

Judge Finds MassDOR Decision “Unlawful” in Denying Brownfields Tax Credits to Colleges

Northeastern, BU, and Wellesley Win Summary Judgment

October 31, 2015

Andover, MA – A closely watched Massachusetts Superior Court case regarding Brownfields Tax Credit applications has been decided in favor of three Boston-area colleges, setting the stage for the schools to collect more than \$16 million of the state tax credits.

In 2012, Northeastern University, Boston University, and Wellesley College each independently applied to the Massachusetts Department of Revenue (DOR) for approval of their applications regarding environmental cleanups at the respective schools. Massachusetts has a Brownfields Tax Credit program, passed in 1998, that allows a credit for partial reimbursement of response costs for qualifying projects. In 2006, the state Legislature passed an amendment to the program allowing non-profit organizations to participate. The amendments also allowed the credits to be transferred or sold, so that non-profits and others with insufficient tax liability could benefit from the program on the same basis as for-profit companies and other taxpayers.

Since these amendments, the use of the program has increased, with many non-profits including colleges, Community Development Corporations (CDCs), hospitals, and others able to take advantage of the credit for projects that improve the environment and spur economic development. MassDOR admitted in its filings in the case that it was precisely this increase that caused a reassessment in the management of the program.

In April 2013, the Department released a “clarification” that effectively changed its long-standing procedures. Because the changes were applied to all “pending and future” applications, the proposed rule changes rendered the colleges’ applications (and many other applications) non-qualifying. These changes were finalized in November 2013 in Department Directive 13-4, leading to the subsequent denial of the colleges 2012 applications.

Following an internal appeal, which DOR also denied, the colleges sued. The case (Civil Action 2014-02617, *Northeastern University, Trustees of Boston University and Wellesley College vs. Massachusetts Commissioner of Revenue*), was heard in October 2015. Additional details regarding the case, including **background information** and **a summary of each side’s arguments**, have been published by Cooperstown Environmental LLC, a leading authority on Massachusetts Brownfields Tax Credits.

Cooperstown Environmental LLC is an environmental engineering consulting firm based in Andover, Massachusetts that provides high-quality, practical, and cost-effective engineering and environmental consulting services to businesses, property owners, institutions, government agencies, and the legal community. We also are the authority on the Brownfields Tax Credit program. The program began in 1998 as part of an effort to encourage and provide an incentive for the cleanup of contaminated sites, sometimes known as Brownfield sites, by allowing environmental costs to be recovered.

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The **decision**, which is dated October 20, 2015, found for the plaintiffs that:

“Directive 13-4 is unreasonable and DOR’s denial of the applications based on that directive was unlawful. It appears to be nothing more than a naked, confiscatory attempt by a state administrative agency to appropriate private property to fill government coffers.”

In essence, the Judge agreed with the plaintiff’s lawyer, Daryl Lapp of the law firm Locke Lord in Boston, who argued that the DOR was not allowed to reinterpret the tax credit program absent any changes by the Legislature. The court determined that the rules of the Brownfields program were “unambiguous” and that DOR did not have the independent authority to change them. Therefore, “the directive is unreasonable because the legislature left no room for interpretation in either G. L. c. 63, § 38Q, or G. L. c. 62, § 6(j).”

The case may not be over, however; the DOR has 30 days from the entry of the order to file a notice of appeal. Should DOR do so, the case would move to the Massachusetts Appeals Court, if nothing else delaying the awarding of the credits to the colleges.

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