

Memorandum Regarding Adverse Impact of Proposed Prevailing Wage Legislation on New York State Brownfield Cleanup Program

ENVIRONMENTAL AND ENERGY LAW SECTION

Environmental #1

June 20, 2019

S. 1947

By: Senator Ramos

A. 1261

By: M. of A. Bronson

Senate Committee: Labor

Assembly Committee: Codes

Effective Date: Immediately

AN ACT to amend the labor law, in relation to hours, wages and supplements in contracts for public work.

LAW AND SECTIONS REFERRED TO: Section 220 of the labor law.

S. 1948

By: Senator Ramos

Senate Committee: Labor

Effective Date: Immediately

AN ACT to amend the labor law, in relation to requiring certain financially assisted development projects in a city with a population of one million or more to be subject to certain prevailing wage requirements.

LAW AND SECTIONS REFERRED TO: Section 220 of the labor law.

S. 4630

By: Senator Ramos

A. 6964

By: M. of A. Crespo

Senate Committee: Labor

Assembly Committee: Labor

Effective Date: Immediately

AN ACT to amend the labor law, in relation to covered developers, covered employers, covered lessees or lessors, financial assistance provided to covered developers, covered leases, and covered development projects.

LAW AND SECTIONS REFERRED TO: Section 230 of the labor law.

The Environmental and Energy Law Section of the New York State Bar Association (EELS) is providing the following comments on proposed legislation relating to payment of prevailing wages, and the potential effect of such legislation on the viability of the New York State Brownfield Cleanup Program (BCP).

Each of the above-referenced bills would require payment of prevailing wages on projects receiving public funding in New York State.

The BCP provides tax credits to incentivize the cleanup and redevelopment of contaminated property. These credits are awarded after remediation and/or construction is complete, based on the amount of money that BCP applicants themselves have expended in bringing sites through the Program. Thus, even though the credits are administered out of the State treasury, they are not what is typically considered “public funding”, which is generally awarded in the form of a grant or incentive at the beginning of a project.¹

Nonetheless, several of the proposed bills are drafted broadly enough so that these tax credits might be construed as public funding triggering the requirement to pay prevailing wages.

Were that to occur, it would have a potentially devastating effect on the BCP.

Cleanup and redevelopment of brownfield sites furthers important public policy goals, including the protection of the public from continued exposure to hazardous substances at such sites, and the revitalization of neighborhoods in environmental justice communities. But the economics of such cleanups, and the potential liability involved, make such projects difficult, risky and more expensive than typical development projects.

The Legislature also felt it important that any such cleanups be performed under the supervision of the New York State Department of Environmental Conservation (NYSDEC) and the New York State Department of Health (NYSDOH), with full opportunity for public review and comment.

That is why, in 2003, the Legislature enacted the BCP, which includes a carefully crafted program of tax incentives to be awarded to only to participants after they have completed remediation and/or development of these complex sites. The Legislature has revisited these incentives several times, most recently in 2015. In each case, the underlying strong public policy favoring the cleanup and redevelopment of brownfield sites under the supervision of NYSDEC and NYSDOH was reaffirmed.

The blanket imposition of prevailing wage requirements would seriously undermine this carefully crafted arrangement. The marginal cost of paying prevailing wages would in most cases totally eliminate the incentive to clean up and redevelop these sites. As a result, many such sites will remain unremediated. Others may be addressed without any governmental supervision or public participation whatsoever.

Accordingly, the EELS urges that any prevailing wage legislation make clear that receipt of tax credits under the Brownfield Cleanup Program, in and of itself, will *not* trigger a requirement to pay prevailing wages on such projects.

¹ We exclude from our comments projects such as public schools, which are traditionally considered “public works” projects.