

946 CMR 3.00: BROWNFIELDS REDEVELOPMENT FUND

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3.01: Purpose and Authority

- (1) Authority. 946 CMR 3.00 *et seq.* is promulgated pursuant to the authority of Massachusetts Development Finance Agency under St. 1998, c. 463 and St. 1998, c. 289, § 24, and M.G.L. c. 23G, § 29A.
- (2) Purpose. The purpose of 946 CMR 3.00 is to establish the terms, procedures and standards which the MassDevelopment shall employ to:
 - (a) process Applications,
 - (b) make lending decisions;
 - (c) safeguard the Fund; and
 - (d) accomplish the purposes of the Fund.

3.02: Definitions

As used herein, the following capitalized words and terms shall have the following meanings:

Applicant - any Person who submits an Application for a Grant or Loan from the Fund.

Application - an application filed by an Applicant with MassDevelopment in order to determine the Applicant's eligibility to qualify for a Grant or Loan from the Fund.

Board - the Board of Directors of MassDevelopment.

Borrower - any Person who receives a Loan from the Fund.

Brownfields Advisory Group - the Brownfields Advisory Group, established pursuant to St. 1998, c. 463.

Economically Distressed Area - an area or municipality that has been designated as an economic target area, or that would otherwise meet the criteria for such designation, pursuant to M.G.L. c 23A, § 3D, or the site of a former manufactured gas plant.

Eligible Project - a Project located at a Project Site which MassDevelopment has determined meets the requirements contained in 946 CMR 3.00 *et seq.* and is eligible for financing.

Environmental Cleanup Action - activity, including but not limited to an Environmental Site Assessment, undertaken to contain or remove from land or structures, oil or hazardous material as defined in M.G.L. c. 21E and regulations promulgated pursuant thereto, in compliance with all applicable laws.

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Environmental Site Assessment - activity undertaken in compliance with the applicable laws to determine:

- (a) the existence, source, nature and extent of a release or threat of release of oil or hazardous materials; or
- (b) the extent of danger to the public health, safety, welfare and environment.

Fund - the Brownfields Redevelopment Fund.

Grant - a sum of money given by MassDevelopment from the Fund in accordance with these regulations to finance a portion of the costs of an Environmental Site Assessment or an Environmental Cleanup Action.

Guarantor - any Person who, on behalf of a Borrower, guarantees repayment of a Loan from the Fund.

Loan - a loan or credit enhancement, including but not limited to, a direct loan, a contingent loan, a loan guarantee, a letter of credit, or a line of credit, issued or obtained by MassDevelopment from or on behalf of the Fund to finance all of the costs or a portion of the costs of an Environmental Site Assessment or an Environmental Cleanup Action.

MassDevelopment - the Massachusetts Development Finance Agency.

Matching Party - the Person who or which provides the Requisite Match.

Ombudsman - the Director of the Office of Brownfields Revitalization, who serves as the Brownfields Ombudsman pursuant to St. 1998, c. 463 and M.G.L. c. 21E.

Person - any person, organization or entity, for profit or not for profit, including but not limited to, an individual, a corporation, partnership, limited partnership, limited liability company, limited liability partnership, trust, governmental agency or instrumentality, state or quasi-state entity, municipality, community development corporation created and operating in accordance with the provisions of M.G.L. c. 40F, economic development and industrial corporation established pursuant to M.G.L. c. 121C, redevelopment authority established pursuant to M.G.L. c. 121B and any other entity.

Priority Project - an Eligible Project which, in MassDevelopment's opinion, the city or town in which the Project Site comprising the Eligible Project, or portion thereof, is located, has made available substantial funds, in the form of grants, loans, or abated property taxes, in furtherance of the purposes of the Brownfields Redevelopment Fund.

Project - the redevelopment project proposed to be undertaken at a Project Site.

Project Site - any vacant, abandoned or underutilized industrial or commercial property located within an Economically Distressed Area where real or perceived environmental contamination and liability is an obstacle to the redevelopment or improvement of said property.

Recipient - any Person who receives a Grant from the Fund

Requisite Match - a loan or grant of funds or other investment made by, or on behalf of, an Applicant on terms and conditions satisfactory to MassDevelopment, for the purposes of financing, in combination with Loan or Grant proceeds, an Environmental Site Assessment or Environmental Cleanup Action.

Site - a place or area where oil or hazardous material has been released, as further defined in M.G.L. c. 21E, § 2.

3.03: Purposes and Objectives of the Fund

The public purposes and objectives of the Fund are set forth in St. 1998, c. 463 and include, but are not limited to, the following:

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- (a) to encourage economic development in Economically Distressed Areas of the Commonwealth by providing Loans and Grants to finance Environmental Site Assessments and Environmental Cleanup Actions;
- (b) to defray costs incurred in the administration of the Fund; and
- (c) to purchase with funds not immediately required for use pursuant to 946 CMR 3.03(1) and (2), such securities as may be lawful investments for fiduciaries in the Commonwealth.

3.04: Loans From the Fund

MassDevelopment may make and administer Loans from the Fund to finance Environmental Site Assessments and Environmental Cleanup Actions, in accordance with the following provisions:

(1) General Provisions.

- (a) No Loan shall be given unless:
 - 1. the Borrower submits an Application in accordance with 946 CMR 3.06; and
 - 2. the Borrower, in MassDevelopment's opinion, satisfies the requirements and criteria contained in 946 CMR 3.04 and 3.06.
- (b) No Loan shall be made to finance an Environmental Site Assessment or an Environmental Cleanup Action that is eligible for funding under M.G.L. c. 21J. Eligibility under M.G.L. c. 21J shall be evidenced by the issuance of a Certificate of Eligibility in accordance with 503 CMR 2.00 *et seq.*
- (c) No Loan shall be given to finance an Environmental Site Assessment or an Environmental Cleanup Action unless the Borrower certifies in the Application and in the Loan documents that the Borrower shall transfer the results of the Environmental Site Assessment to the appropriate regional office of the Department of Environmental Protection if the Borrower does not proceed with the development of the Project after the performance of an Environmental Site Assessment.

(2) Loan Amounts.

- (a) The maximum amount of a Loan for an Environmental Cleanup Action relating to an Eligible Project (which is not a Priority Project) shall not exceed \$500,000.
- (b) The maximum amount of a Loan for an Environmental Site Assessment relating to an Eligible Project (which is not a Priority Project) shall not exceed \$50,000.
- (c) The maximum amount of financing available from the Fund for an Environmental Site Assessment and an Environmental Cleanup Action for a Priority Project shall not exceed \$2,000,000.
- (d) No Loan shall be given in the total estimated amount required to complete a response action at a Project Site. Borrower shall provide evidence satisfactory to MassDevelopment that the Borrower has secured a Requisite Match to the Loan, in an amount to be determined by MassDevelopment. Notwithstanding the foregoing, MassDevelopment may waive the requirement of the Requisite Match and provide funding for the entire response action.

(3) Loan Structure.

- (a) MassDevelopment may structure a Loan from the Fund in the following forms:
 - 1. a direct loan;
 - 2. a guarantee of Borrower's debt
 - 3. contingent liability;
 - 4. obtaining a line of credit; or
 - 5. obtaining a letter of credit.
- (b) Loan proceeds shall be advanced in disbursements, upon receipt by MassDevelopment of invoices and receipts satisfactory to MassDevelopment to reimburse costs incurred by the Borrower in connection with performing an Environmental Site Assessment or Environmental Cleanup Action only. Loan proceeds may only be used to reimburse costs incurred for work approved by MassDevelopment.

(4) Loan Security.

- (a) A Loan shall be secured by collateral in the form and amount as determined by MassDevelopment, which may include, but shall not be limited to, the following:

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1. a first lien real estate mortgage and security agreement on the Project Site, or other real property owned by Borrower and any Guarantor;
 2. a first lien security interest on personal property and other tangible and intangible property and assets at or related to the Project Site, owned by the Borrower and any Guarantor, including without limitation, all accounts, funds, proceeds, fixtures, equipment, machinery, profits, products, leases, licenses, patents, trademarks, copyrights and contracts;
 3. a first lien pledge of personal property and other tangible and intangible property at or related to the Project Site, owned by the Borrower and any Guarantor, including without limitation, all accounts, funds, proceeds, and profits;
 4. a first lien assignment of leases, rents, contracts, permits, development rights or other rights or interests related to the Project Site, owned by the Borrower and any Guarantor; and
 5. pledge of options or warrants for the purchase of stock, shares of stock, or other forms of equity owned by the Borrower and/or any Guarantor.
- (b) Any security given in connection with a Loan may, in MassDevelopment's discretion, be subordinate to other financing obtained by a Borrower in connection with the acquisition, remediation or development of a Project Site.
- (5) Loan Interest Rates. The interest rate due and payable under a Loan shall be determined by MassDevelopment at a rate comparable to then-prevailing commercial loan rates set by MassDevelopment for brownfields transactions. Notwithstanding the foregoing, MassDevelopment may set an interest rate for a Loan that is below its prevailing rates in order to make an Eligible Project financially feasible.
- (6) Loan Terms and Conditions. Loans shall be made upon terms and conditions outlined in a commitment letter drafted by MassDevelopment and accepted by the Borrower. The terms and conditions for each Loan shall be determined by MassDevelopment in accordance with its internal underwriting criteria and shall be based upon MassDevelopment's review of the Application, the financial statements, the anticipated economic impact associated with the Eligible Project, and any other documents required by MassDevelopment from the Borrower and any Guarantor or Matching Party.
- (7) Legal Documents. Any Loan made from Fund shall be documented by standard loan documents by and between MassDevelopment, the Borrower, the Guarantor or Matching Party, if any, and any other party required by the Fund's legal counsel.

3.05: Grants from the Fund

MassDevelopment may give and administer Grants from the Fund to finance Environmental Site Assessments and Environmental Cleanup Actions in accordance with the following provisions:

- (1) General Provisions.
 - (a) A Grant shall be awarded only to a city or town, redevelopment authority, redevelopment agency, economic development and industrial corporation, community development corporation or an economic development authority.
 - (b) No Grant shall be awarded unless:
 1. the Recipient submits an Application in accordance with 946 CMR 3.06; and
 2. the Recipient, in MassDevelopment's opinion, satisfies the requirements and criteria contained in 946 CM 3.05 and 3.06.
 - (c) No Grant shall be awarded to finance an Environmental Site Assessment or an Environmental Cleanup Action that is eligible for funding under M.G.L. c. 21J. Eligibility under M.G.L. c. 21J shall be evidenced by the issuance of a Certificate of Eligibility in accordance with 503 CMR 2.00 *et seq.*
 - (d) No Grant shall be awarded unless the Recipient contributes a Requisite Match in an amount equal to 20% or greater of the Grant amount toward the financing of the Project.

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(2) Grant Amounts.

- (a) The maximum amount of a Grant for an Environmental Cleanup Action relating to an Eligible Project (which is not a Priority Project) shall not exceed \$500,000.
- (b) The maximum amount of a Grant for an Environmental Site Assessment relating to an Eligible Project (which is not a Priority Project) shall not exceed \$50,000.
- (c) The maximum amount of financing available from the Fund for an Environmental Site Assessment and an Environmental Cleanup Action for a Priority Project shall not exceed \$2,000,000.

(3) Grant Structure.

- (a) A Grant shall be a direct appropriation from the Fund.
- (b) Grant proceeds shall be advanced in disbursements, upon receipt of invoices and receipts satisfactory to MassDevelopment, to reimburse costs incurred by the Recipient in connection with performing an Environmental Site Assessment or Environmental Cleanup Action only. Grant proceeds may only be used to satisfy costs incurred in connection with work approved by MassDevelopment
- (c) MassDevelopment may require that all or a portion of the Grant amount be reimbursed to the Agency in most circumstances if:
 - 1. the Project Site is sold, leased, gifted or otherwise transferred or conveyed by the Recipient or the Project Site owner within five years of the award of the Grant; or
 - 2. the Project proceeds to the redevelopment/development phase by the Recipient, Project Site Owner, or any other entity within five years of the award of the Grant.

- (4) Legal Documents. Any Grant awarded from the Fund shall be fully documented through closing documents by and between MassDevelopment, the Recipient, the Matching Party, and any other party required by the Fund's counsel.

3.06: Eligibility Requirements for Loans and Grants

(1) Overview.

- (a) Loans and Grants shall only be made by MassDevelopment to a Borrower or a Recipient if MassDevelopment determines that
 - 1. the Borrower or Recipient satisfies the requirements and criteria contained in 946 CMR 3.04, 3.05, and 3.06, as applicable; and
 - 2. the Project satisfies the requirements and criteria contained in 946 CMR 3.06 and qualifies as an Eligible Project, as applicable.
- (b) In order for MassDevelopment to make its determinations under 946 CMR 3.06, each potential Borrower or Recipient shall submit a completed Application to the Brownfields Advisory Group (which may be sent c/o MassDevelopment) and to MassDevelopment for:
 - 1. a Loan or Grant for an Environmental Site Assessment; and
 - 2. a Loan or Grant for an Environmental Cleanup Action.
- (c) The Brownfields Advisory Group and MassDevelopment shall review each Application. Each Application is subject to MassDevelopment's final approval.

(2) General Requirements of the Application Process.

- (a) Each Application shall be signed by an authorized representative of the Applicant.
- (b) The Application shall be prepared on the form prepared by MassDevelopment.
- (c) MassDevelopment may return an Application to an Applicant, or hold an Application without taking action, if additional or supplemental information is needed.
- (d) The Application, as completed, shall contain sufficient information to enable MassDevelopment to determine whether the Applicant and the Project satisfy the eligibility requirements and criteria contained in 946 CMR 3.04, 3.05, and 3.06, as applicable.
- (e) If an Applicant is not the owner of the Project Site, the Applicant shall provide evidence satisfactory to MassDevelopment:
 - 1. that the current owner of the Project Site is aware of and consents to the Project, the proposed Environmental Site Assessment and/or the proposed Environmental Cleanup Action and the Applicant has control of the Project Site;

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2. that the Applicant has the legal right to enter and conduct the Environmental Site Assessment, the Environmental Cleanup Action and/or the Project and has control of the Project Site; and
3. the Applicant, (and the current owner of the Project Site if applicable):
 - a. did not own or operate the Project Site at the time of a release of hazardous materials as defined under M.G.L. c. 21E;
 - b. did not cause or contribute to the release of hazardous materials, as defined under M.G.L. c. 21E, at the Project Site; or
 - c. does not have a familial or business relationship with the party or entity that meets the criteria of 946 CMR 3.06(2)(e)3.a. and (2)(e)3.b..

(3) Contents of an Application for Funding for an Environmental Site Assessment. An Applicant shall submit a completed Application to MassDevelopment to be considered for financing for an Environmental Site Assessment, which Application may contain, in addition to the requirements of 946 CMR 3.06(2), the following information:

- (a) certification that the Project Site is located in an Economically Distressed Area;
- (b) whether the Applicant and, if applicable, the current Owner of the Project Site:
 1. owned or operated the Project Site at the time of the release of hazardous materials as defined under M.G.L. c. 21E;
 2. caused or contributed to the release of hazardous materials, as defined under M.G.L. c. 21E, at the Project Site; or
 3. has a familial or business relationship with the party or entity that meets the criteria of 946 CMR 3.06(2)(e)3.a. and (2)(e)3.b..
- (c) certification that the proposed Environmental Site Assessment is not eligible for funding under M.G.L. c.21J, the Underground Storage Tank Fund;
- (d) evidence that the Project will result in a significant economic impact in terms of the number of jobs to be created or will contribute to the economic or physical revitalization of the Economically Distressed Area in which the Project Site is located and a significant level of community benefits shall be associated with the Project;
- (e) certification as to whether the Applicant is subject to any outstanding administrative environmental enforcement action or judicial environmental enforcement action;
- (f) in the case of an Application from a redevelopment authority, redevelopment agency, economic development and industrial corporation, community development corporation, or economic development authority, evidence of the enabling legislation or statutory authority;
- (g) in the case of an Application submitted by a city or town, evidence of authority (by warrant, vote or otherwise) for such Application;
- (h) certification that the Applicant will transfer the results of the Environmental Site Assessment to the appropriate regional office of the Department of Environmental Protection if the Borrower does not proceed with the development of the Project after the performance of an Environmental Site Assessment;
- (i) the results of any Environmental Site Assessments or other reports previously conducted on the Project Site in the Applicant's possession;
- (j) the historical use of the Project Site;
- (k) a detailed explanation of the proposed reuse of the Project Site, if known;
- (l) the Applicant's experience in the redevelopment of properties and experience in conducting the proposed reuse of the Project Site;
- (m) a feasibility study or market analysis of the proposed reuse of the Project Site;
- (n) the identity of the environmental professional (who should also be a Licensed Site Professional) who will direct the Environmental Site Assessment;
- (o) a detailed estimate, broken down by cost per task, of the expenses involved in conducting the Environmental Site Assessment, prepared by the Licensed Site Professional identified in 946 CMR 3.06(3)(n);
- (p) a detailed scope of services and schedule for the work involved with the Environmental Site Assessment prepared by the Licensed Site Professional identified in 946 CMR 3.06(3)(n);
- (q) Applicant's certified financial statements for the past three years;
- (r) the identity of the proposed end-user of the Project Site;
- (s) evidence of community and municipal support. In the case of a Grant Application, the Applicant must submit three letters of community support from municipal or civic entities;

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- (t) evidence of other sources of funding, including the funding for the Requisite Match in the case of a Grant Application, which when combined with the Loan or Grant amount, shall total an amount greater than the total costs associated with the Environmental Site Assessment and the Project (if known);
- (u) any other information required by MassDevelopment.

(4) Contents of Application for Funding for an Environmental Cleanup Action. An Applicant shall submit a completed Application to MassDevelopment to be considered for funding for an Environmental Cleanup Action, which Application may contain, in addition to the requirements of 946 CMR 3.06(2), the following information:

- (a) certification that the Project Site is located in an Economically Distressed Area;
- (b) whether the Applicant and, if applicable, the current owner of the Project Site:
 1. owned or operated the Project Site at the time of the release of hazardous materials as defined under M.G.L. c. 21E;
 2. caused or contributed to the release of hazardous materials, as defined under M.G.L. c. 21E, at the Project Site; or
 3. has a familial or business relationship with the party or entity that meets the criteria of 946 CMR 3.06(2)(e)3.a. and (2)(e)3.b..
- (c) certification that the proposed Environmental Cleanup Action is not eligible for funding under M.G.L. c.21J, the Underground Storage Tank Fund;
- (d) evidence that the Project will result in a significant economic impact in terms of the number of jobs to be created or will contribute to the economic or physical revitalization of the Economically Distressed Area in which the Project Site is located and a significant level of community benefits shall be associated with the Project;
- (e) certification as to whether the Applicant is subject to any outstanding administrative environmental enforcement action or judicial environmental enforcement action;
- (f) in the case of an Application for a Grant, evidence of the enabling legislation or statutory authority for the redevelopment authority, redevelopment agency, economic development and industrial corporation, community development corporation, or economic development authority;
- (g) in the case of an Application submitted by a city or town, evidence of authority (by warrant, vote or otherwise) for such Application;
- (h) any Environmental Site Assessments, Massachusetts Contingency Plan (310 CMR 40.00 *et seq.*) Phase I, II, or III reports, as applicable, or any other report previously conducted on the Project Site;
- (i) the historical use of the Project Site;
- (j) a detailed explanation of the proposed reuse of the Project Site;
- (k) the Applicant's experience in the redevelopment of properties and experience in conducting the proposed reuse of the Project Site;
- (l) a feasibility study or market analysis of the proposed reuse of the Project Site;
- (m) the identity of the Licensed Site Professional who will direct the Environmental Cleanup Action;
- (n) detailed estimate, broken down by cost per task, of the expenses involved in conducting the Environmental Cleanup Action, prepared by the Licensed Site Professional identified in 946 CMR 3.06(4)(m);
- (o) a detailed scope of services and schedule for the work involved with the Environmental Cleanup Action, prepared by the Licensed Site Professional identified in 946 CMR 3.06(4)(m) which scope of services, in the Licensed Site Professional's opinion, should achieve a cleanup standard that is in compliance with the requirements of the Department of Environmental Protection and will result in a Permanent Solution, Remedy Operation Status, and in certain circumstances a Class C Response Action Outcome;
- (p) Applicant's certified financial statements for the past three years;
- (q) the identity of the proposed end-user of the Project Site;
- (r) evidence of community and municipal support. In the case of a Grant Application, the Applicant must submit three letters of community support from municipal or civic entities;
- (s) a detailed Project budget, which includes costs involved with the remediation of the environmental contamination and any acquisition costs, construction costs, operating costs, and any other costs associated with the Project;
- (t) a detailed proposed work schedule prepared by and certified by the Applicant's architect and contractor;

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- (u) evidence of other sources of funding, including the Requisite Match, which when combined with the Loan or Grant amount, should total an amount greater than the total costs associated with the Environmental Cleanup Action and Project;
- (v) copies of all applicable permits or completed applications for permits required for the Environmental Cleanup Action and the Project available as of the date of the Application; and
- (w) any other information reasonably required by MassDevelopment.

(5) Eligibility.

(a) Threshold Requirements for Eligibility for Funding for an Environmental Site Assessment. In reviewing and evaluating each Application for funding for an Environmental Site Assessment for eligibility purposes, MassDevelopment must find that the Applicant and the Project Site satisfy the following requirements:

1. the Project Site is located in an Economically Distressed Area;
2. the Project will result in a significant economic impact in terms of the number of jobs to be created or will contribute to the economic or physical revitalization of the Economically Distressed Area in which the Project Site is located and a significant level of community benefits shall be associated with the Project;
3. the Applicant certified that it shall transfer the results of any Environmental Site Assessment to the regional office of the Department of Environmental Protection if the Applicant does not proceed with the development of the Project after the performance of an Environmental Site Assessment;
4. the Applicant certified that the Applicant
 - a. would be liable for the environmental contamination solely pursuant to M.G.L. c. 21E, § 5(a)(1);
 - b. did not cause or contribute to the release of oil or hazardous material at the Site;
 - c. did not own or operate the Project Site at the time of the release;
 - d. does not have a familial relationship or any direct or indirect business relationship, other than that by which the Applicant's interest in such property is to be conveyed or financed, with another party that is potentially liable under M.G.L. c. 21E with regard to the Project Site.

946 CMR 3.06(5)(a)4.a. may be waived with the approval of the Board after full disclosure by the Applicant of the familial or business relationship with a potentially responsible party;

5. the Applicant is not subject to any outstanding administrative environmental enforcement action or judicial environmental enforcement action provided that, if the Applicant is subject to one or both of the foregoing enforcement actions, the Applicant shall have entered into an agreement with the Department of Environmental Protection or the Office of the Attorney General, as applicable, to resolve said enforcement action with respect to any Project Site under consideration for assistance from the Fund and with respect to any other properties located within the Commonwealth for which the Applicant is liable pursuant to M.G.L. c. 21E;
6. the financing requested complies with 946 CMR 3.04 and 3.05, as applicable; and
7. the Applicant demonstrates to MassDevelopment that it has the financial resources and experience to successfully undertake and finance the Environmental Site Assessment, and the Project, if the details of the Project are known at the time of the filing of the Application.

(b) Factors to Be Considered In Evaluating an Application for Funding for an Environmental Site Assessment. In reviewing an Applicant and Project Site and making findings pursuant to 946 CMR 3.06(5)(a)2. (if applicable based on the terms of the Application), MassDevelopment shall consider the following factors:

1. the level of unemployment and poverty in the Economically Distressed Area and in the census tract, if any, within the Economically Distressed Area in which the Project Site is located;
2. the presence of community benefits associated with the Project, including without limitation, the creation or revitalization of open space;
3. the proximity of the Project Site to existing transportation and utility infrastructure appropriate to support the proposed reuse of the Project Site;

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4. whether the Project Site is located in an area designated as a Federal Empowerment Zone or Enterprise Community pursuant to chapter 120 of title 42 subsection 11501 *et seq.* of the United States Code;
 5. whether the Project Site qualifies as a Priority Project; and
 6. MassDevelopment shall give priority to a Project Site located in an Economically Distressed Area that is considered by the Ombudsman and the Department of Economic Development to be of substantial economic benefit to the community and which will result in the creation or retention of jobs for that community.
- (c) Threshold Requirements for Eligibility for Funding for an Environmental Cleanup Action. In reviewing and evaluating each Application for eligibility purposes, MassDevelopment must find that the Applicant and the Project Site satisfy the following requirements:
1. the Project Site is located in an Economically Distressed Area;
 2. the Project will result in a significant economic impact in terms of the number of jobs to be created or will contribute to the economic or physical revitalization of the Economically Distressed Area in which the Project Site is located and a significant level of community benefits shall be associated with the Project;
 3. assistance from the Fund is necessary to make the Project financially feasible;
 4. the Applicant certified that it shall transfer the results of any Environmental Site Assessment to the regional office of the Department of Environmental Protection if the Applicant does not proceed with the development of the Project after the performance of an Environmental Site Assessment;
 5. the Applicant certified that the Applicant
 - a. would be liable for the environmental contamination solely pursuant to M.G.L. c. 21E, § 5(a)(1);
 - b. did not cause or contribute to the release of oil or hazardous material at the Site;
 - c. did not own or operate the Project Site at the time of the release;
 - d. does not have a familial relationship or any direct or indirect business relationship, other than that by which the Applicant's interest in such property is to be conveyed or financed, with another party that is potentially liable under M.G.L. c. 21E with regard to the Project Site.
- 946 CMR 3.06(5)(c)5.d. may be waived with the approval of the Board of Directors of MassDevelopment after full disclosure by the Applicant of the familial or business relationship with a potentially responsible party;
6. the Applicant is not be subject to any outstanding administrative environmental enforcement action or judicial environmental enforcement action, provided that if the Applicant is subject to one or both of the foregoing enforcement actions, the Applicant shall have entered into an agreement with the Department of Environmental Protection or the Office of the Attorney General, as applicable, to resolve said enforcement action with respect to any Project Site under consideration for assistance from the Fund and with respect to any other properties located within the Commonwealth for which the Applicant is liable pursuant to M.G.L. c. 21E;
 7. the financing requested complies with 946 CMR 3.04 and 3.05, as applicable; and
 8. the Applicant demonstrates to MassDevelopment that it has the financial resources and experience to successfully undertake and finance the Environmental Cleanup Action and the Project.
- (d) Factors to Be Considered In Evaluating an Application. In reviewing an Applicant and Project Site and making findings pursuant to 946 CMR 3.06(5)(c)2., MassDevelopment shall consider the following factors:
1. the level of unemployment and poverty in the Economically Distressed Area and in the census tract, if any, within the Economically Distressed Area in which the Project Site is located;
 2. the likelihood that the proposed response action will be adequate to cleanup the Project Site in accordance with the requirements of applicable laws;
 3. the presence of community benefits associated with the Project, including without limitation, the creation or revitalization of open space;
 4. the proximity of the Project Site to existing transportation and utility infrastructure appropriate to support the proposed reuse of the Project Site;

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5. whether the Project Site is located in an area designated as a Federal Empowerment Zone or Enterprise Community pursuant to chapter 120 of title 42 subsection 11501 *et seq.* of the United States Code; and
 6. whether the Project Site qualifies as a Priority Project.
 7. MassDevelopment shall give priority to a Project Site located in an Economically Distressed Area that is considered by the Ombudsman and the Department of Economic Development to be of substantial economic benefit to the community and which will result in the creation or retention of jobs for that community.
- (6) Application Review and Approval Process.
- (a) MassDevelopment shall review each Application and shall make findings as to whether:
 1. the Applicant satisfies the requirements contained in 946 CMR 3.04, 3.05 and 3.06, as applicable; and
 2. the Project Site satisfies the requirements and criteria contained in 946 CMR 3.06 and qualifies as an Eligible Project for financing from the Fund.
 - (b) After reviewing each Application and making a determination as to whether the Applicant and the Project Site are eligible for funding, MassDevelopment may present its findings to its Board at its next scheduled meeting for the Board's vote of approval on the Applications that have been recommended by MassDevelopment for funding.
 - (c) Upon approval for funding by the Board, MassDevelopment shall notify the Applicant that its Application and Project Site have been approved. MassDevelopment shall assign a staff member to the Project, who shall be responsible for drafting a commitment letter or notice setting forth the terms and conditions of the Loan or Grant, and who shall work with the Applicant to process the Loan or Grant.
 - (d) MassDevelopment shall notify those Applicants whose Application or Project Site are:
 1. not eligible for funding; or
 2. not approved for funding by the Board.
- (7) Changes to Approved Applications Requiring Amendments. The Applicant must notify MassDevelopment of any material changes in an Eligible Project, or to an Applicant, Matching Party, or Guarantor, after approval of an Application by MassDevelopment but prior to the closing of the Loan or Grant. If such a material change occurs, an amendment to the Application may be required. The term "material changes" shall include, but not be limited to, the following:
- (a) an increase in the amount of the Loan or Grant of more than 10%; or
 - (b) an increase in the term of a Loan by more than one year;
 - (c) any material change in the status of the Borrower, the Recipient, the Project, the Guarantor, or the Matching Party; or
 - (d) any other change that, in the discretion of MassDevelopment, may affect the:
 1. financial soundness of the Loan or Grant;
 2. feasibility of the Eligible Project;
 3. reserve requirements of the Fund; or
 4. compliance of the Application with the purposes and objectives of the Fund and 946 CMR 3.00.
- (8) Approval of Amended Applications. The Board must approve an amended Application prior to the actual funding of the Loan or Grant, except where:
- (a) the amendment only adds the name of the Matching Party where such name was previously unknown or omitted; or
 - (b) such amendment and such Matching Party are approved by the Executive Director of MassDevelopment.
- (9) Applications Initially Not Identifying Source of Requisite Match.
- (a) At the time that an Applicant files an Application, the Applicant shall not be required to have a commitment from, or list the identity of, the Matching Party participating in either a Loan or a Grant, provided that the Applicant certifies in the Application its good faith intention to seek such financing.

3.06: continued

(b) Notwithstanding that an Application does not identify the Matching Party, MassDevelopment may determine that a Project Site is an Eligible Project and recommend approval to the Board, provided that any approval shall be subject to the Applicant's amendment of its Application, prior to the three month anniversary date of Board approval, to add the identity of the Matching Party and the terms and conditions of such Requisite Match, to the extent that such terms and conditions differ materially from the terms and conditions contained in the Application.

(10) Time Limitations. MassDevelopment may establish time limitations governing the period during which its approval of an Application shall remain in effect.

3.07: Fees

MassDevelopment may charge the following fees in connection with processing Applications and administering Loans and Grants.

(1) Application Fee. MassDevelopment may charge an Application fee payable to MassDevelopment in an amount to be determined by MassDevelopment and set forth in the Fund Guidelines. The commitment fee shall be non-refundable, unless waived by MassDevelopment.

(2) Commitment Fee. MassDevelopment may require that a commitment fee in an amount to be determined by MassDevelopment and set forth in the Fund Guidelines be paid to MassDevelopment within 30 days of MassDevelopment's issuance of a commitment letter. The commitment fee shall be non-refundable, unless waived by MassDevelopment.

(3) Closing Fees. The Applicant may be required to reimburse the Fund for any and all direct expenses incurred by the Fund or MassDevelopment through the actual funding of the Loan or the Grant and any required follow-up to the funding. The expenses subject to reimbursement shall include without limitation, the costs incurred in connection with:

- (a) appraisals;
- (b) market studies;
- (c) legal costs;
- (d) engineering, architectural and environmental consultant costs; and
- (e) any other third party costs deemed necessary or appropriate by MassDevelopment.

This reimbursement of expenses shall constitute the closing fees and shall be due no later than the date on which the Loan or Grant is funded.

If, for any reason, an Eligible Project is cancelled, terminated, or otherwise suspended before the closing date, MassDevelopment may require that the Applicant reimburse the Fund or MassDevelopment any and all expenses incurred by the Fund or MassDevelopment to that date.

(4) Administration Fees. MassDevelopment may charge and collect fees for expenses incurred in administering a Loan or Grant in an amount to be determined by MassDevelopment and set forth in the Fund Guidelines. These fees may include, but are not limited to:

- (a) fees for processing partial releases of mortgages;
- (b) fees for the late payment of principal and interest or other obligations; and
- (c) fees to defray MassDevelopment's costs in administering requirements contained in the transaction documents.

3.08: Administration and Management of the Fund

(1) General Provisions.

- (a) The Fund shall be maintained as a separate financial and accounting fund of MassDevelopment. All assets of the Fund shall be held in the Fund and shall remain separate from all other funds of MassDevelopment.
- (b) 30% of all monies administered from the Fund shall be used to make Grants and Loans to finance Environmental Site Assessments.
- (c) All fees collected by MassDevelopment in connection with processing Applications and administering Loans and Grants shall be deposited into the Fund.

3.08: continued

(d) The assets of the Fund may be used to reimburse MassDevelopment for any monies MassDevelopment advances in connection with Environmental Site Assessments or Environmental Cleanup Actions prior to the effective date of the Fund, provided the borrower or grant recipient, as the case may be, meets the threshold requirements of M.G.L. c. 463, § 24.

(2) Assets of the Fund. The assets of the Fund shall include, but not be limited to, the following:

- (a) proceeds of any and all appropriations and other funds authorized by the general court for the Fund;
- (b) proceeds from any financing transaction capitalizing the Fund;
- (c) any and all fees, interest income and debt repayments related to Loans and Grants;
- (d) proceeds from the sale of Loans;
- (e) proceeds from the sale of any warrants, options, other equity participations, stock or collateral granted the Fund;
- (f) any grants or loans, private donations to, or investments in the Fund;
- (g) the proceeds of any investment income;
- (h) the proceeds of any bonds or other debt instruments issued by MassDevelopment for the purposes of the Fund, net of all costs,

(3) Expenses of the Fund. Any and all expenses, obligations and liabilities of the Fund shall be charged to the Fund, which shall include but not limited to:

- (a) all operating and administrative costs of the Fund including expenses incurred by MassDevelopment on behalf of and in furtherance of the purposes and objectives of the Fund;
- (b) the payment of obligations associated with Loans and Grants by the Fund;
- (c) the contingent liabilities of the Fund.

(4) Accounting Records and Policies. The accounting records of the Fund shall be held and maintained in accordance with generally accepted accounting principles consistently applied and in accordance with the accounting policies of MassDevelopment. The financial statements and records of the Fund shall be subject to an annual audit by an independent certified public accountant as part of the annual audit of the financial statements of MassDevelopment.

(5) Management of the Fund. All funds held by the Fund shall be managed by the Chief Financial Officer of MassDevelopment in accordance with MassDevelopment's internal operating policies and guidelines. All funds held by the Fund and not required for immediate disbursement shall be invested by MassDevelopment in securities that are lawful investments for fiduciaries in the Commonwealth, subject to the investment policy of MassDevelopment and any agreement or agreements governing Loans and Grants.

(6) Loan Portfolio Management. All Loans and Grants made from the Fund shall be managed and overseen by the Portfolio Manager of MassDevelopment in accordance with MassDevelopment's internal operating policies and guidelines.

3.09: Brownfields Advisory Group

(1) The Brownfields Advisory Group shall convene on a monthly basis at the offices of MassDevelopment in order to review actions taken by MassDevelopment with respect to the Fund and may make advisory recommendations regarding such action.

(2) A quorum of the members of the Brownfields Advisory Group must be in attendance in order to conduct a meeting.

(3) Members of the Brownfields Advisory Group may attend a meeting via teleconferencing.

(4) A chair of the Brownfields Advisory Group shall be elected by a majority of the members.

3.09: continued

(5) The Brownfields Advisory Group shall assist MassDevelopment in the preparation of an annual report to be filed on March 15, 1999 and each year thereafter, in writing, and filed with the Governor, the Attorney General, the Commissioner of the Department of Environmental Protection, and the Clerks of the House of Representatives and the Senate, who shall forward the same to the President of the Senate, the Speaker of the House of Representatives, and the Chairmen of the House and Senate Committees on Ways and Means. The annual report shall include financial statements related to the effectiveness of the Fund based on the following criteria, as applicable:

- (a) the number of Projects assisted through the Fund, with a specification of the amount of Loan or Grant awarded to each;
- (b) the manner in which these Projects contribute to the economic and physical revitalization of the areas in which the Projects are located, and a description of steps taken by MassDevelopment to make the Application process efficient and manageable; and
- (c) such other information that would provide a fair evaluation of the Fund and MassDevelopment's administration and management of the Fund.

(6) The Ombudsman shall serve in an advisory capacity to the Brownfields Advisory Group.

3.10: Offices

The principal office of the Fund shall be at 75 Federal Street, 10th Floor, Boston, Massachusetts 02110, or at such other place in the Commonwealth as the Board may determine. MassDevelopment may establish and maintain an additional office or offices at such place or places, either within or without the Commonwealth, as the MassDevelopment may determine.

3.11: Books and Records

Except as the business of the Fund may require, all of the books and records of the Fund shall be kept at the Fund's principal office. Such books and records shall be available at all reasonable times for inspection by any Member of the Brownfields Advisory Group or the Board.

3.12: Confidentiality

(1) Pursuant to St. 1998, c. 289, § 24, St. 1998, c. 23G, § 2(e), and M.G.L. c. 66, § 10, certain documents, material and/or data submitted to MassDevelopment with or as part of an Application, or otherwise, shall be exempt from the provisions of state law which require the disclosure of agency records to the public if the subject documents, material and/or data consist of, in whole or in part, trade secrets or commercial or financial information related to the operation of any business conducted by the Applicant or other user of the Project.

(2) MassDevelopment shall not be required to disclose any such information which meets such definition hereunder. MassDevelopment shall, in its discretion, retain the ability to disclose any information provided to it by an Applicant unless the Applicant follows the procedure contained in 946 CMR 3.12(3).

(3) If an Applicant believes that certain documents, material and/or data submitted with the Application or otherwise meet the above criteria, the Applicant must, at the time of delivery or submission of the items:

- (a) indicate and clearly identify those certain documents, material and/or data, or portions thereof, that qualify for the above exemption and that should not be disclosed to the public; and
- (b) specify the reason(s) said documents, material and/or data meet the above criteria.

3.12: continued

(4) While an Applicant may consult with MassDevelopment regarding the confidentiality status of particular information prior to the submission of such material, MassDevelopment shall rely on the Applicant's identification of materials to be "confidential" and shall have no independent duty to make such a determination on its own behalf.

REGULATORY AUTHORITY

946 CMR 3.00: M.G.L. c. 23G, § 29A(j).