

COMMONWEALTH OF MASSACHUSETTS

_____)	
IN THE MATTER OF 40 FEDERAL STREET)	
REALTY HOLDINGS, LLC'S)	BROWNFIELDS COVENANT
REDEVELOPMENT OF 40 FEDERAL STREET,)	NOT TO SUE AGREEMENT
LYNN, MASSACHUSETTS)	
_____)	MassDEP RTN 3-0361

I. STATEMENT OF PURPOSE

A. This Agreement is made and entered into by and between the Office of the Attorney General (the "OAG") on behalf of the Commonwealth of Massachusetts (the "Commonwealth") and 40 Federal Street Realty Holdings, LLC ("FSRH"). Collectively, the OAG and FSRH are referred to as the "Parties."

B. This Agreement is entered into pursuant to the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, as amended and codified in Massachusetts General Laws Chapter 21E ("G.L. c. 21E"), and the OAG's Brownfields Covenant Not to Sue Agreement Regulations at 940 CMR 23.00 ("Brownfields Covenant Regulations"), with reference to the Massachusetts Contingency Plan, 310 CMR 40.0000 (the "MCP"). This Agreement relates to an approximately 24-acre parcel located at 40 Federal Street in Lynn, Massachusetts ("the Property"), which was formerly the location of a General Electric Company ("GE") facility that manufactured electrical products, and its remediation, and redevelopment (the "Project").

C. The Parties intend to set forth in this Agreement their respective duties, obligations and understanding so that the Project can contribute to the physical and economic revitalization of an area of Lynn, Massachusetts. The Parties agree that this Agreement, pursuant to G.L. c. 21E, § 3A(j)(3), addresses potential claims by the Commonwealth as to FSRH and is predicated upon the FSRH's compliance with the terms and conditions of this Agreement.

D. The Parties agree that FSRH's ability to conduct the Project may be contingent upon independent approval processes of other departments, agencies and instrumentalities of the federal, state and local governments. Nothing in this Agreement should be construed as an endorsement by the OAG of the proposed project for such approval processes. FSRH's failure to secure independent governmental approvals for the Project shall not excuse FSRH from performance of any requirements of G.L. c. 21E and the MCP.

E. The Commonwealth believes that this Agreement is fair, consistent with G.L. c. 21E and in the public interest, and has entered into this Agreement as part of an effort to revitalize an area of Lynn, Massachusetts.

II. THE PARTIES

A. The OAG is a duly constituted agency of the Commonwealth of Massachusetts charged with the legal representation of the Commonwealth and maintains offices at One Ashburton Place, Boston, Massachusetts 02108. Included within the OAG's authority is the authority to enter into Brownfields Covenant Not to Sue Agreements pursuant to G.L. c. 21E, § 3A(j)(3).

B. FSRH is a limited liability company with its principal place of business in Swampscott, Massachusetts. FSRH shall undertake the Project as discussed in Section IV.A.2. of this Agreement.

III. STATEMENT OF FACT AND LAW

A. The Commonwealth enters into this Agreement pursuant to its authority under G.L. c. 21E, § 3A(j)(3), and the Brownfields Covenant Regulations.

B. Unless otherwise expressly provided, terms used in this Agreement which are defined in the Brownfields Covenant Regulations shall have the meaning assigned to them under such regulations. Terms not defined in the Brownfields Covenant Regulations, but defined under G.L. c. 21E and/or the MCP, shall have the meaning assigned to them under G.L. c. 21E and/or the MCP. Terms used in this Agreement which are defined in the Brownfields Covenant Regulations, G.L. c. 21E, the MCP, as well as those defined in this Agreement, are capitalized.

C. The Property is an approximate 24-acre parcel located at 40 Federal Street in Lynn, Massachusetts, which was formerly the location of a GE facility that manufactured electrical products. The Property is more fully described in Exhibit A, which is attached and incorporated into this Agreement. The principal chemicals of concern at the Property are volatile organic compounds ("VOCs"), of which trichloroethene ("TCE") is considered the most significant based on its frequency of detection, concentrations, and extent. There are also metals-impacted soils on the Property.

D. The Massachusetts Department of Environmental Protection ("MassDEP") has received notice of Releases of Oil and/or Hazardous Materials ("OHM") at the Property. The areas where OHM have come to be located as a result of the Releases were assigned RTN 3-0361 and constitute the "Site," as that term is defined at 310 CMR 40.0006, for the purposes of this Agreement. The Site is also the "property addressed" by this Agreement as the term "property addressed" is used at 940 CMR 23.08(1) in the Brownfields Covenant Regulations. The Site is more fully described in Exhibit B, which is attached and incorporated into this Agreement. Exhibit B describes the environmental conditions in detail, including the nature and extent of contamination detected at the Site, as well as the Response Actions undertaken at the Site and the regulatory status of each Response Action Outcome Statement ("RAO") assigned to the Site. The following are among the documents filed with the MassDEP relative to the Site (the "Remediation Documents"):

- In September 2000, a Class C RAO for the Site was submitted to MassDEP by GE. The temporary solution established in the Class C RAO included an Activity and Use Limitation ("AUL") to restrict future activities and uses of the former GE

facility, and continued monitoring and operation of a groundwater extraction system to limit off-site impacts and reduce the mass of oil and hazardous material at the Site.

- In June 2012, operation, maintenance and monitoring (“OM&M”) activities at the Site transitioned from Post-Class C RAO OM&M to Remedy Operation Status (“ROS”). This transition included GE’s submittal on June 12, 2012 of the following reports to MassDEP: (1) *Phase II Comprehensive Site Assessment and Risk Assessment Addendum Report*; (2) *Revised Phase III Remedial Action Plan and Completion Statement*; (3) *Phase IV Remedy Implementation Plan, and* (4) *Phase IV Final Inspection Report, Completion Statement, and Remedy Operation Status (ROS) Submittal*.
- In August 2012, an amended AUL was recorded for the Site by GE, and a Class A-3 Partial RAO Statement (documenting the attainment of a Permanent Solution) was submitted by GE to MassDEP for the portions of the Site labeled Areas A and B on attached Figure 2 (taken from *Remedy Operation Status Report, Quarter 3 and 4, 2012*, submitted on January 31, 2013 to MassDEP).

IV. COMMITMENTS AND OBLIGATIONS

In consideration of the representations made and promises exchanged by and between the Parties, each of them covenants and agrees to the terms and conditions which follow.

A. REPRESENTATIONS AND COMMITMENTS BY FSRH

1. FSRH represents that:
 - a. it is an Eligible Person;
 - b. it is not at the time of execution of this Agreement a person with potential liability for the Site pursuant to G.L. c. 21E;
 - c. it is not now nor has it ever been previously affiliated with any person having potential liability for the Site pursuant to G.L. c. 21E, except as set forth below;
 - d. its involvement with the Site has been limited to:
 - i. evaluating the Property for purposes of acquiring the Property;
 - ii. negotiating an agreement to acquire the Property; and
 - iii. communicating with the Commonwealth and local authorities with respect to the remediation and redevelopment of the Property;

e. none of FSRH's activities has caused or contributed to the Release or Threat of Release of OHM at the Site under G.L. c. 21E and/or the MCP; and

f. FSRH is not at the time of execution of this Agreement subject to any outstanding administrative or judicial environmental enforcement action arising under any applicable federal, state or local law or regulation.

2. FSRH agrees to the following terms and conditions:

a. FSRH shall endeavor to acquire ownership of the Property and, if it becomes an Owner and/or Operator of the Property, undertake the Project.

i. FSRH has gained private capital investment of approximately \$20 million to fund the purchase of the Property as well as construction of the Project.

ii. Transfer of the Property is anticipated to occur in late spring or early summer, 2013. The initial redevelopment involves construction of a supermarket and related functions, e.g., parking. Upon obtaining ownership of the Property, FSRH will retain a general contractor to renovate and expand the existing building on the Property. It is anticipated that contractors will mobilize to the Property by mid-summer 2013. Store opening for the Project's first phase is scheduled for the second quarter of 2014.

iii. The redevelopment of the former GE site is anticipated to have both immediate and long-term public benefits. In the short-term, the renovation and expansion of the existing building to serve as a supermarket will provide between 25 to 50 construction jobs. Once the store is opened, 500 new and permanent jobs (100 full time and 400 part time) will be created.

iv. During the Project's second phase, retail capacity will be developed on the land to the east of Federal Street. The second phase should begin during the subsequent year. This will produce additional construction and permanent jobs in 2015-16, though it is too early to estimate the number.

v. The goal is to yield at Project completion significant employment opportunities to the region, as well as increased real estate tax revenues to the City of Lynn, and overall enhancement of the neighborhood and the local economy.

b. If it becomes an Owner and/or Operator of the Property, FSRH shall, consistent with the Remediation Documents, cooperate fully with GE in maintaining any Permanent Solution and/or ROS status at the Site, in accordance with G.L. c. 21E, the Standard of Care defined in G.L. c. 21E, and the MCP. If it becomes an Owner and/or Operator of the Property, FSRH shall also cooperate fully with MassDEP.

- c. To cooperate fully includes, without limitation:
 - i. providing prompt and reasonable access to the portion of the Site owned or operated by FSRH to MassDEP for any purpose consistent with G.L. c. 21E and the MCP;
 - ii. complying with the Release notification provisions established by G.L. c. 21E and the MCP;
 - iii. responding in a timely manner to any request made by the MassDEP or OAG to produce information as required pursuant to G.L. c. 21E;
 - iv. taking reasonable steps to prevent the Exposure of OHM to people at the Site or portion of the Site under FSRH's control, such as (1) by fencing or otherwise preventing access to the Site if appropriate and/or necessary to prevent Exposure, or (2) by taking action as otherwise required by G.L. c. 21E, the MCP or MassDEP;
 - v. containing any further Release or Threat of Release of OHM from a structure or container under FSRH's control, to the extent necessary under, and in accordance with, G.L. c. 21E and MCP, upon obtaining knowledge of a Release or Threat of Release of OHM; and
 - vi. to the extent FSRH conducts, or causes to be conducted, Response Actions at the Site, doing so in accordance with G.L. c. 21E, the Standard of Care defined in G.L. c. 21E, and the MCP.
- d. FSRH shall operate the Property consistent with any Activity and Use Limitation ("AUL"), recorded for the Property.

e. FSRH shall provide a copy of this Agreement to any successors, assigns, lessees or licensees of FSRH's ownership or operational interests in any portion of the Property ("Subsequent Owners and/or Operators").

B. COVENANT NOT TO SUE BY THE COMMONWEALTH

1. FSRH

Pursuant to G.L. c. 21E, § 3A(j)(3), in consideration of the representations and commitments by FSRH set forth in Section IV.A. of this Agreement, and subject to FSRH's compliance with the terms and conditions of this Agreement and the Termination for Cause provisions described below in Section IV.B.5., the Commonwealth covenants not to sue FSRH for Response Action costs, contribution, property damage, natural resource damages or injunctive relief under G.L. c. 21E, or for property damage under the common law, relating to any Release of OHM subject to the ROS and Class A-3 Partial RAO Statement described in

Section III.D. (the “Covered Releases”), provided, however, that the covenants in this Paragraph shall vest on the dates described in Section IV.D.5. This Agreement shall not affect any liability established by contract.

2. Subsequent Owners and/or Operators

The Commonwealth also covenants not to sue Eligible Persons who are Subsequent Owners and/or Operators, as defined in Section IV.A.2.e. of this Agreement, for Response Action costs, contribution, property damage, natural resource damages or injunctive relief under G.L. c. 21E, or for property damage under the common law, relating to the Covered Releases. The liability relief available to Subsequent Owners and/or Operators shall be subject to the same terms and conditions as those that apply to FSRH and the Subsequent Owner’s and/or Operator’s covenant not to sue the Commonwealth in Section IV.C. of this Agreement.

3. Applicability of the Agreement

After the applicable Effective Date, as set forth in Section IV.D.5., the Commonwealth’s covenant not to sue FSRH or Subsequent Owners and/or Operators for Response Action costs, contribution, property damage or injunctive relief under G.L. c. 21E, or for property damage under the common law, relating to any Release of OHM occurring at the Site prior to the execution of this Agreement shall remain in effect unless and until the statutory protections available to FSRH or Subsequent Owners and/or Operators pursuant to G.L. c. 21E, § 5C are in effect. Protections in this Agreement from claims for natural resource damages shall not be affected if the statutory protections available under G.L. c. 21E, § 5C are in effect. This Agreement is subject to the Termination for Cause provisions described below in Section IV.B.5.

4. Reservations of Rights

The Commonwealth’s covenants in this Agreement shall not apply to:

a. any Release of OHM at or from the Property that first occurs after the date of execution of this Agreement;

b. any Release of OHM which FSRH or any Subsequent Owner and/or Operator causes, contributes to, or causes to become worse, but if the cause or contribution is that of a Subsequent Owner and/or Operator, such reservation shall affect the liability protection applicable only to such Subsequent Owner and/or Operator and shall not affect FSRH’s liability protection under this Agreement;

c. any Release of OHM not discovered when any past or future RAO or ROS Statement is or was submitted to MassDEP that would have been discovered if an assessment of the Property or portion of the Property covered by or addressed in the RAO or ROS Statement had been performed consistent with the Standard of Care in effect when the RAO or ROS Statement was submitted;

d. any Release or Threat of Release of OHM from which there is a new Exposure that results from any action or failure to act pursuant to G.L. 21E by FSRH or a Subsequent Owner and/or Operator during FSRH’s or a Subsequent Owner’s and/or Operator’s

ownership or operation of the Property, but if the action or failure to act is that of a Subsequent Owner and/or Operator, such reservation shall affect the liability protection applicable only to such Subsequent Owner and/or Operator and shall not affect FSRH's liability protection under this Agreement;

e. any Release of OHM not expressly described as one of the Covered Releases in Section IV.B.1. of this Agreement;

f. any claims (i) for damages for injury to, destruction of, or loss of natural resources due to a Release of Oil and/or Hazardous Material occurring after the execution of this Agreement, (ii) for exacerbation of injury to, destruction of, or loss of natural resources occurring after the execution of this Agreement, where original injury, destruction or loss of natural resources was due to a Release of Oil and/or Hazardous Material occurring either before or after the execution of this Agreement, (iii) for the costs of any natural resource damage assessment relating to conditions first caused or exacerbated after the execution of this Agreement, and (iv) for damages for injury to, destruction of, or loss of natural resources due to a Release of Oil and/or Hazardous Material that is not a Covered Release. If, however, injury to, destruction of, or loss of natural resources, or the exacerbation of such conditions, is caused by a Subsequent Owner and/or Operator, this reservation shall affect the liability protection applicable only to such Subsequent Owner and/or Operator, and shall not affect FSRH's liability protection.

5. Termination for Cause

a. If the OAG or MassDEP determines that FSRH submitted materially false or misleading information as part of its Application to Enter into a Brownfields Covenant Not to Sue Agreement, the OAG may terminate the liability protection offered by this Agreement for the offending party in accordance with Section IV.B.5.c. of this Agreement. A statement made by FSRH regarding the anticipated benefits or impacts of the proposed Project will not be considered false or misleading for purposes of this section if the statement was asserted in good faith at the time it was made.

b. If the OAG or MassDEP determines that FSRH or a Subsequent Owner and/or Operator has violated the terms and conditions of this Agreement, including, but not limited to, failure to cooperate with GE in accordance with Section IV.A.2.b. of this Agreement, G.L. c. 21E and the MCP, failure to arrange for a timely response to a Notice of Audit Finding or any other notice requiring additional work to achieve and/or maintain a Permanent Solution or Remedy Operation Status, or failure to perform Response Actions in accordance with the Standard of Care, or if the OAG or MassDEP determines that FSRH will not acquire ownership of the Property despite endeavoring to do so, or a Permanent Solution or Remedy Operation Status is not achieved or maintained in accordance with G.L. 21E or the MCP, the OAG may terminate the liability protection offered by this Agreement in accordance with Section IV.B.5.c. of this Agreement. In the event that the liability protection is terminated solely because of a violation by a Subsequent Owner and/or Operator of one or more of the conditions set forth in Section IV.A.2.c.i. through Section IV.A.2.c.vi. of this Agreement, such termination shall affect the liability protection applicable only to the Subsequent Owner and/or Operator and shall not affect FSRH's liability protection.

c. Before terminating the liability relief provided by this Agreement, the OAG will provide FSRH or a Subsequent Owner and/or Operator, as appropriate, with written notice of the proposed basis for, and a 60-day opportunity to comment on, the proposed termination. If the OAG, in its sole reasonable discretion, deems it appropriate, the notice from the OAG shall provide a reasonable period of time for FSRH or a Subsequent Owner and/or Operator, as appropriate, to cure an ongoing violation in lieu of termination of the liability relief provided by this Agreement.

d. Termination of liability relief pursuant to this section shall not affect any defense that FSRH or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

C. COVENANT NOT TO SUE BY FSRH AND ANY SUBSEQUENT OWNER AND/OR OPERATOR

1. In consideration of the Commonwealth's covenants not to sue in Section IV.B. of this Agreement, FSRH covenants not to sue and not to assert any claims or causes of action against the Commonwealth, including any department, agency, or instrumentality, and its authorized officers, employees, or representatives with respect to the following matters as they relate to the Site or this Agreement:

a. any direct or indirect claims for reimbursement, recovery, injunctive relief, contribution or equitable share of response costs or for property damage pursuant to G.L. c. 21E in connection with any of the Covered Releases;

b. any claims for "takings" under the Fifth Amendment to the United States Constitution, under the Massachusetts Constitution, or under G.L. c. 79 based on the argument that, with respect to a Covered Release, the requirements of Chapter 21E, the MCP, or the requirements of this Agreement constitute a taking;

c. any claims for monetary damages arising out of Response Actions at the Site and/or the Property;

d. any claims or causes of action for interference with contracts, business relations or economic advantage based upon the conduct of MassDEP pursuant to Chapter 21E prior to the date of this Agreement concerning any of the Covered Releases; or

e. any claims for costs, attorneys fees, other fees or expenses incurred in connection with the Covered Releases.

2. Subsequent Owners and/or Operators shall be bound by FSRH's covenants in this Section IV.C. In the event that, despite these covenants, a Subsequent Owner and/or Operator asserts any claims or causes of action against the Commonwealth, including any department, agency, or instrumentality, and its authorized officers, employees, or representatives with respect to the claims listed in this Section IV.C., such claims or causes of action shall have no effect on the rights, benefits, and protections secured under this Agreement for any other entity.

D. GENERAL PROVISIONS

1. This Agreement may be modified only upon the written consent of all Parties.

2. If any court of competent jurisdiction finds any term or condition of this Agreement or its application to any person or circumstance unenforceable, the remainder of this Agreement shall not be affected and each remaining term and provision shall be valid and enforceable to the full extent permitted by law.

3. Each Party warrants and represents to the others that it has the authority to enter into this Agreement and to carry out its terms and conditions.

4. This Agreement may be fully executed by all Parties in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument.

5. Effectiveness


The Commonwealth's covenant not to sue FSRH or Subsequent Owners and/or Operators for natural resource damages, relating to any Release of OHM occurring at the Site prior to the execution of this Agreement, as described in Section IV.B.1. of this Agreement, shall be effective as of the date this Agreement is fully executed by all parties. The Commonwealth's covenant not to sue FSRH or Subsequent Owners and/or Operators for Response Action costs, contribution, property damage or injunctive relief under G.L. c. 21E, or for property damage under the common law, relating to any Release of OHM occurring at the Site prior to the execution of this Agreement, as described in Section IV.B.1. of this Agreement, shall be effective as to any Covered Release if and when the ROS Statement described in Section III.D. of this Agreement and applicable to such Covered Release is no longer valid.

In the matter of 40 Federal Street Realty Holdings, LLC
Brownfields Covenant Not To Sue Agreement

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

By: _____


John Béling
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Date: _____

5/16/13

40 Federal Street Realty Holdings, LLC

By: _____

Date: _____

In the matter of 40 Federal Street Realty Holdings, LLC
Brownfields Covenant Not To Sue Agreement

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

By: _____
John Beling
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Date: _____

40 Federal Street Realty Holdings, LLC

By: 

Charles A. Patsios, Manager

Date: 5-14-13

In the matter of 40 Federal Street Realty Holdings, LLC
Brownfields Covenant Not To Sue Agreement

As to protections for FSRH from claims for natural resource damages:

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

By: _____
Richard K. Sullivan
Secretary of Energy and Environmental Affairs

Date: _____