

LAW

Brownfields law needs a few small repairs

By JEREMY HARRELL

When it won passage in October 2003, New York's brownfields law was the best thing since sliced bread, environmentally speaking at least.

With the help of tax credits and truncated liability, landowners and developers could clean up old industrial properties and create a new stock of valuable land while doing their part for the environment.

It's nearly three years later, and there's a sense the law hasn't worked as well as it could, said Miriam E. Villani, counsel with Farrell Fritz in Uniondale and chair of the State Bar Association's Environmental Law Section. Confusion over the rules and unsustainably bountiful tax-incentive packages have kept the number of projects to a minimum.

"Like anything, there are little glitches," said Villani, who is leading a forum in Albany in April to discuss the brownfields law.

Panelists include the law's authors, Sen. Carl Marcellino, R-Oyster Bay, and Rep. Tom DiNapoli, D-Great Neck. A top enforcement official from the Department of Environmental Conservation will be there, as will Val Washington, counsel to

the state's trial lawyer association and the former executive director of a large environmental organization.

The timing is ripe. While the Legislature approved the law in 2003, the Department of Environmental Conservation still hasn't written the ground rules. The department is still taking public comments, which means there's opportunity to shape the way New York deals with brownfields, Villani said.

"It's basically the infancy of these laws," she said. "To get to mold these new laws for our clients is tremendous."

Though the DEC hasn't written the rules, developers have been allowed to take a crack at cleaning up the 450,000 blighted parcels in New York (6,800 of which are on Long Island). But Villani said two hurdles in particular have kept participation low.

First, there's disagreement about what constitutes a clean parcel. The law requires different standards of remediation based on land use — industrial or retail, say — and properties

would always carry deed restrictions reflecting the level of contamination. The only problem is that deed restrictions lessen the value of land, which leads to disputes over the level of decontamination.

"How clean is clean is always the question," Villani said.

The other issue deals with what she described as "unbelievably generous" tax incentives. The law bases tax credits on the value of what's built on the brownfield, not

on the value of the property itself. A developer can put up a multimillion dollar building on a half-acre site that contains an underground gas tank and claim tax credit out of proportion to the size of the land or the cost of cleaning it up, she said.

"Developers love this and attorneys for developers love this, and they don't want it to change," Villani said.

Consequently, the DEC has balked at signing off on brownfields projects, and very few have been undertaken since 2003, she said. But it's not a lost cause.

"It's a good law that's in need of repair," Villani said. "It just needs a little tweaking."



Miriam E. Villani