

THE BEST BROWNFIELD PROGRAM IN THE NATION IMPROVES

Brownfield Act and Michigan Business Tax Brownfield Credit Amended

Michigan has long been recognized as having the best brownfield program in the nation. This is due to the institution of the causation based liability standard as well as the land-use based cleanup standards in the 1990s and the excellent set of brownfield redevelopment financial incentives that have been developed over the past 12 years. The Brownfield Redevelopment Financing Act, Act 381 of 1996, had several significant amendments in late December, 2007, that improve Michigan's Brownfield Program (Public Acts 201-204 of 2007). In addition, amendments to the Michigan Business Tax Brownfield Credit passed the legislature on March 20, 2008, (HB 5511). These amendments expand the scope and value of the incentives available for brownfield projects.

Brownfield Redevelopment Financing Act

Changes in Act 381 extended the sunset date for approval of school taxes to finance eligible activities under a brownfield plan to December 31, 2012 and made changes in 3 other basic areas of the act: (1) eligible activities and eligible property, (2) brownfield plans and process, and (3) the process for approval and implementation of an Act 381 Work Plans. An Act 381 Work Plan must be approved by the Department of Environmental Quality to finance environmental activities such as Baseline Environmental Assessments, etc., with tax increment financing from school taxes and by the Michigan Economic Growth Authority to finance non-environmental activities such as demolition, lead and asbestos abatement, site preparation, and infrastructure activities.

Eligible Activities and Eligible Property. The activities and properties added as eligible under the amendments include:

- Reasonable costs of preparing brownfield plans and work plans.
- Acquisition of property by a Land Bank Authority if the property is for economic development purposes.
- Demolition and lead and asbestos abatement on any property (i.e., not in a core community) that is facility, functionally obsolete, or blighted.
- Reasonable costs of environmental liability insurance.
- Properties with buried demolition debris. Any property with buried demolition debris is now defined as "blighted" and an eligible property for brownfield incentives.

Brownfield Plans. The changes to brownfield plans and process include:

- Increasing and clarifying the duration of brownfield plans by allowing the start of tax capture under a plan to be delayed up to 5 years and that the brownfield plan can be as much as 35 years in length, but can only include 30 years of tax capture.
- Allowing tax increment financing to be used to reimburse the cost of brownfield plans and work plans.
- Allowing the delegation of the public hearing process for a plan to the Brownfield Redevelopment Authority or a sub-committee of the governing body by resolution. The plan still must be approved by the governing body.

- Reducing the public notice requirement for the public hearing on a brownfield plan to 10 days and also requiring that the DEQ and the Michigan Economic Growth Authority be notified 10 days prior to the hearing if school taxes will be captured.
- Allowing the reimbursement of costs for Baseline Environmental Assessment and due care activities incurred before approval of the brownfield plan with local taxes.
- Allowing reimbursement of interest on municipal and developer bonds and loans from school tax capture for eligible activities.
- Increasing per year amount of administrative costs for the BRA captured from tax increment financing based on the number of active projects:
 - Up to 5: \$100,000
 - 6 to 10: \$125,000
 - 11 to 15: \$150,000
 - 16 to 20: \$175,000
 - 21 to 25: \$200,000
 - 26 or more: \$300,000

Act 381 Work Plans. These changes allow some activities to be eligible for the use of school tax reimbursement without approval of the Department of Environmental Quality and clarify the review and approval process.

- Frequently brownfield redevelopment projects are held up during the time critical start-up of development waiting for DEQ approval of the Act 381 Work Plan. These amendments allow a Brownfield Redevelopment Authority (BRA) to use school taxes to reimburse the following activities without approval of an Act 381 Work Plan: (1) investigations for a Baseline Environmental Assessment (BEA) or due care plan, (2) completing a BEA report, and (3) preparing a due care plan.
- Understanding and addressing information needs of the DEQ in the Act 381 Work Plan approval process has sometimes been difficult. To help address this, the bill requires the DEQ to state with specificity the reasons for any denial of an Act 381 Work Plan and allows the BRA to revise and resubmit the plan.
- The bill clarifies the conditions for approving an Act 381 Work Plan. It specifically allows the approval of additional response activities that are more restrictive than those allowed by due care. It also sets a 45-day time limit for DEQ response to additional information provided by the BRA and allows a BRA to fund activities from local tax capture when the DEQ denies the use of school taxes for those activities.

These new amendments will add new clarity and power to the brownfield redevelopment efforts of Genesee County. Of special note is the ability to reimburse the costs of demolition and lead and asbestos abatement under a brownfield plan for any community in the county, not just in the City of Flint. They also provide the Genesee County Brownfield Redevelopment Authority greater ability to finance its administration through the increased levels of funding allowed under the amendments. The amendments to the Michigan Business Tax Brownfield Credit greatly expand the tax credits available to developers of brownfield property.

Michigan Business Tax Brownfield Credit

Important changes were made in the size of the brownfield tax credit available to developers and in the administration of the tax credit program increasing the value and flexibility of this redevelopment tool.

Size of Brownfield Tax Credits Increased. For the next three years, brownfield projects located in an “urban development area” are eligible for a tax credit of up to 20% of the hard costs to develop a project. After that three year period, projects will still be eligible for a tax credit of up to 15% of the eligible investment. An urban development area project must be located in the “downtown or traditional business district” or a “traditional commercial corridor” of a “core community” or county seat. The Michigan Economic Growth Authority (MEGA) must consider the following criteria when reviewing an application for an “urban development area project” including:

- If the project increases the density of the area by promoting multistory development.
- If the project promotes mixed-use development and walkable communities.
- If the project promotes sustainable redevelopment.
- If the project addresses area wide redevelopment and includes multiple parcels of property.
- If the project addresses underserved markets of commerce.
- Any other criteria determined by MEGA.

For all other projects, the credit is increased from 10% to 12.5% of the eligible investment. This was compensated for by removing “soft costs” from the credit calculation except architecture, engineering, surveying, and similar professional fees.

Administrative Changes Made. Important changes were made to the administration of the tax credit program that will improve the ability of developers to work with the program including:

- The “mini” and “small” credit categories were combined to produce one category of projects of \$10 million or less capped at a total annual amount of \$40 million. Any unused credit allocation can be carried forward for one year. In addition, the number of credits available for projects of over \$10 million was increased from an annual limit of 17 to 20 with one credit of over \$10 million available.
- Before HB 5511 the amount of the credit could not be increased once the preapproval letter was issued. Now the preapproval letter can be amended prior to any “hard costs” being spent on the project.
- MEGA may extend duration of project up to an additional 5 years. The statute requires a qualified taxpayer to complete a project within 5 years after MEGA issues the preapproval letter. In practice, however, some projects cannot be completed within this 5-year timeframe. For these projects, it has been common practice for MEGA to convert the projects into multi-phase projects to give additional time to complete. HB 5511 eliminates the need for this by allowing a qualified taxpayer to request an extension of the duration to complete an approved project for an additional 5 years, i.e., the project must be completed within 10 years after the date of the preapproval letter.

- Discretion can be exercised to determine when a component of a multi-phase project is complete. Before HB 5511, the statute required each component of a multiphase project to obtain all certificates of occupancy in order to be considered complete. This was a problem for some residential developments where the municipality would not issue certificates of occupancy for unoccupied units even though the units were complete. HB 5511 addresses this concern by allowing MEGA to determine that a component is complete, regardless of whether the municipality has issued all certificates of occupancy.
- A cash refund of 85% is now available. Many developers who apply for a credit are limited liability companies with no MBT liability. These developers must sell the credits in the open market for a discounted rate to receive any benefit from the credit. HB 551 gives these developers the additional option of electing to have the amount exceeding the developers' tax liability to be refunded at the rate of 85% and forego the remaining 15%.
- Ninety-day look-back for eligible investment expenses is now available. HB 5511 creates a 90-day look-back on eligible investment made before the date of the preapproval letter but after the date the brownfield plan was approved. Previously, any investment made before the date of the preapproval letter was ineligible.
- A qualified taxpayer now includes a person who has entered into a purchase agreement. Before HB 5511, an applicant was required to own or lease eligible property before applying for a credit. Unfortunately, for many projects, the applicant does not own or lease the property at that time, but rather has only entered into an agreement to purchase or lease. This requires many applicants to enter into a temporary lease for the sole purpose of receiving a preapproval letter, which creates unnecessary legal fees. HB 5511 solves this problem by allowing an applicant who has entered into an agreement to purchase or lease to apply for and receive a preapproval letter.

There has never been a better time to develop brownfield properties in Michigan than right now. The Genesee County Brownfield Redevelopment Authority and AKT Peerless Environmental Services look forward to assisting you in obtaining these incentives.

James S. Linton
Vice President of Brownfield Operations
AKT Peerless Environmental Services
517-482-9227
lintonj@aktpeerless.com
www.aktpeerless.com