

COMMONWEALTH OF MASSACHUSETTS

_____))
IN THE MATTER OF)) BROWNFIELDS COVENANT
)) NOT TO SUE AGREEMENT
COMMUNITY DEVELOPMENT))
CORPORATION OF SOUTH BERKSHIRE)) MassDEP RTN 1-0682
REDEVELOPMENT OF 100 BRIDGE STREET,))
GREAT BARRINGTON, MASSACHUSETTS))
_____))

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 the Community Development Corporation of South Berkshire ("CDCSB"). The OAG and CDCSB are referred to collectively 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 the remediation and redevelopment of the former New England Log Homes property located at 100 Bridge Street, Great Barrington, Massachusetts (the "Property"), in order to facilitate the development of: (1) a 40-unit Low Income Housing Tax Credit Project; (2) a 30-unit elderly ownership, continuing care facility; and (3) 30,000 square feet of commercial space (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 Great Barrington, Massachusetts. The Parties agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth against CDCSB and is predicated upon CDCSB's compliance with the terms and conditions of this Agreement. This Agreement also addresses potential claims brought by third parties for contribution, response action costs or property damage pursuant to G.L. c. 21E, §§ 4 and 5 or for property damage under common law. This Agreement does not, however, address liability arising under contract law.

D. The Parties agree that CDCSB'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. CDCSB's failure to secure independent governmental approvals for the Project shall not excuse CDCSB 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 Great Barrington, 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. CDCSB is a 501(c)(3) Massachusetts nonprofit corporation with a principal place of business at 17 Bridge Street, Great Barrington, Massachusetts, 01230. In accordance with this Agreement, CDCSB shall undertake the obligations described 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 approximately 8.2 acre parcel located in the center of Great Barrington Massachusetts, at 100 Bridge Street, which is located at the corner of Bridge and Bentley Streets, to the north and east of the Property, respectively, and abutting the Housatonic River to its west. The Property is two blocks from Main Street. The Property currently contains several burned out and collapsing buildings for which demolition has already been arranged and will be undertaken imminently, if it has not commenced already. The Property is the former New England Log Homes site. The Property is more fully described in Exhibit A and the figure presented in Exhibit A-1, which are attached and incorporated into this Agreement.

D. Since 2007, CDCSB has been, and continues to be, the owner of the Property.

E. Due to historic industrial activities and a fire at this location, dioxins, pentachlorophenol ("PCP"), metals, petroleum hydrocarbons and asbestos-containing materials are known to exist in the soil and/or ground water at the Property.

F. The Massachusetts Department of Environmental Protection ("MassDEP") has received notice of Release(s) of Oil and/or Hazardous Materials ("OHM") at the Property. MassDEP has assigned Release Tracking Number ("RTN") 1-0682 to those Release(s). The areas where OHM have come to be located as a result of the Release(s) assigned RTN 1-0682

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.

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 CDCSB

1. CDCSB 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, other than as a current owner/operator of the Site;
- 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 the purpose of acquiring it;
 - ii. negotiating to acquire the Property, and acquiring it;
 - iii. arranging for and/or performing demolition and other work in preparation for redevelopment;
 - iv. performing site assessment and other MCP Response Actions and granting access to MassDEP to do the same;
 - v. communicating with local, Commonwealth and federal agencies with respect to the assessment, remediation and redevelopment of the Property; and
 - vi. performing maintenance of fencing at the Property to restrict access to the Property.
- e. none of CDCSB'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. CDCSB 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. CDCSB agrees to the following terms and conditions:

a. CDCSB shall redevelop the Property into a mixed-use development consisting of a 40-unit Low Income Housing Tax Credit Project, a 30-unit elderly ownership and continuing care facility, and 30,000 square feet of commercial space, pursuant to a development plan attached hereto as Exhibit C and incorporated into this Agreement.

b. CDCSB shall achieve and maintain or arrange for the achievement and maintenance of a Permanent Solution for any Release of OHM occurring at the Site and submit a Response Action Outcome (“RAO”) Statement describing such Permanent Solution, in accordance with G.L. c. 21E, the Standard of Care defined in G.L. c. 21E, and the MCP. CDCSB shall cooperate fully with MassDEP in achieving and maintaining a Permanent Solution at the Site.

c. To cooperate fully includes, without limitation:

i. providing prompt and reasonable access to the portion of the Site owned or operated by CDCSB 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 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 CDCSB’s control, such as (1) by fencing or otherwise preventing access to the Site if appropriate and/or necessary to prevent Exposure or (2) 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 CDCSB’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;

vi. conducting Response Actions at the Site in accordance with G.L. c. 21E, the Standard of Care defined in G.L. c. 21E, and the MCP.

d. After the achievement of a Permanent Solution in accordance with Section IV.A.2.b of this Agreement, CDCSB shall operate the portions of the Property within its control consistent with any Activity and Use Limitation (“AUL”), if any, recorded for the Property.

B. COVENANT NOT TO SUE BY THE COMMONWEALTH

1. CDCSB

Pursuant to G.L. c. 21E, §3A(j)(3), in consideration of the representations and commitments by CDCSB set forth in Section IV.A of this Agreement, and subject to CDCSB's compliance with the terms and conditions of this Agreement and the Termination for Cause provisions described below in Section IV.B.6, the Commonwealth covenants not to sue CDCSB 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 occurring at the Site prior to the execution of this Agreement (the "Covered Releases"). The covenant in this Paragraph shall vest on the effective date of this Agreement as defined in Section IV.E.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 successors, assigns, lessees or licensees of CDCSB's ownership or operational interests in the Property or any portion of the Property, or who are lessees or licensees of CDCSB's successors and assigns (the "Subsequent Owners and/or Operators") pursuant to G.L. c. 21E for Response Action costs, contribution, property damage or injunctive relief, or for property damage under the common law, relating to any Release of Oil and/or Hazardous Material occurring at the Site prior to the execution of this Agreement that is fully described and delineated in an RAO Statement to be submitted to MassDEP with respect to the Site, so long as the Response Actions upon which the RAO Statement relies meet the Standard of Care in effect when the RAO Statement is submitted to DEP. The liability relief available to Subsequent Owners and/or Operators shall be subject to the same terms and conditions as those that apply to CDCSB 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

a. This Agreement, except as it applies to claims for natural resource damages, shall be in effect unless and until the statutory protections available to CDCSB pursuant to G.L. c. 21E, §5C are in effect for the Site. 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.6.

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 CDCSB 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 CDCSB's liability protection under this Agreement;

c. any Release of OHM not discovered when an RAO Statement is 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 Statement had been performed consistent with the Standard of Care in effect when the RAO 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 CDCSB or a Subsequent Owner and/or Operator during CDCSB'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 CDCSB'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; and

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 not expressly described in Section IV.B.1 or Section IV.B.2 of this Agreement. 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 CDCSB's liability protection.

6. Termination for Cause

a. If the OAG or MassDEP determines that CDCSB submitted materially false or misleading information as part of their 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.6.c of this Agreement. A statement made by CDCSB 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 CDCSB or a Subsequent Owner and/or Operator has violated the terms and conditions of this Agreement, including, but not limited to failure to complete the Project, and failure to arrange for or achieve and maintain a Permanent Solution in accordance with Section IV.A.2 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 failure to perform Response Actions in accordance with the Standard of Care, the OAG may terminate the liability protection offered by this Agreement in accordance with Section IV.B.6.c of this Agreement. In the event that the liability protection is terminated solely because of a violation by CDCSB 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 CDCSB and shall not affect a Subsequent Owner and/or Operator's liability protection. In the event that the liability protection is terminated solely because of a violation of the conditions set forth in 940 CMR 23.03(3)(a) through (g) by a Subsequent Owner and/or Operator, such termination shall affect the liability protection applicable only to such Subsequent Owner and/or Operator.

c. Before terminating the liability relief provided by this Agreement, the OAG will provide CDCSB 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 CDCSB 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 CDCSB or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

C. COVENANT NOT TO SUE BY CDCSB 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, CDCSB 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 ("Matters Addressed"):

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 CDCSB'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.

3. Nothing in this Agreement is intended to limit the rights of CDCSB or Subsequent Owners and/or Operators to pursue claims against third parties for Response Action costs or contribution.

D. CONTRIBUTION PROTECTION AND RIGHTS OF AFFECTED THIRD PARTIES

With regard to the Covered Releases, CDCSB and any Subsequent Owner and/or Operator are entitled to the protection G.L. c. 21E §3A(j)(3) provides from claims for contribution, Response Action costs or property damage brought by third parties under G.L. c. 21E, §§ 4 and/or 5, or third party claims brought for property damage claims under common law, based solely on the status of CDCSB or any Subsequent Owner and/or Operator as Owner or Operator of the Property and/or the Site, provided that: CDCSB has provided Affected Third Parties and the public with notice pursuant to G.L. c. 21E, §3A(j)(3) and 940 CMR 23.04(2); and the Response Actions upon which any RAO Statement submitted to MassDEP pursuant to Section IV.A.2.b of this Agreement meets the Standard of Care in effect when the RAO Statement is submitted to MassDEP.

E. 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. The terms of this Agreement shall be effective as of the date this Agreement is fully executed by all Parties.

In the matter of Community Development Corporation of South Berkshire
Redevelopment of 100 Bridge Street, Great Barrington, Massachusetts
Brownfields Covenant Not To Sue Agreement

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

By:



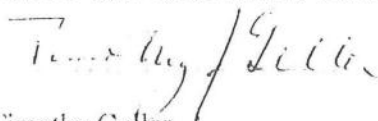
Carol Iancu
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Date:

12/15/11

In the matter of Community Development Corporation of South Berkshire
Redevelopment of 100 Bridge Street, Great Barrington, Massachusetts
Brownfields Covenant Not To Sue Agreement

COMMUNITY DEVELOPMENT CORPORATION OF SOUTH BERKSHIRE

By: 

Name: Timothy Geller

Title: Executive Director

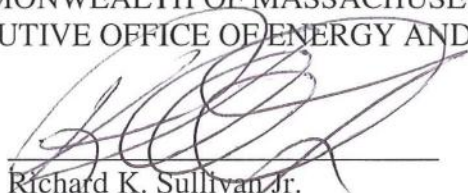
Date: 12/19/11

In the matter of Community Development Corporation of South Berkshire
Redevelopment of 100 Bridge Street, Great Barrington, Massachusetts
Brownfields Covenant Not To Sue Agreement

As to protections for the Community Development Corporation of South Berkshire from claims
for natural resource damages:

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

By:


Richard K. Sullivan Jr.
Secretary of Energy and Environmental Affairs

Date:

12/15/9

EXHIBIT A

PROPERTY DESCRIPTION

The Property is approximately 8.2 acres in size and is generally rectangular-shaped and level. Bridge Street bounds the Property to the north. Bentley and Crosby Streets are located east of the Property. Residential properties are located across Bridge and Bentley Streets north and east of the property, respectively. The Housatonic River is located along the western property boundary and flows in a southerly direction. Great Barrington's wastewater treatment plant abuts the property to the south. The Property address is 100 Bridge Street. CDCSB's deed for the Property was recorded on June 29, 2007, in the Southern Berkshire Registry of Deeds, at Book 1780, Page 278.

The Property is the former site of New England Log Homes, which manufactured log home components.

See Aerial photograph attached hereto as Exhibit A-1.

EXHIBIT A-1



EXHIBIT B

SITE DESCRIPTION AND SUMMARY OF ENVIRONMENTAL CONDITIONS

Environmental conditions at the Property include the following:

- RTN 1-0682 was assigned to the Site on January 15, 1990 for releases of dioxins, pentachlorophenol (“PCP”), metals and petroleum hydrocarbons to the soil and ground water from or at the Property. Historic industrial activities performed at the former New England Log Home site released these hazardous materials to the environment at the Site. Asbestos containing materials are also present at the Site.
- On March 15, 2001, a fire occurred at the Site. The fire significantly damaged the main building, burning more than half of it to the ground. Due to the fire, existing structures are not suitable for reuse. Charred debris, including building remnants containing asbestos, persist within the structures planned for demolition.
- *See* Figure C1.10 of the Release Abatement Measure (RAM) Plan, dated October 4, 2011, prepared by Fuss & O’Neill, Revised Demolition Plan, Former NELH – Building Demolition, showing areas subject to RTN 1-0682, attached hereto as Exhibit B-1.

EXHIBIT B-1

EXHIBIT C

PROJECT DESCRIPTION

The redevelopment of the former New England Log Homes site is a green and smart growth development project: it will transform an 8-acre abandoned, contaminated and blighted downtown site into a thriving, mixed-use extension of Main Street, with high density housing, commercial space for new job creation and significant public gathering spaces along the Housatonic River. It is the last remaining large-scale development site in the downtown corridor of Great Barrington.

The development program has three primary components in addition to public space:

1. a 30,000 s.f. commercial building that will house an expansion of the Berkshire Co-op Market, a thriving \$7 million/year business with over 70 employees currently located one block to the west on Bridge Street. The Berkshire Co-op Market has been growing steadily, even through the current recession, and has been actively looking for expansion possibilities in the downtown center of Great Barrington. Although not yet fully committed to the Log Homes site for this expansion, it is their primary potential location, contingent upon demolition and remediation.
2. The Abby Inn, a 30-unit senior ownership housing described as a “working class Kimball Farms”, the highly successful ownership/continuing care facility in Lenox, MA. This complex will be developed by an independent partnership that has successfully developed similar products around New England, Galanek Associates and Saloomey Construction.
3. A 40-unit, three building, Low Income Housing Tax Credit (LIHTC) project. The development partner for this portion of the site is Canus Corporation of Mt. Claire, NJ; a for-profit development company with 30 years of experience in brownfields redevelopment, mixed commercial and residential development and Low Income Housing Tax Credit projects. The CDC has an existing relationship with Canus Corporation as Partners in RiverSchool, LLC, the redevelopment entity for Searles and Bryant Schools, Great Barrington, adjacent to the Log Homes site.
4. Public Open Space: Nearly one-third of the 8-acre site will remain open, accessible to the public, and will include walking paths and public gathering spaces along the Housatonic River front.

The redevelopment of the site will be carried out in three phases:

- I. Demolition
- II. Commercial Real Estate
- III. Housing