

COMMONWEALTH OF MASSACHUSETTS

IN THE MATTER OF)	BROWNFIELDS COVENANT
)	NOT TO SUE AGREEMENT
HATEM ENTERPRISES ACAPESKET)	
ROAD, LLC)	
)	
)	DEP RTN 4-000523

I. STATEMENT OF PURPOSE

A. This Brownfields Covenant Not to Sue Agreement (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 Hatem Enterprises Acapesket Road, LLC ("Hatem"). Collectively, the OAG, on behalf of the Commonwealth, and Hatem 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, Massachusetts General Laws Chapter 21E ("G.L. c. 21E") and the Massachusetts Contingency Plan, 310 CMR 40.0000 (the "MCP"), and involves the remediation and redevelopment of 121 East Falmouth Highway, Falmouth, Massachusetts (the "121 East Falmouth Highway 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 Falmouth, Massachusetts. The Parties agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth as to Hatem and is predicated upon its compliance with the terms and conditions of this Agreement.

D. The Parties agree that Hatem's ability to conduct the 121 East Falmouth Highway Project, as proposed in this Agreement, 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.

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 Falmouth, 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. Included within the OAG's authority is the authority to enter into Brownfields Covenants Not to Sue Agreements pursuant to G.L. c. 21E, §3A(j)(3), which provides liability relief under G.L. c. 21E, as amended.

B. Hatem Enterprises Acapesket Road, LLC is a limited liability company, duly organized and existing pursuant to the general laws of the Commonwealth of Massachusetts located at 94 East Falmouth Highway, Falmouth, Massachusetts. In accordance with this Agreement, Hatem shall undertake the Project as discussed in Section IV, Paragraph A, subparagraph 2., below.

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 940 CMR 23.00: Brownfields Covenants Not to Sue Agreements.

B. Unless otherwise expressly provided, terms used in this Agreement which are defined in 940 CMR 23.00, *et seq.*, shall have the meaning assigned to them under those regulations. Terms not defined in 940 CMR 23.00, *et seq.*, but defined elsewhere under G.L. c. 21E and the MCP, shall have the meaning assigned to them under G.L. c. 21E and the MCP.

C. The Project involves the Property located at 121 East Falmouth Highway, Falmouth, which is the site of the former Sousa's Texaco. The Property is more particularly described in Exhibit 1. Exhibit 2 contains photographs of the Property taken in the fall of 2004.

D. The Department of Environmental Protection ("DEP") assigned Release Tracking Numbers ("RTN") 4-000523 to the Releases of Oil and/or Hazardous Material released on the Property. For purposes of this Agreement, the releases of Oil and/or Hazardous Material assigned RTN 4-000523 constitute the "Site," as further defined in 310 CMR 40.0006.

IV. COMMITMENTS AND OBLIGATIONS

NOW, THEREFORE, 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

1. By Hatem Enterprises Acapesket Road, LLC

Hatem represents that it is an Eligible Tenant at the Property, and, as an Eligible Tenant, is subject to clause (e) of the definition of "Owner or Operator" in Chapter 21E, §2, which conditionally exempts Tenants from owner and operator liability. Hatem intends to purchase the Property and also represents that it would be an Eligible Person with respect to the Site. Hatem represents that it did not own or operate the Site at the time of the Release of Oil and/or Hazardous Material or cause or contribute to the Release of Oil and/or Hazardous Material at the Site. Hatem further represents that it is not now nor has it ever been previously affiliated with any person having such potential liability at the Site, except as set forth below.

Hatem also represents, and, for the purposes of this Agreement, the Commonwealth relies upon those representations, that Hatem's involvement with the Site has been limited to the following:

- a. As a tenant, and evaluating and the Property for purposes of acquiring the Property;
- b. Negotiating to acquire and acquiring the Property; and
- c. Communicating with the Commonwealth and local authorities with respect to the design and planning of improvement projects and various permitting issues with respect to the Property. Hatem represents that none of these activities has caused or contributed to the Release or threatened Release of an Oil and/or Hazardous Material at the Site under G.L. c. 21E.

2. Hatem agrees to the following terms and conditions:

a. Hatem shall create at least one one-bedroom affordable housing rental unit and at least two one-bedroom rental units at 121 East Falmouth Highway, Falmouth, Massachusetts. In addition, Hatem shall close the two gasoline service bays and the motor vehicle service repair operation. Hatem will also create two new permanent employment positions. Moreover, Hatem shall conduct the following activities at a 1.2-acre parcel off Acapesket Road, Falmouth, Massachusetts: 1. Excavate and dispose of two steel subsurface valve boxes and their concrete surrounds; 2. Remove and dispose of an obsolete gas fired catalytic oxidizer, disconnected from gas service, mounted to a concrete pad surrounded by a stockade fence outside of the smaller of the buildings (knocking down and disposing of the fence as necessary); and 3. Remove and dispose of all other debris and loose items, including steel and PVC piping, valves, scrap metal, electrical equipment, and other solid waste within, and on the ground outside of, the two former treatment system buildings.

b. Hatem shall maintain a Remedy Operation Status with respect to the Site in accordance with G.L. c. 21E and the MCP. Hatem shall achieve and maintain a Permanent Solution with respect to water borne contamination at the Site in accordance with G.L. c. 21E and the MCP. Hatem shall cooperate fully with DEP. To cooperate fully means, without limitation:

1. providing prompt and reasonable access to the Property to DEP 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 DEP or OAG to produce information as required pursuant to G.L. c. 21E;

iv. to the extent necessary (a) preventing the exposure of people to Oil and/or Hazardous Material by fencing or otherwise preventing access to the Property; and (b) containing any further Release or Threat of Release of Oil and/or Hazardous Material from a structure or container, upon obtaining knowledge of a Release or Threat of Release of Oil and/or Hazardous Material; and

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

3. Hatem 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.

B. THE BROWNFIELDS COVENANT NOT TO SUE

1. Hatem

In consideration of the Representations and Commitments by Hatem set forth in Section IV, Paragraph A of this Agreement, and subject to Hatem's compliance with the terms and conditions of this Agreement and the Termination for Cause provisions, described below in Section IV, Paragraph B, subparagraph 5, the Commonwealth covenants not to sue Hatem pursuant to G.L. c. 21E, for response action costs, contribution, or injunctive relief for the Matters Addressed at the Property Addressed by this Agreement. This Covenant shall vest on the effective date of this Agreement as defined in Section IV, Paragraph E, subparagraph 5. This Agreement shall not affect any liability established by contract. For purposes of this Agreement, the Property Addressed shall be the Site as defined in Section III, Paragraph D, and the Matters Addressed shall be defined as those Releases of Oil and/or Hazardous Material at the Site which are fully described and delineated in the Response Action Outcome ("RAO") statement to be submitted to DEP with respect to the Site, so long as the Response Actions upon which the RAO relies meet the Standard of Care in effect as of the time of submittal of the RAO.

2. Subsequent Owners and/or Operators

The Commonwealth also covenants not to sue Eligible Persons who are successors, assigns, lessees or licensees of the real property interests of Hatem, or who are lessees or licensees of its successors and assigns (the "Subsequent Owners and/or Operators") having rights in the Property for which Hatem receives covenants in this Agreement, with respect to the Matters Addressed at the Property Addressed. The liability relief available to Subsequent Owners and/or Operators shall be subject to the same terms and conditions as those that apply to Hatem.

3. Applicability of the Agreement

With respect to Hatem, this Agreement shall be in effect unless and until

the statutory protections available to Hatem pursuant to G.L. c.21E, §5C, are otherwise in effect. This Agreement is subject to the Termination for Cause provisions, described below in Section IV, Paragraph B, subparagraph 5.

4. Reservations of Rights

The Brownfields Covenant Not to Sue shall not apply to:

- a. any new Release of Oil and/or Hazardous Material at or from the Property that occurs after the date of execution of this Agreement;
- b. any Release of Oil and/or Hazardous Material which Hatem, or any Subsequent Owner and/or Operator causes or contributes to or causes to become worse than it otherwise would have been if Hatem or any Subsequent Owner and/or Operator had not engaged in such activities;
- c. any Release of Oil and/or Hazardous Material at the Site that has not been discovered as of the time of submittal of the RAO to DEP that could have been discovered if an assessment of the Site covered by or addressed in the RAO had been performed consistent with the Standard of Care, in effect as of the time of submittal of the RAO;
- d. any Release or Threat of Release of Oil and/or Hazardous Material from which there is a new Exposure that results from any Action or failure to act pursuant to G.L. 21E during Hatem's or Subsequent Owners's and/or Operators's ownership or operation of the Property;
- e. any Release of Oil and/or Hazardous Material not expressly described in Section IV, Paragraph B above; and
- f. any claims for damages for injury to, destruction of, or loss of natural resources and for the costs of any natural resource damage assessment.

5. Termination for Cause

- a. If the OAG or DEP determines that Hatem 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 in accordance with subparagraph 5.c. A statement made by Hatem regarding the anticipated benefits or impacts of the proposed project will not be considered false or misleading for purposes of this subparagraph, if the statement was asserted in good faith at the time it was made.
- b. If the OAG or DEP determines that Hatem or a Subsequent Owner and/or Operator has violated the terms and conditions of this Agreement, including, but not

limited to, failure to achieve and maintain the Permanent Solution at the Site, or failure to respond in a timely manner to a Notice of Audit Finding or any other Notice requiring additional work to achieve and/or maintain a Permanent Solution at the Site, the OAG may terminate the liability protection offered by this Agreement in accordance with subparagraph 5.c., below. In the event that the liability protection is terminated solely because of a violation of one or more of the conditions set forth in 940 CMR 23.08(3)(a) through (d) 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 Hatem 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. In the OAG's sole discretion, notice from the OAG may provide a reasonable period of time for Hatem or 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 Hatem or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

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

In consideration of the Brownfields Covenant Not to Sue in Section IV, Paragraph B, Hatem or a Subsequent Owner and/or Operator 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 Site or this Agreement, including, but not limited to:

1. 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;

2. any claims under the Fifth Amendment to the United States Constitution, or under the Massachusetts Constitution for any "takings," provided that the claims relate to the performance of Response Actions under G.L. c. 21E or CERCLA;

3. any claims arising out of Response Actions at the Property, including claims based on DEP's selection of Response Actions, oversight of Response Actions, or approval of plans for those activities;

4. any claims or causes of Action for interference with contracts, business relations or economic advantage; or

5. any claims for costs, attorneys fees, other fees or expenses incurred.

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. The terms of this Agreement in Section IV, Paragraph B, subparagraph 1, with respect to the Covenant Not to Sue for Hatem shall be effective as of the date the OAG executes this Agreement, subject to the conditions contained in this Agreement.

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

HATEM ENTERPRISES ACAPESKET
ROAD, LLC

BY: 

James R. Milkey
Assistant Attorney General, Chief
Nancy E. Harper
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

BY: 

John Hatem
Manager / Member
94 East Falmouth Highway
Falmouth, MA 02536

Date: 6/20/05

Date: 6/29/05

EXHIBIT 1

[Description and encumbrances, if any]

The land with the buildings thereon in that part of Falmouth, Barnstable County, Massachusetts called East Falmouth at the corner of Waquoit Road (Route 28) and Acapesket Road, bounded and described as follows:

NORTHERLY by Waquoit Road (Route 28) Ninety-seven (97) feet, more or less;

EASTERLY by Acapesket Road, Ninety and 13/100 (90.13) feet;

SOUTHERLY by land of Manuel G. Souza, Jr. and Emma Souza, One Hundred Three and 43/100 (103.43) feet; and

WESTERLY by land of Nicholas Miraglia, Ninety and 00/100 (90.00) feet.

Being property commonly used as a gasoline station at said location.

For title see deed to us from John F. Ferreira and Joseph Motta dated May 29, 1969 and recorded with Barnstable Deeds Book 1442, Page 428.

EXHIBIT 2



