guidance" evaluation (or lack thereof) is likewise significant. The arbitrary application (or non-application) of these "guidance" factors is a significant factor in evaluating whether the actions of the DEC were based on a reasonable application of the law or whether the application of the "guidance" factors was arbitrary and capricious, illegal and unsupported in law. It should also be noted that at the same time, DEC requested additional information from the applicant in the December 29, 2006 letter, a request made eighteen (18) months after it had confirmed the application complete. Again, a search of the record reveals no reason for this extensive delay.

[19] Return item # 8.

The letter of December 29, 2006 was almost immediately responded to by petitioner, by way of the January 12, 2007 letter from Peter L. Cappuccilli, Jr. [20] Multiple pieces of information attached to reports of Spectra Environmental were delivered to the DEC, setting forth potential work plan and estimate of potential cost, as well as relevant items requested and volunteered. Those estimates as set forth in the Spectra reports evidence remediation costs of anywhere from $50,100,000.00 to as much as $82,500,000.00 as an "order of magnitude" estimate. That report goes on to note that not included in the estimate are the significant costs of special piling materials and construction methods, ground water management, health and safety measures, and a more complicated foundation design, all of which can contribute tens of millions of dollars of additional costs, given the complication of the contamination on the site. At oral argument, it was argued by the petitioner that estimated costs could well exceed $100,000,000.00 as a complicating factor to the overall development costs.

Those reports notwithstanding, on October 5, 2007 (some ten months later) the DEC sent its final determination with regard to the properties, again agreeing to have the six original properties admitted into a Brownfield cleanup agreement, but denying the rest of the properties in accordance with the provisions of that October 5, 2007 determination. [21]

The DEC determined that all of the property North of Hiawatha Boulevard (the "Carousel Parcel") did not fall within the statutory definition of "a Brownfield site",

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[20] Return item # 9.

[21] Return item # 10.

basing its decision on four separate and distinct reasons. First, the DEC found that Carousel Mall is not one of the "abandoned and likely contaminated properties that threaten the health and vitality of the communities they burden" (citing ECL § 27-1403). The initial denial was based further upon the fact that the Carousel Mall is a large commercial property that is currently developed and in productive use and that the prior remedial activities have ensured the mall property is fully protective of public health in the environment for its current commercial use. [22]

The second reason the DEC gave for declining to include the "Carousel Parcels" in the BCP dealt with the fact that the DestiNY USA project had been in planning stages for many years, even before the enactment of the Brownfield statute. The DEC notes, in fact, that an 848,000 square foot expansion of the mall began in April, 2007 and that pile driving for the foundation began on August 9, 2007, during the pendency of the application. The DEC also notes that given the scale of the project any additional remedial activities that may be undertaken are likely to be minimal in relation to the overall costs of the mall expansion.

The third reason given by the DEC in its October 5, 2007 determination was that the real estate was going to be restored to productive use regardless of the presence of

[22] DEC in this determination, used not only its "guidance criteria" but also reworded, redefined, and apparently expanded the criteria to give additional reasons to support its determination, most of which are incapable of measurable evaluation.

contaminants and it is rational for the department to conclude that the complications statutory requirement has not been met. [23]

Finally, with regard to the "Carousel Parcel", the DEC determined that the Clark Containment parcel was excluded because of what the DEC alleged to be an ongoing state or federal enforcement action thus being excluded pursuant to ECL § 27-1405(2)(e).

The October 5, 2007 determination letter further goes on to exclude the eight parcels previously set out in the December, 2006 letter because they were currently subject to ongoing state or federal enforcement actions relating to the contamination, which is at or emanating from the site subject to the present application [ECL § 27-1405(2)(e)]. In short, the October 5, 2007 letter was an extension of the December 29,

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[23] In these determinations, the DEC relied, to a great extent, on 377 Greenwich, LLC v. New York State Department of Environmental Conservation, 14 Misc.3d 417 (Sup. Ct., NY County, 2006). The DEC presumably was unaware of the significant litigation pending with DestiNY USA over the time period between the initial application and the determination letter issued some twenty-eight (28) months later. There is nothing in the Return concerning this litigation and noting to indicate that DestiNY USA had significant roadblocks. The DEC fails to address the issue of certain "takings" through eminent domain by SIDA, and the fact that litigation ensued during this time period through the New York State court system to the United States Supreme Court. DEC also fails to take into consideration the rigid schedule of construction faced upon DestiNY USA by SIDA and the purchasers of SIDA Bonds (the financing requirements) that forced DestiNY USA to commence construction on Phase I during the twenty-eight (28) month delay in the DEC decision-making process. The DEC now seeks to capitalize upon its own unexplained delay in addressing the merits of the application. This is significant to the issue of the reasonableness of the actions of the DEC regarding the prolonged delay in making its final determination and whether their actions were arbitrary and capricious, given the use of the "mootness" prongs of the "guidance" criteria, as relied upon through the 337 Greenwich, LLC decision. Also, at oral argument, the Court sought to determine at what "stage" of idea or development (or planning) does a project have to be before a project would be accepted into the BCP . No measurable criteria was (or apparently could be) given. It seems as though these criteria rest at the whim of the DEC decision makers.

2006 letter with regard to the "Oil City" parcels and made definite conclusions determining the "Carousel Parcel" would not be included in the BCP. [24]

V - DISCUSSION OF THE DENIALS - ARBITRARY, CAPRICIOUS AND/OR ILLEGAL OR WELL-FOUNDED

Having laid out the history of the statute and the history of the current litigation, the question that now must be addressed by this Court is whether or not the actions of the DEC were arbitrary, capricious, illegal, or whether they were well-founded in a just and fair exercise of their discretion granted to that agency by the legislature.

In order to begin the evaluation of this salient issue, it is necessary to again focus on the statutory history and the statutory meaning which lays the foundation for the BCP.

As previously stated, the BCP is an Act of the legislature and governor, created in 2003 that amended the Environmental Conservation Law so as to add additional sections to Article 27 to create the BCP. It was designed to be a voluntary program to be used primarily by developers and others who would buy Brownfields, then seek to

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[24] The agreement concerning the "Clark Containment" parcel was one of OM&M (basically monitoring) voluntarily entered into by the prime developers' predecessor, and currently being fulfilled by the developer. The "Oil City Parcel" agreements relied upon by the DEC were those with the original owners of the properties. The DEC does not deal with, in its arguments, anywhere on the record with the voluntary agreement of the developer (Return item # 25) nor the understanding between the parties that dealt with that agreement. As will be discussed later, that agreement, by its terms, superceded all other agreements, was entered into voluntarily by the developer, and the understanding between the parties was that the agreement would not adversely affect developers (soon to be submitted) application for inclusion into the BCP. With regard to the Clark Containment Parcel, nothing was disclosed through the Return concerning the Record on Decision ("ROD") of March, 2004. That, for all practical purpose, closed any affirmative responsibility by the developer concerning that parcel.

redevelop and reuse them, while at the same time requesting admission into the BCP. Admission into the BCP gives a developer significant tax credits, upon completion of remediation, and limits the liability of a developer who uses the program to invest its own funds to effectuate remediation of Brownfield contamination. [25]

In 1994, the DEC administratively undertook to create a voluntary cleanup program (VCP) to help encourage the clean up of abandoned, undeveloped or underdeveloped and contaminated sites, and while so doing, offered limited protection against liability to the State under CERCLA and other environmental laws. [26] The BCP became effective on October 7, 2003. At that time, the stated purpose was clear - to help promote the clean up and remediation of Brownfields that were predominately in urban areas.

The clear and unambiguous purpose of the BCP was to expand the availability of clean up of Brownfields, while at the same time allow municipalities to take advantage of

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[25] The Brownfield Redevelopment Tax Credits are set forth in the New York State Tax Law at § 21. These credits, without going into great detail, include site preparation credit, tangible property credit, on-site ground water remediation credit and others, all applied through a percentage that is defined through the tax law.

[26] The VCP was a creation of the DEC in an administrative attempt (not statutory) to foster Brownfield remediation and to reverse the trend of non-development of urban Brownfield spaces. Under the VCP, the DEC would enter into stipulations ("voluntary cleanup agreements") with entities wishing to remediate Brownfields. The DEC would, itself, choose those parcels admitted to VCP, and the stipulations were very similar to the stipulated agreements from the era that preceded the VCP, in that developers would agree to a remediation plan, pay the cost, and agree to go forward with the plan. Unlike some stipulated orders, the DEC subsequently allowed selected VCP participants into the BCP program. These "invitations" were made at the discretion of the DEC. The whole VCP was, for the most part, reliant upon the unbridled discretion of the DEC.

opportunities for redevelopment, job creation, and overall economic growth. [27] In addition to the expansion of the definition of covered "waste" and "substances", Tax Credits were implemented to help invigorate the program and expedite the clean up of Brownfields, showing the true and unambiguous intent of the legislature. These Tax Credits accumulated at every step of the development and remediation process. Developers and volunteers were lured to Brownfield properties. Enticements under the program were real. The entitlements were measurably identifiable. Extensive Tax Credits and liability limitations were designed to be the profound catalyst that would lead developers to the distressed Brownfields of the inner city to build restaurants, residential housing, condominiums, hotels, commercial office buildings and tourist and recreational attractions. The plan was sound. The legislature, after decades of misdirection, had finally found the vehicle that would, once and for all, change the course of urban decay, and allow the major metropolitan cities of the State of New York to become prosperous, beautiful and usable once again.

With the new BCP statute, liability to those admitted into the program who undertook clean up and remediation was limited. Upon completion and upon certification that the remediation was complete and the requirements of the Act had

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[27] As stated by Governor George Pataki - "This is a historic day for New York State, and it is with great pleasure that I sign this bill. The programs and initiatives contained in this legislation illustrate the direct link between environmental health and fiscal stability. With a restored State Superfund and a new Brownfields program, we are able to further our mission of improving the quality of life for all New Yorkers. This measure allows municipalities across the state to take advantage of opportunities for redevelopment, job creation, and overall economic growth while protecting public health by removing contamination from communities." - Governor Pataki, October 7, 2003. This excerpt is found in the BCP Program Guide, May 12, 2004.

been met, the DEC issues a certificate of completion, which then triggers the tax benefits provided by the Tax Law and the limited liability provisions of the ECL. [28]

The statute was clear and unambiguous. The statutory purpose of was pointedly stated in the statute itself (27-1403) and the legislative history speaks volumes about the statutory intent that the legislature had in passing the statute. Indeed, the BCP was designed to be a statute of invigoration. It was designed to be a statute that would promote development in urban decayed areas where contamination was present, and development was expensive. Indeed, the statute was a statute designed to take not only abandoned properties, but older properties that had been used for retail, residential or commercial use and allowed developers to develop them in a way that was modern, cost-worthy and effective. The statute itself created a vehicle whereby potential developers could go to financial institutions and seek financing on projects without the institutions worrying about the ultimate liability of ownership and financing. Indeed, the tax credits available and the limited liability provisions that become effective upon completion show that the overall intent of the statute was clear, unambiguous, and designed to be applied liberally throughout the State of New York. [29]

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[28] See ECL § 27-1419(3); ECL § 27-1421(1); and New York State Tax Law § 21. Indeed, ECL § 27-1421(1) provides the applicant "shall not be liable to the state upon any statutory or common law cause of action arising out of the presence of contamination at the site."

[29] Clearly, the legislature assumed, that if the clear mandates of the statue were appropriately executed, urban areas would experience a boom of development that would significantly revive once prosperous and flourishing city neighborhoods, by bringing urban jobs and overall economic growth.

VI - THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION "GUIDANCE FACTORS"

Shortly after the BCP went into affect in October, 2003, the DEC took it upon itself to prepare a "draft Brownfield cleanup program guide". [30] This guide contained information applying to the BCP that was created by the DEC, the purpose of which was to allegedly help a potential developer investigate a site, select a remedy, and implement the selected remedy. In October, 2004, the DEC prepared a new "Brownfield cleanup program eligibility determination guidance" which was ultimately finalized on March 9, 2005.

The DEC "guidance" lists a number of factors that the DEC staff purportedly considers in determining whether there is confirmed contamination or a reasonable basis to believe that contamination is likely to be present on a property, and whether or not the contamination may be complicating the development, use or reuse of a property. Such factors include whether the proposed site is idle, abandoned or underutilized; whether the proposed site is unattractive for redevelopment or reuse due to the presence or reasonable perception of contamination; whether properties in the immediate vicinity of the proposed site show indicators of economic distress, such as high commercial vacancy rates or depressed property values; and/or whether the estimated costs of any necessary remedial program is likely to be significant in comparison to the anticipated value of the proposed site as redeveloped or reused.

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[30] This guide, dated May, 2004, is found at HTTP://www.dec.ny.gov/chemcial/8450.html.

The draft cleanup program "guidance" came under significant assault from urban planners, developers and environmental lawyers throughout the state. The New York State Bar Association Environmental Law Section severely criticized the guidance as being thoroughly arbitrary, capricious, and unduly and illegally limiting of the clear intention of the statute. [31] These comments, dated November 19, 2004, start by saying:

> *... the proposed new restrictions on site eligibility do not have a clear basis in the statute itself ...*

Many of the concerns raised by the New York State Bar in those comments reverberate through the decisions in this case by the Department of Environmental Conservation" (see e.g. comment 6.4, 6.5, 6.6, 6.9 and others). The comments criticize DEC for taking on the role official watchdog (comment #7), and effectively legislation "statutory" criteria that defines the overall fiscal effect of implementing the statute. Petitioner asserts (as did the New York State Bar Environmental Law Section) that only the legislature has authority to contend with the fiscal ramification of a statute, and it does, when passing legislation.

In December, 2006, following a two-year public review process, the New York State Department of Environmental Conservation issued regulations with regard to the BCP. These regulations took affect December 14, 2006 (see, 6 N.Y.C.R.R. Part 375). A thorough review of these regulations do not include the "guidance factors" upon which the DEC relies upon in determining whether or not a subject site should be included into

[31] A full and complete copy of the comments developed by the Environmental Law Section of the New York State Bar Association are attached to this Decision as Exhibit "A".

the BCP. Indeed, the "guidance factors" are significantly more limiting in its scope, and gives significantly more authority to the DEC in making case-by-case determinations as to which properties should be allow into the program and which should not. The "guidance" is much more restrictive and limiting than 2006 regulations.

During oral argument, there were significant discussions had between the Court and counsel for the respondent with regard to the measurable effect of the DEC "guidance". When pressed, it was clear that there is no real "guidance" dealing with the criteria that DEC purports to define the "complication" component of the statute. The DEC has promulgated in "guidance factors", which clearly lead to decisions being made arbitrarily and without grounded reason. The "guidance" that has been drafted and used by the DEC profoundly limits and blunts the desired effect of the statute in a myriad of ways and, at the same time, vests unlimited authority and unfettered discretion with DEC personnel on issues dealing with the BCP.

This Court scoured the record to see under what plausible theory the DEC can simply choose to limit the clear and unequivocal language and legislative intent of the statute. This Court has been unable to find a single basis upon which the DEC could possibly justify the addition of such significant limitations placed upon the clear meaning of the statute. Clearly, in deciding to adopt the "guidance factors", the DEC has opted to make itself a fiscal watchdog without legislative authority. Moreover, by adopting the so called "guidance factors" the DEC has chosen to rewrite the statute that was clearly written by the legislature, the effect of which is to not only dull, but to

emasculate the clear intent of the statute, by administrative agency fiat. Such activities cannot - and should not - be condoned. [32]

The legislative history leading up to the passage of the statute, and the clear language of the statute itself, clearly show that the statute is one to be liberally applied to Brownfields throughout the state that satisfy the barest of requirements.

VII - STANDARD OF REVIEW AND THE "CAROUSEL PARCELS"

The standard of review for agency action is grounded in our State's tri-part system of government that distributes power among the executive, legislative and judicial branches. Boreali v. Axelrod, 130 A.D.2d 107, affirmed 71 N.Y.2d 1. The Separation of Powers Doctrine (New York State Constitution Article 3, Section 1; Article 4, Section 1; Article 6), maintains a delicate balance among the three branches of government, and prevents the concentration of power in any one branch. The New York State Constitution clearly vests the power to enact laws in the legislature, which may not delegate its lawmaking function to an administrative agency. Conversely, an administrative agency may not, by agency fiat, take away from the legislature the power to enact laws, by emasculating the very laws that they are charged to enforce. Boreali v. Axelrod, *supra*; New York State Constitution Article 3, Section 1; Matter of Nicholas v. Kahn, 47 N.Y.2d 24; Matter of Levine v. Whalen, 39 N.Y.2d 510.

While the legislature may confer discretionary authority to an agency, the agency range of discretion is limited and must remain within the standards provided by the

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[32] The statute defines a "Brownfield site" as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant" [ECL § 27-1405(2)]. The DEC takes this clear descriptive qualifying phrase and adds a number of more restrictive "guidelines".

legislature. Thus, an agency is empowered to administer the law as enacted by the legislature and in accord with the intent of the legislature at the time of enactment. An administrative agency cannot adopt its own "agency" intent, at the risk of forsaking the clear legislative intent. Matter of Nicholas v. Kahn, *supra*; Matter of Levine v. Whalen, *supra*. It is the role of the Judiciary to safeguard the separation of powers and prevent agencies from encroaching upon the legislature's domain when an agency usurps the legislature's lawmaking powers. In making the determination whether or not agency action is valid, given the Separation of Powers Doctrine, the Court must ask whether the agency has acted rationally - that is - not in an arbitrary and capricious manner. Boreali v. Axelrod, 130 A.D.2d 107 @ 119. The answer to the question of whether an agency has acted appropriately depends on whether the agency's action effectuates the enabling legislation's purpose and "is in harmony with the language, policy, remedial structure and legislative history of the governing statute." Boreali v. Axelrod, *supra*.

It is true, that deference is accorded to an agency when the interpretation of a statute requires some type of specialized knowledge. Matter of Belmonte v. Snashall, 2 N.Y.3d 560. But, the rule of deference has limitations to be imposed in law and fact. An agency will apply its specialized knowledge or expertise when it relies upon a knowledge and understanding of underlying operational practices or its determination entails an evaluation of factual data and inferences to be drawn therefrom. Kurcsics v. Merchants National Insurance Company, 49 N.Y.2d 451. If the agency's action runs counter to the clear holding of the statutory provision, it should not be accorded any weight. Kurcsics v. Merchants National Insurance Company, *supra*. Indeed, an agency is not entitled to deference when the question is one of pure statutory reading and analysis dependent

only upon an accurate apprehension of legislative intent. Matter of Belmonte v. Snashall, *supra*. In that circumstance, an agency is charged with the duty to support legislative intent - not to eviscerate that intent and callously adopt its own in its place and stead. [33]

At oral argument, this Court inquired, at great lengths, with respondent's counsel with regard to the rule of deference, and the particularized knowledge upon which the respondent relied in created the DEC "guidance". It turns out that the "guidance" is no guidance at all. Indeed, through the conversation with counsel at oral argument, it became clear that guidance was not anticipated at all in the "guidance criteria", but the so-called "guidance" was nothing more than an enabling feature to allow the DEC to make decisions at their whim. Repeated questions concerning the measurable formulas, or other considerations that went into the "guidance factors" determinations went unanswered or were avoided by counsel for respondent. What is clear, and what has been clear from the record before this Court with regard to the agency "guidance" is that it provides no "guidance" at all. Rather, it creates a scenario whereby unfettered discretion is self-created and given to an agency to create its own laws - to legislate its own criteria - to create its own fiscal policy - and to severely cripple and limit a clear and unequivocal statutory intent and purpose and at the same time leave unlimited discretion to the agency heads who are charged with the rational application of the statute in the real world.

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[33] See also: Sworman v. NYS Division of Housing & Community Renewal, 94 N.Y.2d 359; Matter of Gruber, 89 N.Y.2d 225; N.Y.S. Association of Life Underwriters v. NYS Banking Dept., 83 N.Y.2d 353.

The respondent cites 337 Greenwich, LLC v. New York State Department of Environmental Conservation, 14 Misc.3d 417, 827 N.Y.S.2d 608, for the proposition that that court found that the use of eligibility "guidance factors" was not inconsistent with the statutory scheme. However, the facts and issues in that case were significantly different than those of the case at bar. There, the developer had arranged financing approval before the BCP statute was passed and commenced remediation without any form of DEC approval and over the DEC's express admonishment that the owner was proceeding at its own risk. Subsequently, the petitioner then reported to the DEC that remediation was complete, and claimed that the cost of remediation was approximately one million dollars. It then sought inclusion into the BCP to obtain the Tax Credits triggered by the statute. The facts of that case are distinctly different than the ones at bar.

Here, there is no question but that the application was made before financing was approved. In fact, the fact of the very application to the DEC is duly noted and included in the financing documentation. There, the developer went ahead with construction. Here, the developer had not even had approval to go forward with construction at the time of application. Here, the DEC sought to do a comparison of the costs of development versus the cost of remediation. However, no details that showed knowledge of the development process were elicited by respondent or included anywhere in the record. Upon direction questioning at oral argument, it was very clear that counsel for respondent had little or no knowledge whatsoever concerning the development process that DestiNY USA had undertaken with regard to the project in question. In multiple questions to respondent Counsel, the Court made inquiry into the

"guidance factors" and it was apparent that there were no real, measurable, credible guidelines or factors that dealt with the particular reasons for denial in this case.

For example, when asked at what stage of the process does a project get disqualified, respondent had no answer. No answer was given that could be considered guidance. For example, would such a denial come with the idea for a project, or perhaps the first engineering or architect drawing, or at the first application for a building permit. No answers were give or could be given to these questions, as the "guidelines" that were relied upon for the denial in this case were simple verbiage with no concrete guidance whatsoever. [34]

Respondent's reliance on JOPAL Enterprises, LLC et ano v. NYS Department of Environmental Conservation (Supreme Court, Suffolk County, July 31, 2006 (Hon. Elizabeth Emerson, JSC)) is also misplaced. There, the question presented to the Court was only whether there was enough contamination even to allow the petitioner into the BCP. None of the other "guidance factors" relied upon by respondent in this case were either at issue or discussed by the Court. That notwithstanding, there is no significant

[34] What is clear from the record, is that it appears the DEC delayed their determination in this case knowing that DestiNY USA had to proceed with construction in the summer of 2007. There is no other conceivable reason for the extensive twenty-eight (28) month delay. In the determination of October 5, 2007, they then cite, 337 Greenwich, LLC v. New York State Department of Environmental Conservation, *supra*, as part of their determination. Coincidentally in their "guidance" DEC writes, in pertinent part as follows: "Given the nature of many real estate transactions, timing is important. In order to provide greater certainty relative to timing, the law provides for the Department of Environmental Conservation (Department) to use its best efforts to meet certain time frames for reviews and approvals. The Department, in concert with our partners, will make every effort to meet these time frames." [page 4] BCP Program Guide, May 12, 2004. DEC, however, bootstraps their position by citing 337 Greenwich, LLC v. New York State Department of Environmental Conservation, *supra*, knowing that a full review of the "guidance factors" was not done in that case.

review, in that case, of the "guidance factors" or other "factors" that are at issue in this case. As a result, respondent's reliance on JOPAL is misplaced.

VIII - DO THE "GUIDANCE" FACTORS SUPPORT THE INTENT OF THE BCP STATUTE?

Political Scientists and educators warn of government rule by the "I am right, you are wrong" mentality of leadership. Such leadership is fraught with concerns of self-indulgence, self-aggrandizement and arrogance. Government generally is the by-product, in most instances, of a two party system that competes for power by using the "I am right, you are wrong" model of rhetoric and setting and initiating policies. The general public usually truly believes that our politicians and government leaders are in office to create and enact policies that will be beneficial for the public good. But once in power, there is a continual struggle between what is the public good, and what is the good of the party in control.

The "three men in a room" analogy of governmental decision making is a perfect example of this power struggle in action. Each house of the legislature as well as the executive branch, struggle for their own sovereign independence and power, but at the same time they are charged with the duty to agree on laws and policies for the benefit of all citizens of the State. In a perfect world, government officials will enact and enforce policies geared only for the public good. In so doing, they make an inquiry into what are the "needs" of the populous that they serve, and then decide how best those needs can be addressed. The policies thus set are those that truly serve the needs of the citizenry and make life better for that citizenry. But in reality in a duel party system, there is continual

struggle, and the underlying reason is usually because each party seeks to sustain itself, increase importance of its' own ideals, and create laws that allow government (party) succession and control.

Government agencies are not immune from this unfortunate form of thinking. Once appointed, agencies constantly find themselves embarked on a journey of determining what is the public good, and what is the good of the agency. Many times, the definition of "good" gets complicated with the agencies desire to survive, to succeed in impressing the community (inside of government as well as outside) of the importance of what the agency does, and in impressing budget makers of the good they serve and the need for the budget dollars to sustain the ever increasing power base.

Under this type of leadership, government agencies sometimes tend to administer programs in a way not with the "good" of the citizenry they are charged to rule in mind, but rather for their own "good" and survival as their foremost concern. Agency survival becomes foremost in developing policies of administration, often displacing the general good of the citizenry and the policies are set and continued only for the purpose of proving the self-worth of the agency and increasing the agency power base.

Instead of ruling on a "need based" basis of setting policy, agency mentality many times is geared toward self-preservation. Instead of really seeking to serve the populous and enact and foster "needs based" policies, agencies often times will try to make themselves, and the job they do, as important as possible in the eyes of those that appoint them, and in the eyes of the citizens. The result is they expand their powers by administrative fiat, enacting rules, regulations or "guidelines" that expand their power

beyond that contemplated by those that create the agency or those that appoint the agency leadership.

Sometimes this expansion of power is done with the support of those that create the agency and rely on the agency to execute the laws and legislation as written and passed. However, many times such expansion of power is without authority and without cause. When done without authority, this exercise of self-increase of power may come into conflict with lawmakers and their stated purpose in enacting laws which the agency is to enforce or administrate. Is it at that stage that agency actions tend to become arbitrary, capricious or unlawful. Indeed, unchecked agency power, results in activities that may become unlawful and in derogation of the very purpose for which statutes were enacted in the first instance.

In order to determine whether a particular agency has exceeded its power and attempted to act beyond the intent of the lawmakers, it is necessary to not only look at the legislative history of a particular statute and the wording of the statute itself, but also to look closely at the "needs" that the statute is intended to address. By making this inquiry, it is possible to compare the effect of agency action, by way of rules, regulations and "guidelines" they create with the statutory purpose and intent. By doing so, it is possible to see whether those agency actions support the "needs" to be addressed or whether they hinder the very purpose of the statute it seeks to enforce.

It is the role of the Judiciary to carefully evaluate the "needs" that a statute is designed to address and whether the agency action rationally addresses those needs, or whether the agency arbitrarily or capriciously detracts from the "needs" by the use of

"survival" based misdirected agency power. The Judiciary is charged with the inquiring into what the general society "needs" are under the circumstances, and whether the statute is being administered in a way to help accomplish those needs or not.

The BCP is a perfect example, however, of bipartisan politics—the lawmaking branches of government working together in the interest of the common good to address the "needs" of the citizens of the State. The Senate, Assembly and the Executive Branch all simultaneously realized a vision that would address the true needs of the State and the citizenry, and created a law that was uniquely designed to be implemented in a way that would help address many these "needs".

For example, in the case of the BCP, it is clear to this Court that some of the "needs" to be addressed are obvious from the intent of the statute from the legislative history and the wording of the statute itself as expressed before. But there are other needs that are supplied by the faithful carrying out of the purpose of the statute that while not actually stated, are clearly accomplished by the faithful administration of the Statute. For example, here are but a few:

1. The need to eliminate Brownfields.(stated)

2. The need to entice developers to invest in the urban areas and cities of the State.(stated)

3. The need for the local governments and urban planners to be free to design their cities in a way that will attract people and foster business growth.

4. The need to develop and utilize “Green” technology and lesson the reliance on fossil fuels.

5. The need to replace Brownfields with modern construction that is geared to be the highest and best use of a particular property.

6. The need to use tax incentives to entice developers to invest in “Green” technology and develop that technology as quickly as possible.

7. The need for the independence of Urban and City planners to redevelop their urban areas and Cities to their highest and best potential.

8. The need for local governments to make their own decisions about development of land within their local boundaries without the imposition of authority from State agencies that have less development knowledge about the municipality, the local citizenry and development needs.

9. The need to develop a standardized reliable system of allowing properties into the BCP and monitoring and governing the program.

10. The need for the cities in the state of New York to compete at the highest and best level possible with cites of other states so as to attract viable business and people to the state.

11. The need to expand and increase the tax base of urban cities by using and developing land within the cities to the highest and best use.

12. The need to expand the number of jobs in the State of New York.

13. The need to bring reasonably priced retail, residential, and commercial development projects into the State's urban areas.

14. The need to have administrative "guidance" or rules evenly applied to all citizens of the State.

The analysis to be done now is to determine whether the DEC's "guidance factors" and the additional factors used by DEC in this case truly serve to help meet the societal "needs" or, conversely, frustrate them.

The three initial reasons that the DEC disqualified the "Carousel Parcels" were directly related to an apparent use of the "guidance factors" or some derivative of those factors. The four (4) combined reasons given by DEC to disqualify the "Carousel Parcels" were based, succinctly stated, upon a finding by DEC that Carousel was already developed some nineteen (19) or so years ago, that at the time the property was remediated so as to provide for the safety of the citizens; that DestiNY USA had been in the planning stages for years, and was not likely to rely totally on the BCP benefits for the development; that by purportedly conducting a "cost of remediation vs. cost of development" the DEC the cost of development so far outweighed the cost of remediation that entry into the program was not necessary.

It is clear just by looking at the BCP Statute that no such criteria is found anywhere in the statute. It is likewise clear that there is no authority given in the statute to the DEC to devise such criteria by the plain statutory wording. And so it is clear that there is no authority in the BCP to utilize any such assessments. Ordinarily, this court

could stop the analysis there, and make the finding that the DEC has exceeded its' authority and wrongfully relied on the "guidance factors'.

But it is appropriate to go forward to see whether applying these criteria, the DEC was furthering the intent of the statute or frustrating that intent. In other words, were the DEC actions in relying on the so called "guidance criteria" supportive of the "needs" of the citizens of New York as such "needs" are clearly intended to be addressed by the clear reading of the BCP.

In looking at the fourteen (14) "need" components set forth above, this Court finds that the application of the "guidance factors" in this case has acted to thoroughly frustrate the very purpose of the statute that the DEC was obligated by law to faithfully support. By using these "guidance factors" to deny inclusion of the "Carousel Parcels" into the BCP, the DEC has completely ignored the ramifications of their decisions *vis a vis* the "needs" of the citizens of the State of New York to be addressed by the statute. In making their determinations, the DEC have ignored the need for local planners to make independent decisions concerning the way their Cities and urban areas will be designed. By artificially adopting at "cost of remediation vs cost of development" assessment, the DEC has made it imperative that, in order to redevelop Brownfields, that local planners must let the DEC have input into the design of local projects, otherwise losing the benefits of the program. In other words, whether a property can and should be developed to its highest and best use becomes secondary to the DEC weighing process, thus making local developers and local planners reliant on the "so called" formula in

making design considerations. Local and urban planners must invite DEC to the design table when courting developers.

But yet another question arises in defining the formula used by DEC in the "cost of remediation vs cost of Construction" "guideline". There is nothing in the record that sets forth the parameters used by DEC in the use of the "guidance factor". In fact there is nothing anywhere in the record as to what measurable components are and/or were used by DEC in making their determination. Quite the contrary, in oral argument, the respondent was unable to give the Court, under extensive questioning, any of the "guidelines" used by the DEC in making the determination under this alleged "guideline". Indeed, it appears that DEC purposely adopted this as a factor so that it could have unbridled discretion over what projects they would admit and which they would not admit into the program. This court recognizes that there can and should be no such artificial restriction imposed on local government planners and developers with regard to the re-development of land within their jurisdiction. The DEC should not enter the development design process. The DEC should not dull goals of local planners to have their city land developed to its highest and best use. Development and design is not, and by statutory mandate, should not be their purpose for existence. The purpose to the BCP statute was not to limit the types of projects the would be entered into the program (or the costs of those programs), it was to entice ALL projects into the program that make sense to local planners and decision makers, and get new projects built upon "Browfields".

In this day and age, the development of "Green" technology is a "need" that our

society has to accommodate and aggressively pursue, given the current crisis dealing with fossil fuels. From the record submitted, it is clear that DestiNY USA is being designed as an experiment in "Green" technology and as a think tank for the development of such technology. Clearly much of the cost of Destiny design and construction will be to develop and introduce new methods of "Green" technology into the project. This is described as one of the main—stated purposes of the project. When complete, it is anticipated that DestiNY USA will not be reliant on fossil fuels for energy sources!

But in denying DestiNY USA into the BCP program, DEC has (quite ironically) taken the position that when extensive financial commitment is put into a project to develop "Green" technology, that such project will be disqualified because of the "cost of remediation vs cost of development" "guidance factor". Thus, the very agency that is charged with protecting our environment has created a "guidance factor" that discourages developers from using BCP Tax Credits and limited liability to foster the research and development of technology that will relieve the reliance upon fossil fuels. Clearly, that effect of DEC's adoption and use of this "guidance factor" cannot possibly be defended as applied in this case. Such application is not only arbitrary and capricious, it runs absolutely contrary to DEC's very purpose for existence. What better application of BCP tax credits could there possibly be other than the development of "Green" technology? Clearly the intent of the legislature is not only served by such a use of these tax credits, but the intent is carried out in a way that compounds and multiplies

the effect of the credits from an environmental standpoint. Such expenditures should be applauded, not used as a factor to disqualify otherwise viable BCP projects.

The cities of the State of New York must, in their effort to rebuild, do so in a way that will attract new residents and businesses. To do so, local governments, developers and urban planners within these cities must be encouraged to support and build out projects that raise property use to their highest and best possible use. To do otherwise will detract from the ability of New York State and its' residents to compete in what has become a world economic environment. Thus, Statutes like the BCP must entice developers and urban planners to use the tax credits to build new buildings that are special, and to replace older, more run down or outdated buildings. Clearly this is one of the purposes of the BCP. But the "guidance factor" used by DEC in their determination concerning DestiNY USA disqualifies DestiNY USA because it is doing that very type of redevelopment. Whether there was contamination or not when the Carousel Mall was first built is not and cannot be the issue. Whether there is an existing mall is not and cannot be the issue. No such "guidance" exists in the Statute. But DEC has engineered a determination of disqualification that runs in the very face of the intent of the statute. The issues must be decided by local governments and planners, to design and build special projects - projects that can compete in a worldwide market for jobs, technology, recreation, leisure and more.

There is a distinct "need" to bring reasonably priced retail, commercial and residential buildings to our urban areas and to Upstate New York. Businesses that want to rent or lease space must be able to do so at a reasonable cost. Companies that are

looking to re-locate must be enticed by new buildings that are equipped with state of the art technology. Indeed, one of the very purposes (and desired effects) of the BCP is that tax credits would allow for the very type of reasonable priced buildings for new businesses to take up residency in urban areas. Such intent—when carried out—will allow the cities of New York State to flourish, not just simply exist. Such intent—when acted upon—will serve as a catalyst for the creation of jobs and an increase in the tax base of the cities and urban areas throughout New York State. Such action will allow for the increase and augmentation of sales and use taxes of extraordinary levels. It will provide an influx of money into the economy of urban areas not seen in the past. Such action will ease excessive real estate taxes that have strangled growth in our State for decades. Buildings built with "Green" technology will ease the excessive energy costs that have blunted economic growth and deterred business advancement. Indeed, all of the stated reasons for the development of DestiNY USA parallel the very focus and intent of the legislature in developing the BCP. That is why, no doubt, there is such an overwhelming acceptance of DestiNY USA by Federal, State, County and local City officials. There is an overwhelming public interest attached to the development of DestiNY USA - one that parallels the very intent of the BCP Statute. DestiNY USA could be the one singular project that changes the legacy that our generation gives to the next.

IX - LIMITS ON AGENCY "GUIDANCE"

An agency is permitted to prepare guidance that may include forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory. (New York State

Administrative Procedures Act ("SAPA") Section 102(2)(b)(iv)). But the law is well settled that an agency may not, under any circumstances legislate by adding a requirement through "guidance" that is not authorized by the statute. (Matter of Medical Society of the State of New York v. Serio, 100 N.Y.2d 854 ; Boreali v. Axelrod, 71 N.Y.2d 1).

Here, it is clear, that under the guise of determining whether a development will be "complicated" by the presence or potential presence of contamination, the DEC has effectively revised the clear statutory definition and established a new Brownfields policy. This policy, written through "guidelines" flies in the face of the stated policy of the BCP, and eviscerates the effect of the policy as written. This new policy created by the DEC ignores the very purpose of the statutory BCP, and substitutes a foreign policy—one that ignores and, in fact, conflicts with—the very "needs" of the citizens of the state of New York that the BCP is designed to support. These "guidance factors" do not provide "guidance" but rather become "eligibility" factors which are substantive requirements for eligibility that cannot be inferred from the plain reading of the statute or any recognizable interpretation of legislative intent. Indeed, the use of such "guidance factors" or "eligibility" factors were never authorized or contemplated by the legislature, and instead of furthering the legislative purpose, they castigate such purpose, and serve not to support the "needs" of New York State citizens, but to usurp such needs.

In Trump Equitable v. Gliedman, 62 N.Y.2d 539, the developer sought certain tax credits on the basis that the undeveloped cite was "under-utilized". The term "under-utilized" was not defined in the relevant statute, much the same as "complicated" is not

fully defined in the BCP statute. In that case, the HPD interpreted that term to mean "substantially under-utilized", and sought to deny tax benefits to the developer. The Court of Appeals held that such interpretation improperly limited the availability of the exception, in direct contravention of the plain words of that statute. In so holding, the Court found that the agency interpretation imposed a precondition to the statutory benefit that was not found in the statute. As in Trump, this Court finds that the DEC's "guidance factors" as drafted and as used in this case, have impermissibly imposed value judgements on admission to the BCP that were not intended by the legislature. (Kurcsis v. Merchants National Insurance Company, 49 N.Y.2d 451@458). This Court cannot stand for the application of a limitation or exception into a rule of law without sound reason, especially where that implied runs clearly and absolutely contrary to the plain meaning of the statute and all rationale theories of statutory construction.

The DEC "guidance factors" are far from "explanatory and interpretive" and clearly have crossed into a realm of policy and legislation. As stated very appropriately in Boreali v. Axelrod,

> *"...Striking the proper balance among...(competing) interests, however, is a uniquely legislative function. While it is true that many regulatory decisions involve weighing social and economic concerns against the specific values that the regulatory agency is mandated to promote, the agency in this case has not been authorized to structure a cost-benefit model...and, in fact, has not been given any legislative guidelines at all for determining how the competing concerns...are to be weighed. Thus, to the extent that the agency has built a regulatory scheme on its own*

> *conclusions about the appropriate balance of trade-offs…., it was "acting solely on (its) own ideas of public policy" and was therefore operating outside of its sphere of authority. This conclusion is particularly compelling here, where the focus is on administratively created exemptions rather than on rules that promote legislatively expressed goals, since exceptions runs counter to such goals and, consequently, cannot be justified as simple implementation of legislative values.* (71 N.Y.2d 1 @ 12)

In conclusion, this Court finds that the DEC's use of "guidance factors" and the other factors cited by the DEC in their denial letter of October 5, 2007, in this case was arbitrary, capricious, unlawful, not rational and based on unsound reasoning, erroneous and in violation of law. The determination of the DEC to deny admission into the BCP for the "Carousel Parcels" must be, and hereby is, reversed. Those parcels must be admitted into the BCP.

X- THE CLARK CONTAINMENT STRUCTURE

To the extent that DEC made its' determination on the "guidance factors" and the other factors relied upon in the October 5, 2007 denied, having been considered and decided, the Court now turns its focus to the DEC's denial of the "Clark Containment Parcel". DEC contends that the "Clark Containment (Structure) Parcel" is likewise covered under an agreement and determination, and that fact, in and of itself is reason for disqualification under ECL Section 27-1405(2)(e). DEC again asserts that the Clark Containment Parcel is subject to a federal or state enforcement action, relating to the contamination.

The agreement that the DEC relies upon is found at Return items #27 and #28. These agreements are not actions at all, but are agreements entered into originally by Conklin Ltd., DestiNY USA's predecessor in interest. Under these agreements, DestiNY USA has the ongoing responsibility for operation maintenance and monitoring of the subject parcel.

The Clark Containment Parcel is comprised of a containment cell that was designed at the time Carousel Mall was originally constructed. Under agreement with the DEC Carousel created the Clark Containment Cell and agreed to maintain and monitor the Cell into the future for thirty (30) years. The Cell continues to be present today, and if construction of DestiNY USA goes forward, the Containment Cell will have to be disturbed, and otherwise demolished, remediated and/or otherwise destructed to allow for the construction of the new development.

The process undertaken by Conklin, Carousel and now DestiNY was purely a voluntary remediation process, and the hazardous condition continues to remain on the property. Full build out by DestiNY will require that the cell be disturbed (if not eliminated) and thus, the parcel is—as defined by the BCP—complicated by the presence of these contaminants.

There is no proof of any kind, based on the record before this Court, that there was ever any action, federal state or otherwise, that existed concerning the Clark Containment Parcel. A Record on Decision ("ROD") was adopted by DEC in March of 2004 that concluded the voluntary remediation process concerning the Clark Parcel. In

light of these factors and the plain meaning of the BCP and the governing law, the determination of the DEC to deny inclusion into the BCP is unsound, erroneous and in violation of law. It must be, and is hereby reversed, and that parcel must be admitted into the BCP. [35]

It is clear that, with regard to the "Carousel Mall Parcel", all construction activity on site has been undertaken in consultation with the DEC and with its approval. The DEC has never indicated, let along admonished Destiny, that any of its remedial steps would prejudice its eligibility for the BCP. Here, it is clear that the DestiNY USA plan was developed in reliance upon BCP, given the fact that the project site is so riddled with contamination and the significant complications the contamination had on its development. Based on all of the above, this Court finds that the DEC's actions and determinations of denial with regard to the failure to include the "Carousel Mall Parcels" in the BCP were arbitrary, capricious, illegal, and as a result, must be vacated and set aside. That decision and the determination of October 5, 2007 concerning the "Carousel Parcels" must be, and is, reversed.

XI - THE OIL CITY PARCELS

This Court now turns its assessment to the "Oil City" parcels, and the failure of the DEC to include them into the BCP. The sole reason for the declination as set forth in the October 5, 2007 determination letter was that the requests for inclusion must be denied because all of the parcels were currently under an order on consent [ECL § 27-

[35] This ROD is found at http://www.dec.ny.gov/cfmx/extapps/derfoil/haz/detailes/cfm?pageid=3.

1405(2)(e)]. In other words, according to the DEC determination letter of October 5, 2007, all of the parcels in the Oil City site were "subject to other ongoing state or federal enforcement actions related to the contamination which is at or emanating from the site subject to the present application."

XII - THE MOBIL PARCELS

The DEC admits that the properties are "contaminated" within the meaning of the Brownfield statute. In the determination letter of October 5, 2007, the DEC states that the reason for the denial was that ongoing state or federal enforcement actions were continuing with regard to the parcels. Based on the record before this Court, this simply was not true with regard to the Mobil parcel. By letter, dated June 14, 2004, the DEC agreed to close its case file with respect to the Exxon Mobil properties provided it received a deed restriction prohibiting all ground water use without DEC approval, basically restricting the property from any use other than commercial or industrial and prohibiting any soil disturbance without a wavier from the department (Return item #20). During oral argument, this fact was conceded by attorney for the respondent, and this Court finds that there is simply no issue of fact with regard to the fact that the DEC closed any action pending with regard to the Mobil Oil case on June 14, 2004. As a result, the decision of the DEC must be reversed as such decision is unsupported by the record, unwarranted, in violation of law and the decision to eliminate the Mobil parcels was arbitrary and capricious. That decision must be, and is, reversed. As a result, this Court vacates and sets aside that part of the October 5, 2007 determination letter by the DEC that specifically excludes the Mobil parcels from inclusion into the BCP and

reverses that decision. The Mobil parcels deserve inclusion in the BCP.

XIII - THE REMAINING "OIL CITY" PARCELS

The full analysis with regard to the Oil City parcels cannot end there. There were multiple other parcels that were excluded that this Court needs to address whether or not the declination by the DEC was rational and based on solid, factual and legal analysis, or was arbitrary and capricious under the circumstances and/or otherwise illegal and erroneous.

The DEC's determination letter of October 5, 2007 denies entry into the BCP of all of the "Oil City" parcels for the same reason - because they were "subject to an ongoing state or federal enforcement actions related to the contamination which is at or emanating from the site" (Return item #10 @ 2-3). The determination cited both the language and the specific sub-section number as the reason for denial [ECL § 27-1405(2)(e)]. This clearly is not a typographical error or a mere incorrect citation, as advanced by the respondent at oral argument. The DEC determination clearly quoted and relied upon that section, the determining factor in excluding all eight parcels into the BCP.

The respondent in this case, however, asserts that, in fact, the stipulated orders were, in fact, ongoing state or federal enforcement actions and, alternatively, that they are orders for clean up under Article 12 of the Navigation Law, and as a result, must be excluded from the BCP.

The first issue with regard to the respondent's position is whether or not, in fact, the stipulated orders are "actions at either the state or federal level". This Court finds

that these stipulations and orders are nothing more than voluntary agreements each of which provide recitations that the participants do not admit any liability. There is no indication on the record before this Court at any time that there were any actions that were brought at either the state or federal level, civil or otherwise, against any of the signatories to those agreements [see, return volume 2, numbers 11 (Pyramid, May, 1994), 12 (Hess, April, 1994), 13 (Hess, Terminal Remediation Plan, October 10, 1994), 14 (Pyramid Modification Plan, January 24, 1996), 16 (CITGO Consent Order, November 3, 1999), 17 (CITGO Consent Agreement and Plan, August 26, 1998), 18 (Mobil Consent Order, April, 2000), 20 (DEC Closure of Mobil Case File, June 14, 2004), 23 (Sunoco, Inc. Consent Order, March 27, 2000), 24 (Pyramid Stipulation, March 24, 2002), and 25 (Destiny Stipulation, June 23, 2005)]. This Court has reviewed each of these agreements in detail, and find that they are just that - agreements and stipulations on consent - not actions at either the federal or state level.

This Court finds that, indeed, by clear and convincing evidence that each of these agreements are agreements of stipulations made with the DEC by the respective individual companies that entered into those agreements. Indeed, they are not "actions" as that term would be defined in a court of law. Quite the contrary, they are stipulations and agreements to deal with remediation efforts at a particular site. These stipulations and orders are not "ongoing enforcement actions" in any meaningful sense of the term. Indeed, a negotiated settlement signifies the end of a dispute, not the pendency of one. It signifies the end of an action, not the pendency of one. Indeed, DEC policy guidance document "DEE-2; Order on Consent Enforcement Policy" explicitly recognizes the consent order as a form of administrative settlement of all DEC claims or enforcement

actions. [36] Indeed, the policy explains that consent orders are similar to stipulations or consent orders issued by courts to resolve judicial litigation.

Moreover, and perhaps even more compelling to this Court, is the fact that item 25 of the Return sets forth an agreement between Destiny and DEC, dated June 23, 2005. The record shows that Destiny sought to secure authorization from DEC to commence construction of parking lots on the "Oil City Parcels" in anticipation of closing on financing with SIDA and other financial institutions at the end of 2005. While the closing did not take place as scheduled, and further litigation ensued, which delayed construction for over a year and a half, Destiny sought to use the Oil City properties to provide replacement parking for that parking that was displaced by the first phase of construction that would ultimately take place during the summer of 2007.[37]

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[36] See, DEC website HTTP://www.dec.ny.gov/regulations/25229.html. Here, however, there is no evidence in any part of the record that there were ever any administrative, civil, state or federal actions concerning the subject parcels. By the very lack of inclusion of such evidence in the record, this Court is constrained to conclude that there were no such actions.

[37] It should be noted for purposes of this litigation that Destiny had stringent time schedules that were impressed upon it by SIDA and the City of Syracuse with regard to construction schedules. Violation of those construction schedules would lead potentially to nullification of agreements with the City of Syracuse and SIDA, and as a result, Destiny had little latitude with regard to when or if to start construction on Phase I. It should also be noted that even though Phase I construction has commenced, it has done so with the full knowledge of the DEC, and the DEC is well-familiar with all of the contamination and remediation issues ahead of the petitioner. This is much unlike the circumstances of 337 Greenwich v. New York State Department of Environmental Conservation, *supra*. Moreover, construction was started almost two (2) years after the initial application for inclusion into the BCP, and DEC has not presented, on the record submitted to this Court, any reasonable excuse or reason for its failure to act - as compelled by the statute - at a much earlier (and reasonable) time. DEC cannot now claim "mootness" as a determining factor for denial of Destiny into the BCP.

In the context of starting the parking lot construction or the "Oil City Parcels", Destiny wanted to be assured that such construction, which it was required to commence, would not prejudice any Brownfield application. As a result, DEC agreed and proposed a stipulation that was eventually reduced to writing. (Return item #25 with its attachments). Pursuant to the stipulation, petitioner agreed to undertake interim remedial measures that superceded any prior responsibility of the oil companies under the consent orders.

While not attached to the DEC's return, but attached to the reply affirmation of William J. Gilberti, Jr., dated April 24, 2008, the DEC delivered a letter to the petitioner transmitting the stipulation and explaining its legal consequences. That letter, dated June 23, 2005, states in pertinent part as follows:

> *By signing this stipulation, Destiny is not admitting that it caused any discharge or admitting liability for any discharge under Article 12 of the Navigation Law. The purpose of this stipulation is to effectuate the interim remediation of this discharge in an expeditious fashion. As discussed, it is intended that work under the stipulation will be undertaken on an interim basis while Destiny, or an affiliate seeks authorization to address any remaining remediation issues in the department's Brownfield Cleanup Program ... neither entering into the stipulation nor implementation of any work pursuant to the stipulation will adversely affect Destiny's (or an affiliate's) eligibility or the eligibility of the site as a Brownfield site pursuant to the BCP.*
>
> (See, letter of Richard J. Brazell, P.E., dated June 23, 2005, Exhibit "A" of Gilberti Reply Affirmation)

The significance of this understanding between the DEC and petitioner is clear. First, it entirely belies the DEC's position taken before this Court that the petitioner's

application for Brownfield participation is moot because construction is underway. Indeed, the respondent blessed the commencement of construction, participated fully in its development, and specifically assured petitioner that by undertaking construction they would not prejudice their Brownfield status. [38] Secondly, this understanding is distinctly relevant with regard to the respondent's "ongoing enforcement action" determination and the consent orders entered into by the oil companies. By its very terms, this document supercedes those consent orders, the remediation provided in those consent orders, or any sort of enforcement associated therewith. Moreover, DEC expressly agreed that this stipulation would, in no way prejudice the petitioner's Brownfield application. Clearly, even if the consent orders and stipulations are deemed to be "state or federal enforcement actions" (which this Court distinctly finds they are not their very terms) they have been superceded by the agreement between Destiny and DEC with regard to remediation.

But, as oral argument approached, the respondent chose to (at least apparently) abandon that ground as part of their determination, and substitute in its place (via a footnote in their memorandum submitted to this Court and oral argument) the fact that these "orders and stipulations" were orders pursuant to Article 12 of the Navigation Law, and thereby pursuant to the terms of the statute, called for the exclusion of these parcels from the BCP.

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[38] Again, this series of events is totally in opposite to those facts that occurred in 337 Greenwich, LLC, v. New York State Department of Environmental Conservation, 14 Misc.3d 417, 827 N.Y.S.2d 608.

The law of the State of New York is clear that an agency is bound by the determination it made, and cannot at a later date, having been challenged in litigation, claim some different ground that it thinks may fair better. Matter of Aronski v. Board of Education, 75 N.Y.2d 997. Indeed, judicial review of the proprietary or administration determination is limited to the grounds invoked by the agency in making that determination. Missionary Sisters of the Sacred Heart v. New York State Division of Housing and Community Renewal, 283 A.D.2d 284; Matter of Montauk Improvement v. Proccacino, 41 N.Y.2d 913; Matter of 72 A Realty Associates v. New York City Environmental Control Board, 275 A.D.2d 284; Trump Equitable v. Gliedman, 57 N.Y.2d 588; Matter of Mill Pond Management, Inc. v. Town of Olster Zoning Board of Appeals, 42 A.D.3d 804. [39] This Court finds that the DEC attempt to charge the basis for its determination, at this late date, is grossly inappropriate and contrary to law. These

[39] The respondent alleged, for the first time, that the determinations made were grounded on what it characterizes as orders under Article 12 of the New York State Navigation Law. However, while the Navigation Law is indicated in the preamble, there is no clause specifically identifying these as orders under Article 12 of the Navigation Law. That notwithstanding, it is clear that they are stipulations, and as such, stipulations should not be a disqualifying factor under the BCP (ECL § 27-1405(2)(d)]. That notwithstanding, the case law is clear that an agency cannot charge the basis of a determination after the fact. It should be noted, that the Navigation Law requires sites to be returned to their natural condition. In order to be orders under Article 12 of the Navigation Law that or a similar provision must be included. As a result, this Court finds they are not orders pursuant to Article 12 of the Navigation Law. See AMCO International v. Long Island Railroad Co., 302 A.D.2d 338; Kara v. Getty Petroleum Marketing Co., 2004 WL 1811427 (SDNY, August, 2004); Matera v. Mystic Transportation, 308 A.D.2d 514; see also 6 NYCRR 611.6(a)(4) which contains the requirement "the restoration of environment to its pre-spill condition." Indeed, a review of the stipulated "orders on consent" reveals there is no such requirement, but rather simply monitoring to "natural attenuation." It should be noted these agreements have no admissions of liability, and in fact contain statements otherwise. They are truly voluntary in nature, with no indication otherwise.

are stipulation agreements. These are agreements that have been made by and between the parties at a prior time, which are superceded by and controlled by the Destiny stipulation of June 23, 2005.

As a result, this Court finds, based upon the black-letter law and the rules of law in New York based on the standard of review, that with regard to all of the "Oil City Parcels" that the actions of the New York State Department of Environmental Conservation were arbitrary and capricious, contrary to law and fact, erroneous, and must be vacated and set aside and otherwise reversed, and they hereby are reversed.

XIV - OTHER SIMILARLY SITUATED BCP APPLICANTS AND THERE INCLUSION INTO THE BCP PROGRAM

Petitioner alleges that the DEC's decision denying Destiny's application is grossly unfair when Destiny is compared to other huge development projects that the DEC welcomed with open arms into the BCP.

Petitioner cites three such unique developments, all of which were developments that were operating as retail, commercial or industrial prior to their inclusion into the BCP. These include the Ritz Carlton Westchester, River Place, and IAC Corporation Headquarters. These three developments were discussed at length during the oral argument. At that time, counsel for respondent did not have many of the answers asked by the Court dealing with those particular properties, except to say that they were included into the VCP prior to such time as their admission to the BCP. As a result, the Court asked respondent to supply previous agreements, stipulations and orders

regarding all three (3) projects. Subsequently, some, but not all, information was received by the Court. [40]

Indeed, New York State Court of Appeals has recognized that claims based on discriminatory agency acting, treating regulated persons and entities who are similarly situated differently can be sustainable. In 303 West 42nd Street v. Klein, 46 N.Y.2d 686, it was held that the Equal Protection Doctrine forbids a public authority from applying or enforcing an admittedly valid law "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" (46 N.Y.2d 686 @ 693). To invoke this doctrine of law, it is not only necessary to show that the law was not applied to others similarly situated, but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification. 303 West 42nd Street v. Klein, *supra*. Administrative agencies must treat similarly situated applicants consistently. Lomangino and Sons, Inc. v. City of New York, 980 F.Supp. 676 (applying New York Law); Matter of Charles A. Field Delivery Service, Inc., 66 N.Y.2d 516. The courts have laid out the policies underlying this "fair play" application. These include the ability to provide guidance for those governed by the determinations made; to deal impartially with litigants; promote stability in the law; allow for efficient use of the

[40] No explanation was given for not fully complying with the Court's request. This Court has now reviewed the information that was received (such as it is) with regard to the properties. With regard to each, it is noted that there was nothing submitted with regard to the IAC Corporate Headquarters' project by the DEC and no certification that there were no prior orders or consent agreements concerning the properties submitted. This Court had specifically requested information with regard to pre-existing orders prior to inclusion into the BCP, and the Court has reviewed none with regard to that particular issue, nor any certifications.

adjudicatory process; and to maintain the appearance of justice. Matter of Charles A. Field Delivery Service, Inc., *supra at 519*. Indeed, inconsistent determinations compromise these precepts and erode the credibility of agency decision making, and therefore, meaningful judicial review in an Article 78 proceeding requires the courts to inquiry into precedent to insure that those similarly situated receive similar treatment. Matter of Charles A. Field Delivery Service, Inc., *supra @ 519*. The petitioner in this case has brought before this Court three "similarly situated" parcels and sites that were developed and included into the BCP by the respondent in this case. This Court has reviewed the documents submitted by the respondent in this matter, and this Court sees that it is clear that even though these properties were under a "voluntary cleanup agreement" that they were, in fact, similarly situated to the petitioner in this case, and as a result they were treated quite differently. Indeed, the way that the "guidance" of the DEC is established allows for arbitrary and capricious decisions to be made. The establishment of such "guidance" allows for totally indiscriminate decisions to be made and various different similarly situated parcels, such as those that were brought to the attention of this Court. This Court finds that, in fact, there is clear and convincing proof that similarly situated entities were treated quite disparately under similar circumstances. [41]

[41] No extensive discussion of "guidance factor" decisions is included in any of the documentation submitted to the Court by respondent. Indeed, the lack of measurable criteria in the DEC "guidance" resonates not only in the determinations made in this case, but are profoundly absent in the three (3) subject properties that DEC included in the program. Such "guidance" is nothing more than a moving target, present when convenience for DEC, absent when they need be, and invisible and incapable of being expressed when asked for by an inquiring jurist.

Why this has occurred is clear to this Court. The "guidance" of the DEC gives no guidance whatsoever. Quite the contrary, all the "guidance" does is limit and frustrate the statutory intent and purpose of the BCP, and vest into the very agency chosen to administer that program boundaryless authority to make decisions as they choose on a case-by-case basis, virtually unchecked by the legislature or otherwise. In such circumstances, where agencies set themselves up to be in a position whereby they can cavalierly violate due process of law and equal protection under the law, it is the Judiciary Branch that must take affirmative action to limit, restrict, and otherwise supervise such activities. Indeed, it is the Judiciary Branch that must identify arbitrary, capricious, illegal, and unconstitutional activities of administrative agencies that are charged with the mission of executing the legislative intent and purpose of statutes which they are charged with enforcing. It is the Judiciary that must intervene when necessary to assure that all citizens and entities are assured equal protection under the laws and the right to the free pursuit of happiness without governmental intervention in an arbitrary and capricious way. Boreali v. Axelrod, 130 A.D.2d 107, affirmed 71 N.Y.2d 1; Nicholas v. Kahn, 47 N.Y.2d 24; Levine v. Whalen, 39 N.Y.2d 510; Belmonte v. Snashall, 2 N.Y.3d 560; Kurcsics v. Merchants Mutual Insurance Co., 49 N.Y.2d 451; Matter of Belmonte, 2 N.Y.3d 565. This Court is required to intervene. This Court, based on the entire universe of evidence submitted to it, has no recourse but to vacate, annul, set aside and reverse the determinations of the DEC.

XV - CONCLUSION

Based on the above determination, this Court finds that the respondent, Department of Environmental Conservation, acted arbitrarily, capriciously, in a way not authorized by statute or regulation, in a way that has been effected by an error of law, in violation of lawful procedure, and in excess of its jurisdiction when it failed to include the affected "Carousel Parcels" and "Oil City Parcels" into the BCP. In doing so, this Court finds that the respondent violated the Equal Protection Cause of the New York State Constitution and the Fourteenth Amendment of the United States Constitution, which provides equal protection to all citizens under the laws. This Court also finds that the actions of the DEC in this case were otherwise arbitrary, capricious and without rational basis and has, as a result, discriminated against the petitioner in this matter without promoting a rational, legitimate state interest in so doing.

Now, upon all actions and proceedings heretofore herein had and due deliberation having been had herein, it is hereby

ORDERED, DECREED AND ADJUDGED, that the October 5, 2007 determination of the DEC, to the extent that said determination excluded the eight "Oil City Parcels" and all of the "Carousel Mall Parcels" be, and the same hereby is, annulled, vacated and set aside, and it is further

ORDERED, DECREED AND ADJUDGED, that the DEC is hereby ordered to include the entire project site of DestiNY USA, including all of the "Carousel Parcels" and all of the "Oil City Parcels" in the BCP, and it is further

ORDERED, DECREED AND ADJUDGED, that the DEC's use of the promulgated "guidance" or "guide factors" and all such other determination "factors" in this case was in excess of its jurisdiction, null, void, and of no force and effect and that such "guidance" or "guide factors" and the use thereof was arbitrary, capricious, not authorized by statute or regulation, effected by error of law, and was in violation of lawful procedure in excess of the jurisdiction, and as a result, such "guidance" and "guide factors" be, and the same hereby are, declared null, void, and of no force and effect, and it is further

ORDERED, DECREED AND ADJUDGED, that the DEC's determination as set forth in its October 5, 2007 letter to the extent that it has denied the inclusion of the "Carousel Mall Parcel" and the "Oil City Parcels" be, and the same hereby is, unconstitutional, as applied to the petitioner in this matter, and is in violation of the Equal Protection clause of the State of New York and the United States Constitution, and as such, said determination is null, void, and of no force and effect, and it is further

ORDERED, DECREED AND ADJUDGED, that the DEC shall include all parcels in the "Carousel Parcels" and all parcels in the "Oil City Parcels" in the BCP, effective, *nunc pro tunc,* effective as of June 28, 2005, and it is further

ORDERED, DECREED AND ADJUDGED, that the DEC is hereby directed to enter into immediate discussions with the petitioner in this matter so as to make arrangements for a Brownfiled Cleanup Agreements to be executed as soon as practicable by and between the parties with regard to all "Carousel Parcels" and all "Oil City Parcels", and it is further

ORDERED, DECREED AND ADJUDGED, that the petitioner is hereby awarded costs and disbursements in this matter.

DATED: June 10, 2008.

Hon. John C. Cherundolo, A.J.S.C.