

## Comments on the New York State Department of Environmental Conservation Proposed Definition of "Underutilized"

### ENVIRONMENTAL LAW SECTION

Environmental #2

April 5, 2016

The Environmental Law Section of the New York State Bar Association is pleased to have the opportunity to comment on the definition of "underutilized" proposed by the New York State Department of Environmental Conservation ("NYSDEC" or "Department").

This definition is crucially important to the State's Brownfield Cleanup Program ("BCP"). Being an "underutilized" site is one of the few ways that a New York City brownfield property can now qualify for tangible property credits ("TPCs"). Obtaining these credits can be the difference between a project being built and one that is not viable.

In enacting the BCP Amendments, the Legislature instructed NYSDEC to define "underutilized" by promulgating a regulation "after consultation with the business community and the City of New York ... no later than October first, two thousand fifteen, [taking] into consideration the existing use of the property relative to allowable development under zoning, the need for substantial governmental assistance to redevelopment and other relevant factors."

NYSDEC issued a proposed definition of "underutilized" in June 2015. It held a hearing on this proposal on July 29, 2015 in New York City. The proposal attracted many comments, including those by this Section. Most of those comments were critical of NYSDEC's initial proposal on the grounds that it was unworkable and unduly restrictive as to the types of sites that would qualify as "underutilized".

NYSDEC withdrew its initially-proposed definition, and as a result, the Department failed to meet the October 1, 2015 deadline contained within the statutory definition. It subsequently proposed a revised definition as of March 9, 2016.

While the revised proposed definition of "underutilized" may allow a few commercial or industrial projects into the BCP, we believe it remains unduly restrictive and is inconsistent with both the spirit and the plain language of the BCP Amendments, for at least the following reasons:

1. Restriction on "Underutilized" Sites Based on Proposed *Future Site Use*

NYSDEC's definition requires that the site's future use be at least 75% commercial or industrial to qualify as "underutilized." Basing eligibility so squarely on planned *future* use of the property contravenes the statutory directive to "take into consideration the *existing* use of a property relative to allowable development under zoning".

The focus on "future use" is inconsistent with the plain meaning of underutilized. For example, the Oxford Dictionary defines underutilized as to "Underuse (something)".<sup>1</sup> Likewise, Merriam-Webster defines the term as "to utilize less than fully or below the potential use."<sup>2</sup> The Business Dictionary definition is "[a] condition wherein the resources available are not being used to their fullest potential."<sup>3</sup> The Macmillan Dictionary identifies synonyms of underutilized as "Wasted and not used well, underused, misspent."

What all these definitions have in common are that they apply to the existing condition of the property, not its future use.

That could not possibly be what the Legislature had in mind when it asked NYSDEC to define "underutilized". The BCP Amendments provide four alternative ways for newly-admitted New York City sites to qualify for TPCs. One of those relates to future use—*i.e.* that a site's future use be devoted, at least in part, to affordable housing. If the Legislature had intended to restrict a qualifying site's future use in other ways—*e.g.*, commercial or industrial—it could easily have done so. Instead, however, the Legislature created a separate criterion, "underutilized", relating to past or current use.

Limiting eligible sites to those that will be used at least 75% for commercial or industrial purposes is simply a policy decision by NYSDEC as to the types of future uses to which redeveloped New York City brownfield sites ought exclusively to be devoted.<sup>4</sup> This is not even a rational policy decision. Requiring underutilized sites to be developed primarily for commercial and industrial uses as a prerequisite to qualifying for TPCs will discourage those sites from being used for residential purposes. Not only is residential use traditionally thought of as a property's "highest and best" use, it is also the use requiring the highest level of cleanup, which is an important goal of the BCP. Instead, the proposed definition could encourage low-end commercial and industrial uses that community residents may not want in their neighborhoods. NYSDEC should not, by its

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<sup>1</sup> Retrieved March 25, 2016 from [http://www.oxforddictionaries.com/us/definition/american\\_english/underutilize](http://www.oxforddictionaries.com/us/definition/american_english/underutilize).

<sup>2</sup> Retrieved March 25, 2016 from <http://www.merriam-webster.com/dictionary/underutilize>.

<sup>3</sup> Retrieved March 25, 2016 from <http://www.macmillandictionary.com/us/dictionary/american/underutilized>.

<sup>4</sup> In comments on NYSDEC's initial draft definition of "underutilized", New York City indicated an interest in encouraging commercial and industrial development on its brownfields sites. However, nothing in its comments suggests that *only* such future uses for brownfield sites are acceptable to New York City.

arbitrary definition of “underutilized”, attempt to dictate future site uses, which decisions are best left to the community and to local decision-makers.

In developing implementing regulations, NYSDEC is not free to substitute its own policy predilections for those of the Legislature.<sup>5</sup> Accordingly, we respectfully submit that, to be consistent with legislative intent, NYSDEC should remove any considerations based on future use in determining whether a site qualifies for TPCs as being “underutilized”.

## **2. Failure To Consider Other Statutory or Regulatory Definitions of “Underutilized”**

The Legislature did not act in a vacuum. It chose a term, “underutilized”, which appears in a number of New York statutes and regulations already applicable to various city and state programs—for example, §11.245 of the New York City Code and §431(11) of the state Economic Development Law. “Underutilized” is also commonly used in brownfield and distressed property programs in other states. See Attachment A.

Both as a matter of statutory interpretation, and to take advantage of the experience of other jurisdictions, NYSDEC should look to existing definitions of this term in developing its own definition. Instead, it summarily dismissed existing definitions, because in the Department’s opinion they did “not . . . provide a workable definition in the context of the BCP”. NYSDEC added that some components of these definitions include subjective terms. While that may be true, the arguably subjective terms could have been simply eliminated from the definition while retaining the more objective terms relating to existing or past uses.

## **3. Inclusion of Criteria Which Are Difficult To Administer, or Under Which Virtually No Sites Will Qualify**

*A. The Tax-in-Arrears Test.* The Department of Finance annually sells tax liens to the New York City Tax Lien Trust (“NYCTL”). After the tax lien sale, a tax lien servicer notifies the property owner. If payment is not received within six months, NYCTL will commence a foreclosure action and the tax lien will be sold at a public auction. The net result is that there are exceedingly few (probably no more than two dozen) properties in all of New York City that are five or more years in arrears on property taxes. Accordingly, the five-year tax arrears criterion set forth in proposed §375-3.2(1)(2)(iii)(a) is not a meaningful or practical indicia of an underutilized property in New York City.

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<sup>5</sup> See *Lighthouse Pointe Property Association LLC v. NYSDEC*, 14 N.Y.3d 161, 897 N.Y.S.2d 693 (2010); *Liao v. NYS Banking Department Dept.*, 74 N.Y. 2d 505, 549 N.Y.S. 2d 373, (1989); *Boreali v. Axelrod*, 71 N.Y.2d. 1, 523 N.Y.S. 464 (1987).

*B. The Need for Substantial Governmental Assistance Test.* Based on the statutory language, this test appears to have been intended as one of the factors to be considered, rather than a mandatory factor, in determining whether a site is underutilized.<sup>6</sup>

In addition, there is no provision as to which among the many New York City agencies should make this certification, or what form of certification is required. It is not even clear that there is expertise within the New York City government to make a determination about the level or types of assistance that will render an industrial, commercial or residential project viable. At best, such a certification is likely to be highly subjective.

We recommend that, as with other criteria that must be certified, the certification be left to the Applicant, subject to NYSDEC's review and evaluation of the basis for that certification.

#### 4. Summary

The newly-proposed definition remains extraordinarily narrow and will allow very few, if any sites, into the BCP as being "underutilized".

In that respect, it does not differ materially from the previously proposed rule. In its response to the public comments on its earlier proposal, NYSDEC noted that the sites excluded by the narrow definition of "underutilized" would "be potentially eligible for the upside down gate. In addition, many of these properties would be eligible for TPCs based on affordable housing or location in an EnZone."<sup>7</sup> These comments only underscore NYSDEC's misreading of the Legislature's intent: if all sites deserving of TPCs were eligible under the other gates established by the 2015 BCP Amendments, there would have been no reason for the Legislature to have created a separate category of "underutilized" sites which could also earn TPCs.

In our view, the Legislature included the "underutilized" gate to fill in the gaps of, and help compensate for, the limitations of the other avenues established in the 2015 BCP Amendments for sites to qualify for TPCs. By contrast, NYSDEC's proposed definition of this term would essentially write this criterion out of the statute, in derogation of the clear intent of the Legislature.

We urge NYSDEC to revise its proposed rule along the lines proposed in these comments.

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Section Chair: Michael J. Lesser, Esq.

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<sup>6</sup> Under the proposed definition, only sites whose proposed future use is at least 75% industrial do not have to satisfy this criterion.

<sup>7</sup> See Assessment of Public Comment, Comments Received on Proposed Part 375 Definitions Rulemaking, Response 2-9.

# Attachment A

## ATTACHMENT A

New York City, N.Y., Code § 11-245.1, New York City, N.Y., Code § 11-245.1

New York City, N.Y., Code § 11-245.1  
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES  
NEW YORK CITY ADMINISTRATIVE CODE  
TITLE 11. TAXATION AND FINANCE  
CHAPTER 2. REAL PROPERTY ASSESSMENT, TAXATION. AND CHARGES.  
SUBCHAPTER 2. EXEMPTIONS FROM REAL PROPERTY TAXATION.  
PART 1. EXEMPTIONS FOR CERTAIN RESIDENTIAL PROPERTY.

Currency up to Local Law 39 of 2014 and Chapters 1 - 328 of the Laws of the State of New York for 2014.

Currency up to Local Law 39 of 2014 and Chapters 1 - 328 of the Laws of the State of New York for 2014.

§ 11-245.1. Site eligibility limitations on benefits pursuant to section four hundred twenty-one-a of the real property tax law.

(a) Where eligibility for benefits under section four hundred twenty-one-a of the real property tax law is sought for any construction commenced on or after November twenty-ninth, nineteen hundred eighty-five and before May twelfth, two thousand on the basis that such construction shall take place on land which, on the date thirty-six months prior to the commencement of such construction, was improved with a nonresidential building or buildings and was under-utilized, the under-utilization of the land must have been such that each building or buildings:

(1) contained no more than the permissible floor area ratio for nonresidential buildings in the zoning district in question and a floor area ratio which was twenty percent or less of the maximum floor area ratio for residential buildings, or

(2) had an assessed valuation equal to or less than twenty percent of the assessed valuation of the land on which the building or buildings were situated, or

(3) by reason of the configuration of the building, or substantial structural defects not brought about by deferred maintenance practices or intentional conduct, could no longer be functionally or economically utilized in the capacity in which it was formerly utilized.

For purposes of this subdivision and subdivisions (a-1) through (a-4) of this section, construction shall be deemed to have commenced on the date immediately following the issuance by the department of buildings of a new building permit for an entire new building (based upon architectural, plumbing and structural plans approved by such department) on which the excavation and the construction of initial footings and foundations commences in good faith, on vacant land and for the entire project site, as certified by an architect or professional engineer licensed in the state, provided that installation of footings and foundations is similarly certified by such architect or engineer to have been completed without undue delay.

(a-1) Except as provided in subdivision (a-2) of this section, where eligibility for benefits under section four hundred twenty-one-a of the real property tax law is sought for any construction commenced on or after May twelfth, two thousand and before the effective date of the local law that added subdivisions (a-3) and (a-4) of this section on the basis that such construction shall take place on land which, on the date thirty-six months prior to the commencement of such construction, was improved with a nonresidential building or buildings and was under-utilized, the under-utilization of the land must have been such that each building or buildings:

(1) contained no more than the permissible floor area ratio for nonresidential buildings in the zoning district in question and a floor area ratio which was seventy-five percent or less of the maximum floor area ratio for residential buildings, or

(2) had an assessed valuation equal to or less than seventy-five percent of the assessed valuation of the land on which the building or buildings were situated, or

(3) by reason of the configuration of the building, or substantial structural defects not brought about by deferred maintenance practices or intentional conduct, could no longer be functionally or economically utilized in the capacity in which it was formerly utilized.

For purposes of this subdivision, construction shall be deemed to have commenced as provided in subdivision (a) of this section.

(a-2) Where eligibility for benefits under section four hundred twenty-one-a of the real property tax law is sought for any construction on any tax lot now existing or hereafter created which is located south of or adjacent to either side of one hundred tenth street in the borough of Manhattan which construction commenced on or after May twelfth, two thousand and before the effective date of the local law that added subdivisions (a-3) and (a-4) of this section on the basis that such construction shall take place on land which, on the date thirty-six months prior to the commencement of such construction, was improved with a nonresidential building or buildings and was under-utilized, the under-utilization of the land must have been such that each building or buildings:

(1) contained no more than the permissible floor area ratio for nonresidential buildings in the zoning district in question and a floor area ratio which was fifty percent or less of the maximum floor area ratio for residential buildings, or

(2) had an assessed valuation equal to or less than fifty percent of the assessed valuation of the land on which the building or buildings were situated, or

(3) by reason of the configuration of the building, or substantial structural defects not brought about by deferred maintenance practices or intentional conduct, could no longer be functionally or economically utilized in the capacity in which it was formerly utilized.

For purposes of this subdivision, construction shall be deemed to have commenced as provided in subdivision (a) of this section.

(a-3) Except as provided in subdivision (a-4) of this section, where eligibility for benefits under section four hundred twenty-one-a of the real property tax law is sought for any construction commenced on or after the effective date of the local law that added this subdivision on the basis that such construction shall take place on land which, on the date thirty-six months prior to the commencement of such construction, was improved with a nonresidential building or buildings and was under-utilized, the under-utilization of the land must have been such that each building or buildings:

(1) contained no more than the permissible floor area ratio for nonresidential buildings in the zoning district in question and either (i) had a floor area ratio which was seventy-five percent or less of the maximum floor area ratio for residential buildings in such zoning district, or (ii) if the land was not zoned to permit residential use on the date thirty-six months prior to the commencement of construction, had a floor area ratio which was seventy-five percent or less of the floor area ratio of the residential building which replaces such non-residential building, or

(2) had an assessed valuation equal to or less than seventy-five percent of the assessed valuation of the land on which the building or buildings were situated, or

(3) by reason of the configuration of the building, or substantial structural defects not brought about by deferred maintenance practices or intentional conduct, could no longer be functionally or economically utilized in the capacity in which it was formerly utilized.

For purposes of this subdivision, construction shall be deemed to have commenced as provided in subdivision (a) of this section.

(a-4) Where eligibility for benefits under section four hundred twenty-one-a of the real property tax law is sought for any construction on any tax lot now existing or hereafter created which is located south of or adjacent to either side of one hundred tenth street in the borough of Manhattan which construction commenced on or after the effective date of the local law that added this subdivision on the basis that such construction shall take place on land which, on the date thirty-six months prior to the commencement of such construction, was improved with a nonresidential building or buildings and was under-utilized, the under-utilization of the land must have been such that each building or buildings:

(1) contained no more than the permissible floor area ratio for nonresidential buildings in the zoning district in question and either (i) had a floor area ratio which was fifty percent or less of the maximum floor area ratio for residential buildings in such zoning district, or (ii) if the land was not zoned to permit residential use on the date thirty-six months prior to the commencement of construction, had a floor area ratio which was fifty percent or less of the floor area ratio of the residential building which replaces such non-residential building, or

New York City, N.Y., Code § 11-245.1. New York City, N.Y., Code § 11-245.1

(2) had an assessed valuation equal to or less than fifty percent of the assessed valuation of the land on which the building or buildings were situated, or

(3) by reason of the configuration of the building, or substantial structural defects not brought about by deferred maintenance practices or intentional conduct, could no longer be functionally or economically utilized in the capacity in which it was formerly utilized.

For purposes of this subdivision, construction shall be deemed to have commenced as provided in subdivision (a) of this section.

(b) The department of housing preservation and development may promulgate rules and regulations for the effectuation of the purposes of this section.

(c) The limitations on benefits contained in this section shall be in addition to those contained in any other law or regulation.

#### HISTORICAL NOTE

Section renumbered chap 839/1986 § 46 (formerly § 11-245.01)

Section added chap 907/1985 § 1

Subd. (a) amended L.L. 29/2002 § 1, eff. Oct. 15, 2002.

Subd. (a) amended L.L. 25/2000 § 1, eff. May 12, 2000.

Subd. (a-1) amended L.L. 29/2002 § 1, eff. Oct. 15, 2002.

Subd. (a-1) added L.L. 25/2000 § 2, eff. May 12, 2000.

Subd. (a-2) amended L.L. 29/2002 § 1, eff. Oct. 15, 2002.

Subd. (a-2) added L.L. 25/2000 § 2, eff. May 12, 2000.

Subd. (a-3) added L.L. 29/2002 § 2, eff. Oct. 15, 2002.

Subd. (a-4) added L.L. 29/2002 § 2, eff. Oct. 15, 2002.

#### DERIVATION

Formerly § J51-4.1 added LL 79/1984 § 1

#### CASE NOTES

¶ 1. In order to qualify for "J-51" benefits, the applicant must show that the building can no longer be used productively in its former capacity. 845 U.N. Limited Partnership v. Department of Housing Preservation and Development, N.Y.L.J., page 18, col. 4 (Sup.Ct. New York Co.).

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New York City, N.Y., Code § 11-247, New York City, N.Y., Code § 11-247

i. "Vacant land" means land, including land under water, which contains no enclosed, permanent improvement. A fence, shed, garage, attendant's booth, paving, pier, bulkhead, lighting fixtures, and similar items, or any improvement having an assessed value of less than two thousand dollars shall not constitute an enclosed, permanent improvement.

#### HISTORICAL NOTE

Section added chap 907/1985 § 1

#### DERIVATION

Formerly § 1301 added LL 58/1976 § 1

Subs e, f amended LL 85/1977 § 1

Amended LL 49/1979 § 1

Amended LL 8/1982 § 1

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§ 11-247, New York City, N.Y., Code § 11-247

New York City, N.Y., Code § 11-247  
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES  
NEW YORK CITY ADMINISTRATIVE CODE  
TITLE 11. TAXATION AND FINANCE  
CHAPTER 2. REAL PROPERTY ASSESSMENT, TAXATION. AND CHARGES.  
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PART 3. TAX EXEMPTION FOR CERTAIN INDUSTRIAL AND COMMERCIAL PROPERTIES.

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Currency up to Local Law 39 of 2014 and Chapters 1 - 328 of the Laws of the State of New York for 2014.

§ 11-247. Definitions.

When used in this part:

- a. "Applicant" means any person or corporation obligated to pay real property taxes on the property for which an exemption is sought, or in the case of exempt property, the record owner thereof, provided, however, that such property is not commercial property located in an area designated as excluded pursuant to section 11-249 of this part;
- b. "Board" means the industrial and commercial incentive board;
- c. "Commercial" means any non-residential property used primarily for the buying, selling or otherwise providing of goods or services, provided that the use of such property has not been designated as a restricted commercial use pursuant to section 11-249 of this part;
- d. "Construction" means the building of new industrial or commercial structures on vacant or predominantly vacant land, or the modernization, rehabilitation or expansion or other improvements of an existing commercial structure where such modernization, rehabilitation, expansion or other improvement is not physically or functionally integrated with the existing structure or results in additional usable square footage fifty per centum greater than the square footage of the existing structure;
- e. "Industrial" means property used primarily for the manufacturing or assembling of goods or the processing of raw materials;
- f. "Predominantly vacant land" means land, including land under water, on which not more than fifteen percent of the lot area contains enclosed, permanent improvements; in addition, such land may include existing foundations. A fence, shed, garage, attendant's booth, paving, pier, bulkhead, lighting fixtures, and similar items, or any improvement having an assessed value of less than two thousand dollars shall not constitute an enclosed, permanent improvement;
- g. "Reconstruction" means the modernization, rehabilitation, expansion or other improvement of an existing commercial or industrial structure where the total proposed project cost is in an amount equal to at least twenty per centum of the assessed value of the property at the time an application for a certificate of eligibility pursuant to this part is made, and where such modernization, rehabilitation, expansion or other improvement is physically and functionally integrated with the existing structure and does not create additional usable square footage greater than fifty per centum of the usable square footage of the existing structure except in a case where the existing structure has been substantially destroyed by fire or other casualty;
- h. "Residential property" shall mean property, other than property used for hotel purposes, on which will exist upon completion of construction a building or structure containing more than one independent dwelling unit or where more than one-third of the total square footage of said structure is to be used for residential purposes; it shall also mean, in the case of reconstruction, property on which exists or will exist upon completion of the reconstruction a building or structure where more than one-third of the total square footage is used or is to be used for dwelling purposes;

New York City, N.Y., Rules, Tit. 15, § 20-10  
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES  
NEW YORK CITY RULES & REGULATIONS  
TITLE 15. DEPARTMENT OF ENVIRONMENTAL PROTECTION  
CHAPTER 20. GOVERNING AND RESTRICTING THE USE AND SUPPLY OF WATER.

The Rules & Regulations of the City of New York is current through December 31, 2014.

The Rules & Regulations of the City of New York is current through December 31, 2014.

§ 20-10. Glossary.

For the purposes of "The Rules Governing and Restricting the Use and Supply of Water", the following definitions shall apply:  
Aesthetically objectionable. A condition which could be objectionable to other water consumers, but would not adversely affect human health. Substances such as food-grade dyes, hot water, and stagnant water from fire lines in which no chemical additives are used may result in aesthetically objectionable conditions.

Air gap. The unobstructed vertical distance through the free atmosphere between the lowest opening from any pipe or faucet supplying water to a tank, plumbing fixture, or other device, and the flood level rim of the receptacle, which shall be at least double the diameter of the supply pipe.

Applicant. Any person applying for a permit pursuant to these Rules.

AMR--Automatic Meter Reading. The use of radio or telephone-based technology to read water meters.

ANSI. The American National Standards Institute.

ASCII. American Standard Code for Information Interchange.

ASTM. The American Society for Testing Materials.

Automatic water regulating device. A self regulating valve or other device, the purpose of which shall be to limit the maximum use of City water on air conditioning and refrigeration units that do not have a water conserving device to 1.5 gpm per ton of refrigeration or air conditioning.

AWWA. The American Water Works Association.

Backflow prevention device. An approved air gap, reduced pressure zone (RPZ) device, or double check valve assembly (DCV) used to contain potential contamination within a facility.

Backflow/Backsiphonage. The reversal of normal flow in a system caused by a negative pressure (vacuum or partial vacuum) in the supply piping.

Ball valve. A valve capable of regulating, stopping or starting flow with a one-quarter (90 degree) turn of the valve by means of a movable ball which fits in a spherical seat.

BCS. Bureau of Customer Services.

Booster system. A pumped system used to deliver water at a higher pressure within a building.

Building. An enclosed structure having a specific block and lot (or tax sub-lot) and a separate entry from the street or an outdoor area.

City. The City of New York.

City water. Water supplied by the City of New York.

City water main. A water main owned and maintained by the City of New York under the jurisdiction of the Department.

Combined service. A water service which supplies both domestic and fire suppression end uses and the fire protection requirements exceed the domestic demand and determine the size of the service.

Commissioner. The Commissioner of the New York City Department of Environmental Protection.

Completed meter permit. A meter permit returned to the Department that indicates the meter size, type, serial number, remote identification number, meter and remote receptacle location, and date of installation that has been signed and sealed by the licensed plumber and lists the licensed plumber's business address.

Cross connection. A physical connection or arrangement between two separate piping systems where one system contains potable water; the other contains steam, gas, a chemical, or water of questionable safety, and there may be a flow from one system to the other.

Curb valve. A shutoff valve on the service pipe in the sidewalk area outside the building, generally located eighteen (18) inches from the curb.

Customer. Any person to whom City water is supplied.

Day. Except as otherwise stated, day shall refer to calendar day.

DDC. New York City Department of Design and Construction.

Department or DEP. The New York City Department of Environmental Protection.

Distribution piping. All piping downstream of the water meter setting.

Degree of hazard. The potential of a facility to cause contamination of the public water supply. A facility may be rated Hazardous, Aesthetically Objectionable or Non-Hazardous.

Department. The New York City Department of Environmental Protection.

Detector assembly. A device installed in a water service pipe, in lieu of a meter, which indicates that flow has occurred.

Disinfection. Chlorination in accordance with methods approved by the Department.

Domestic service with sprinkler heads. A domestic service sized for domestic demands which has been approved by the Department of Buildings to supply a limited number of fire sprinkler heads.

Domestic use. Water consumed for purposes other than extinguishing fire.

DOT. New York City Department of Transportation.

Double check detector assembly. A device consisting of two (2) single independently acting check valves, suitable connections for testing the water tightness of each valve, and an indicator that shows whether flow has occurred from the water service pipe into the premises housed together as one unit.

Double check valve assembly. A device consisting of two (2) single independently acting check valves, suitable connections for testing the water tightness of each valve, and inlet control valve and an outlet control valve housed together as one unit.

Electronic meter (electromagnetic meter). A meter that operates using Faraday's Principle.

Encoder-Register. A device from which electronic meter reading data can be obtained from the meter semiautomatically and at a remote location.

Fee. A charge determined by the New York City Water Board.

Fire department. The New York City Fire Department.

Fire service meter. A water meter certified by an AWWA standard for such meters and approved by the Department for use on a service, subject to fire service flows.

Fire pump. A pump installed on a service pipe to insure adequate flow for purposes of fire protection.

Fire service. A service pipe that supplies water exclusively to a fire protection system.

Fixture units. A measure of the probable hydraulic demand on the water supply by various types of plumbing fixtures.

Flood level rim. The edge of the receptacle from which water overflows.

Flushometer valve. A device which discharges a predetermined quantity of water to fixtures for flushing purposes and is actuated by direct water pressure.

Gooseneck. An extra three (3) to five (5) feet of water service pipe installed to the right of the corporation stop (tap) when facing the corporation stop (tap). (See Appendix Figure #2).

G.P.M. (gpm). The rate of flow of water in a service pipe, or through a meter or a pump, measured in gallons per minute.

Hazardous facility. A facility in which substances may be present that may endanger the health of other customers if introduced into the public water system. Examples include: laboratories, sewage treatment plants, chemical plants, hospitals, and mortuaries.

House tank (roof tank). An elevated water storage tank used to feed domestic and/or fire systems, which is usually located on the roof.

Hydrant. A standard New York City fire hydrant.

I.D. The inside diameter of a pipe.

Internal fire protection system. A fire pump system, a sprinkler system or a standpipe system.

Internal water main. A water main constructed by a private entity in private property and not in a mapped street, record street or a street for which an opinion of dedication has been issued. Internal water mains are under the jurisdiction of the Department from the City or private water main up to and including the meter.

Irrigation system. Piping used to supply water to vegetation.

Licensed master plumber. A plumber licensed by the City agency having jurisdiction over such licenses to perform plumbing work within New York City.

Mapped street. A street that appears on the official map of New York City.

Meter. An instrument for measuring amounts of water consumed.

Meter register. The system component that converts the movement of the meter's impeller, turbine, or disc into an electronic signal or display. This component consists of a meter register and a signal (data) encoder assembly, and is assembled as either a single unit, or as separate units to be mounted on the meter.

Meter set date. The date the meter is installed.

Meter setter/resetter. A shop or factory-fabricated set of piping, valves and an electrical continuity bar installed as a unit designed to hold a water meter of two (2) inches or less in diameter.

MTU. Meter Transmitter Unit. An electronics box wired to the water meter. The MTU is part of the AMR system programmed to read the meter and transmit radio frequency readings to a remote receiving unit.

New York City Water Board. A corporate municipal instrumentality of the State of New York established by Chapter 515 of the Laws of 1984 which is authorized to establish and collect fees, rates and other service charges for use of, or for services furnished by, the New York City water and sewer systems.

Non-turf plants. Plants other than a lawn.

Nozzle. A spring loaded self-closing device used for controlling the flow of water from a hose.

Offset swing joint. An installation consisting of three (3) lengths of pipe and four (4) elbows which are installed in lieu of a gooseneck. (See Appendix Figure #2.)

OSHA. The Occupational Safety and Health Administration of the United States Department of Labor.

OS & Y valve. The outside screw and yoke valve used on fire lines.

Person. An individual, partnership, company, corporation, association, organization, governmental agency, administration, department, any other group of individuals, or an officer or an employee thereof.

Pit meter. A water meter installed in an outside pit or vault.

Private water main. A water main constructed by a private person in the bed of a final mapped street or record street.

Professional engineer. An engineer licensed by the New York State Education Department to practice professional engineering in New York State.

psi. The static pressure of water within a closed piping system, or the loss of water pressure due to flow through a piping system, flow control devices or flow measuring devices, measured in pounds per square inch.

Record street. A street that appears on the Tax Map of the City but may not be a mapped street.

Reduced Pressure Zone (RPZ) Device. A minimum of two (2) independently acting check valves, with an automatically operated pressure differential relief valve located between the two (2) check valves.

Registered architect. A person licensed by the New York State Education Department to practice architecture in New York State.

Relay. Replacement of an entire water service pipe without replacement of the corresponding corporation stop (tap) or wet connection.

**Remote read resolution.** Refers to the smallest increment of water volume provided in the meter reading transmitted to a remote location. For example, a water meter may generate a reading in cubic feet, units of tens of cubic feet, or units of hundreds of cubic feet.

**Remote receptacle.** A system component at a location away from the meter that receives the probe of a portable visual-display unit, or a portable meter reading unit.

**Rodding.** The installation of steel rods in order to secure and prevent movement of joints, valves, caps, plugs, fittings and appurtenances.

**Sealed Building.** A building with windows and doors which are locked and covered or blocked by concrete block, bricks, sheet metal or other materials intended to prevent access. Windows covered with wooden boards shall not constitute a sealed building.

**Separation (section) valve.** A valve installed in a City water main or private water main to ensure two (2) separate sources of water.

**Service pipe.** A water supply pipe which connects the customer or a development to a City water main, private water main or internal water main. Service pipes connecting a single customer's premises to a City water main or a private water main are under the jurisdiction of the Department from the City water main or private water main up to and including the meter outlet valve in metered properties, or the first valve within the property in unmetered properties. For properties with an internal water main and a meter vault at the property line, the Department's jurisdiction runs from the water main connection to the first valve inside the property line.

**Sidewalk valve.** A valve on a domestic service pipe located in the sidewalk area, at a distance of two (2) feet (street side) from the property line.

**Stuffing box.** That part of a valve which contains packing or similar material which prevents leakage when the valve is operated.

**Suction tank.** A tank used to protect the City distribution system from a large, sudden water demand.

**Swing joint connection.** An acceptable method of connecting to either well water or City water.

**Tap.** A corporation stop approved by the Department which controls the flow of water.

**Tee connection.** A three-way pipe fitting installed in a private water main or internal water main in lieu of a tap or wet connection.

**Test tee.** A downward pointing plain tip faucet or hose connection located after the water meter but before the meter outlet valve that is used for connecting an outlet hose for meter accuracy testing.

**Title vested street.** A mapped street or record street whose ownership has been accepted by the City of New York, or a street which has a Corporation Counsel Opinion of Dedication.

**UL/FM.** Underwriter's Laboratories/Fireman's Mutual.

**Vacant building.** A building which is not inhabited, or is occupied illegally.

**Valve.** An non-rising stem gate valve.

**Valve box.** A standard New York City valve enclosure including the skirt, head and cover.

**Waiver.** The act of intentionally relinquishing a right or privilege.

**Water conserving device.** With reference to air conditioning or refrigeration systems, an evaporative condenser, water cooling tower, spray pond or economizer.

**Water meter accuracy testing ("meter testing").** Refers to testing the accuracy of a water meter in the field, on an indoor test bench, using methods designed by the Department and in conformance with AWWA's Manual M6: "Water Meters-- Selection, Installation, Testing and Maintenance."

**Water meter setting.** The water meter, inlet and outlet isolation valves, test tee, and associated approved piping and fittings.

**Water outlet.** An orifice through which water is supplied to a fixture, into the atmosphere, to a boiler or heating system, or to any device which requires water to operate.

**Wet connection.** The hardware required to install a connection larger than two (2) inches without interruption of water service. A wet connection shall consist of a sleeve and a corresponding valve approved by the Department.

New York City, N.Y., Rules, Tit. 15, § 20-10, New York City, N.Y., Rules, Tit. 15, § 20-10

Section repealed and added City Record July 25, 2000 eff. Aug. 24, 2000.

Definitions added/amended City Record Jan. 23, 2014 § 20, eff. Feb. 22, 2014. [See T15 § 20-01 Note 2]  
Definitions added/amended City Record May 22, 2009 § 23, eff. June 21, 2009. [See T15 § 20-01 Note 1]

#### DERIVATION

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<General Materials (GM) - References, Annotations, or Tables>



## Underutilized defined:

STATE	LANGUAGE
California	<p>(6) "Eligible property" means a site that is any of the following:</p> <p>(A) A brownfield.</p> <p>(B) An <b>underutilized</b> property that is any of the following:</p> <ul style="list-style-type: none"> <li>○ (i) A property described in clause (v) of subparagraph (D) of paragraph (16).</li> <li>○ (ii) A property located in an enterprise zone established pursuant to the Enterprise Zone Act (Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of the Government Code), in a project area for which a redevelopment plan has been approved pursuant to Article 4 (commencing with Section 33300) of Chapter 4 of Part 1 of Division 24, or in an eligible area, as determined pursuant to paragraph (2) of subdivision (c) of Section 7072 of the Government Code.</li> <li>○ (iii) A property, the redevelopment of which will result in any of the following: <ul style="list-style-type: none"> <li>▪ (I) An increase in the number of full-time jobs that is at least 100 percent greater than the number of jobs provided by the economic activity located on the property before redevelopment occurred.</li> <li>▪ (II) An increase in property taxes paid to the local government that is at least 100 percent greater than the property taxes paid by the property owner before redevelopment occurred.</li> <li>▪ (III) Sales tax revenues to the local government that are sufficient to defray the costs of providing municipal services to the property after the redevelopment occurs.</li> <li>▪ (IV) Housing for very low, low-, or moderate-income households, as defined in paragraph (2) of subdivision (h) of Section 65589.5 of the Government Code.</li> <li>▪ (V) The construction of new or expanded school facilities, public day care centers, parks, or community recreational facilities.</li> </ul> </li> </ul> <p>Cal Health &amp; Saf Code § 25395.20</p>
	<p>(16) "<b>Underutilized</b> property" means property that meets all of the following conditions:</p> <p>(A) It is located in an urban area.</p> <p>(B) An economic activity is conducted on the property.</p> <p>(C) It is the subject of a proposal for development pursuant to this article.</p> <p>(D) One of the following applies:</p> <ul style="list-style-type: none"> <li>○ (i) The economic activity on the property is irregular or intermittent in nature and uses the property for productive purposes less than four months in any calendar year.</li> <li>○ (ii) The economic activity on the property employs less than 25 percent of the property for productive purposes.</li> <li>○ (iii) The structures, infrastructure, and other facilities on the property are antiquated, obsolete, or in such poor repair that they cannot be used for the purposes for which they were originally constructed and require replacement in order to implement the redevelopment proposal.</li> <li>○ (iv) The economic activity conducted on the property is a parking facility or an activity that offers a similar marginal economic service and the facility or activity will be replaced when the property is redeveloped.</li> <li>○ (v) The property is adjacent to one or more brownfields or <b>underutilized</b> properties that are the subject of a project under this article and its inclusion in the project is necessary in order to ensure that the redevelopment of the brownfield or brownfields or <b>underutilized</b> property or <b>underutilized</b> properties occurs.</li> </ul> <p>(E) An <b>underutilized</b> property does not include any of the following:</p> <ul style="list-style-type: none"> <li>○ (i) Property listed or proposed for listing on the National Priorities List pursuant to the federal act (42 U.S.C. Sec. 9605 (a)(8)(B)).</li> <li>○ (ii) Property that is, or was, owned or operated by a department, agency, or instrumentality of the United States.</li> <li>○ (iii) Property that will be the site of a contiguous expansion or improvement of an operating industrial or commercial facility, unless the property is an <b>underutilized</b> property described in subparagraph (C) of paragraph (6).</li> </ul>

	Cal Health & Saf Code § 25395.20
Connecticut	<p>(2) "Brownfield" means any abandoned or <b>underutilized</b> site where redevelopment, reuse or expansion has not occurred due to the presence or potential presence of pollution in the buildings, soil or groundwater that requires investigation or remediation before or in conjunction with the redevelopment, reuse or expansion of the property;</p> <p><u>Conn. Gen. Stat. § 32-760</u></p> <p>*does not independently define underutilized</p>
Iowa	<p>2. "Brownfield site" means an abandoned, idled, or <b>underutilized</b> industrial or commercial facility where expansion or redevelopment is complicated by real or perceived environmental contamination. A brownfield site includes property contiguous with the property on which the individual or commercial facility is located. A brownfield site does not include property which has been placed, or is proposed for placement, on the national priorities list established pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.</p> <p><u>Iowa Code § 15.291</u></p> <p>*does not independently define underutilized</p>
Missouri	<p>(4) "Eligible project", abandoned or <b>underutilized</b> property to be acquired, established, expanded, remodeled, rehabilitated or modernized for industry, commerce, distribution or research, or any combination thereof, the operation of which, alone or in conjunction with other facilities, will create new jobs or preserve existing jobs and employment opportunities, attract new businesses to the state, prevent existing businesses from leaving the state and improve the economic welfare of the people of the state. The term "eligible project", without limitation, includes voluntary remediation conducted pursuant to sections 260.565 to 260.575. To be an "eligible project" pursuant to sections 447.700 to 447.718, the obligations of the prospective applicant and the governmental agency shall be defined in a written agreement signed by both parties. The facility, when completed, shall be operated in compliance with applicable federal, state and local environmental statutes, regulations and ordinances. An "eligible project" shall be determined by consideration of the entire project. The definition or identification of an "eligible project" shall not be segmented into parts to separate commercial and industrial uses from residential uses. Any property immediately adjacent to any abandoned or <b>underutilized</b> property may also be an "eligible project" pursuant to sections 447.700 to 447.718, provided that the abandoned or <b>underutilized</b> property otherwise meets the qualifications of this subdivision;</p> <p><u>§ 447.700 R.S.Mo.</u></p> <p>*does not independently define underutilized</p>
New Jersey	<p>"Qualified real property" means any parcel of real property that is now vacant or <b>underutilized</b>, which is in need of a remediation due to a discharge or threatened discharge of a contaminant;</p> <p><u>N.J. Stat. § 54:4-3.152</u></p> <p>*does not independently define underutilized</p>
North Dakota	<p>14. "Industrial or commercial property" means unused or <b>underutilized</b> real property that is zoned or used as an industrial or commercial site.</p> <p><u>N.D. Cent. Code. § 40-58-01.1</u></p> <p>*does not independently define underutilized</p>

<p>Pennsylvania</p>	<p>"Deteriorated property." An area containing industrial or commercial real property which is abandoned, vacant, undervalued, <b>underutilized</b> or condemned or which contains economically undesirable land use.</p> <p><u>53 P.S. § 18200.103</u></p> <p>*does not independently define underutilized</p>
<p>Pennsylvania</p>	<p>(12) "<b>Underutilized</b> or vacant property" means an entire property or portion thereof, with or without improvements, which is not used or is used irregularly or intermittently by the LEA for instructional or program purposes. "<b>Underutilized</b> or vacant property" does not include real property on which no building or permanent structure has been erected.</p> <p><u>Tenn. Code Ann. § 49-13-104</u></p>
<p>Texas</p>	<p>(5) "<b>Underutilized</b> and economically distressed area" includes any area of this state that:</p> <p>(A) the office determines receives less than 15 percent of the total film and television production in this state during a fiscal year; or</p> <p>(B) has a median household income that does not exceed 75 percent of the median state household income.</p> <p>Tex. Gov't Code § 485.021 (Moving Image Industry Incentive Program)</p>
<p>Washington</p>	<p>(3) "Brownfield property" means previously developed and currently abandoned or <b>underutilized</b> real property and adjacent surface waters and sediment where environmental, economic, or community reuse objectives are hindered by the release or threatened release of hazardous substances that the department has determined requires remedial action under this chapter or that the United States environmental protection agency has determined requires remedial action under the federal cleanup law.</p> <p><u>Rev. Code Wash. (ARCW) § 70.105D.020</u></p> <p>*does not independently define underutilized</p>