

COMMONWEALTH OF MASSACHUSETTS

IN THE MATTER OF)

McELFATRICK, LLC's REDEVELOPMENT)
OF THE COLONIAL THEATRE,)
109-111 SOUTH STREET,)
PITTSFIELD, MASSACHUSETTS)

BROWNFIELDS COVENANT
NOT TO SUE AGREEMENT

MassDEP RTN 1-15607

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"), McElfatrick, LLC ("McElfatrick"), and Reginald LLC ("Reginald."). Collectively, the OAG, McElfatrick and Reginald 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 the remediation and redevelopment of 109-111 South Street, Pittsfield, Massachusetts in order to restore and expand the Colonial Theatre into a refurbished working theater (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 Pittsfield, Massachusetts. The Parties agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth as to McElfatrick and Reginald and is predicated upon compliance by McElfatrick and Reginald 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 the ability of McElfatrick and Reginald 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. The failure of McElfatrick or Reginald to secure independent governmental approvals

for the proposed project shall not excuse McElfatrick or Reginald from performance of any term or condition of this Agreement.

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 Pittsfield, Massachusetts.

II. THE PARTIES

A. The OAG is a duly constituted agency of the Commonwealth 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), which provides liability relief under G.L. c. 21E.

B. McElfatrick is a limited liability corporation corporation, duly organized and existing pursuant to the general laws of the Commonwealth of Massachusetts located at 111 South Street, Pittsfield, Massachusetts. In accordance with this Agreement, McElfatrick shall undertake the Project as discussed in Section IV, Paragraph A, subparagraph 2, below.

C. Reginald LLC is a Massachusetts Limited Liability Company with a principal place of business at 537 North Street, Pittsfield, Massachusetts. In accordance with this Agreement, Reginald shall undertake the Project as discussed in Section IV, Paragraph A, subparagraph 3, 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 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 those regulations. Terms not defined in the Brownfields Covenant Regulations, but defined under G.L. c. 21E or the MCP, shall have the meaning assigned to them under G.L. c. 21E or the MCP. Terms used in this agreement which are defined in Brownfields Covenant Regulations, G.L. c. 21E, or the MCP are capitalized.

C. The Project involves the redevelopment of the 109 South Street, Pittsfield, Massachusetts (the "Property"). The Property is more fully described in Exhibit A, attached and incorporated into this Agreement. The Property is known to be contaminated with Oil and/or Hazardous Material.

D. The Department of Environmental Protection ("MassDEP") has received notice of a Release or Releases of Oil and/or Hazardous Materials at or from the Property, and has assigned Release Tracking Number ("RTN") 1-15607 for this Release or Releases.

E. The areas where Oil and/or Hazardous Materials have come to be located as a result of the Release designated as RTN 1-15607, and other Releases discovered and addressed in the remediation phase of the Project, 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 for the purposes of 940 CMR 23.08(1) in the Brownfields Covenant Regulations. The Site, as now delineated, is more fully described on Exhibit B, which is attached and incorporated into this Agreement. Exhibit B describes in detail the environmental conditions, including the nature and extent of contamination suspected to exist, 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 McELFATRICK AND REGINALD

1. McElfattrick 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 through its status as an Owner and/or Operator pursuant to clause (1) of paragraph (a) of Section 5 of G.L. 21E;

c. it did not cause or contribute to the Release of Oil or Hazardous Material from or at the Site and did not own or operate the Site at the time of the Release;

d. its involvement with the Site has been limited to:

i. evaluating the Property for purposes of acquiring the Property;

ii. negotiating to acquire and acquiring the Property;

iii. designing, planning, and building the Project and maintaining and operating the theatre; and

iv. participating in Response Actions at the Site in accordance with G.L. c. 21E and the MCP;

e. none of its activities has caused or contributed to the Release or Threat of Release of Oil and/or Hazardous Material at the Site under G.L. c. 21E and/or the MCP; and

f. it 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. McElfatrick agrees to the following terms and conditions:

a. McElfatrick shall acquire the Property and complete the Project by refurbishing and reopening the Colonial Theatre, endeavoring to generate approximately 11 full time jobs.

b. McElfatrick shall achieve and maintain a Permanent Solution at the Site in accordance with G.L. c. 21E and the MCP shall achieve and maintain a Permanent Solution at the Site in accordance with G.L. c. 21E and the MCP.

c. McElfatrick shall cooperate fully with MassDEP.

3. Reginald represents that:

a. it was the Owner and Operator of 109 South Street and may be liable for the Release of Oil or Hazardous Material associated with RTN 1-15607 pursuant to G.L. c. 21E, §5.

b. it 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.

4. Reginald agrees to the following terms and conditions:

a. Reginald shall cooperate with McElfatrick, and McElfatrick's affiliates, successors and assigns, in the construction of the Project.

b. Reginald shall cooperate fully with MassDEP.

5. To cooperate fully includes, without limitation:

a. providing prompt and reasonable access to the Property to MassDEP for any purpose consistent with G.L. c. 21E and the MCP, and to other persons intending to conduct Response Actions pursuant to G.L. c. 21E and the MCP;

b. complying with the Release notification provisions established by G.L. c. 21E and the MCP;

c. responding in a timely manner to any request made by MassDEP or OAG to produce information as required pursuant to G.L. c. 21E;

d. taking reasonable steps to prevent the Exposure of people to Oil and/or Hazardous Material, such as by fencing or otherwise preventing access to the Site, if appropriate or necessary to prevent Exposure or as otherwise required by G.L. c. 21E, the MCP, MassDEP or a Licensed Site Professional acting on behalf of McElfatrick, Reginald or a subsequent Owner or Operator of the Site;

e. taking reasonable steps to contain 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

f. conducting, or causing to be conducted, 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.

B. COVENANT NOT TO SUE BY THE COMMONWEALTH

1. McElfatrick

Pursuant to G.L. c. 21E, §3A(j)(3), in consideration of the representations and commitments by McElfatrick set forth in Section IV, Paragraph A of this Agreement, and subject to McElfatrick'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 McElfatrick, pursuant to G.L. c. 21E, for Response Action costs, contribution, or property damage 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 the Response Action Outcome ("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 MassDEP. The Commonwealth's covenants in this Paragraph 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.

2. Reginald

Pursuant to G.L. c. 21E, §3A(j)(3), in consideration of the representations and commitments by Reginald set forth in Section IV, Paragraph A of this Agreement, and subject to Reginald'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 Reginald, pursuant to G.L. c. 21E, for Response Action costs, contribution, or property damage 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 the Response Action Outcome ("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 MassDEP. The Commonwealth's covenants in this Paragraph 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.

Subsequent Owners and/or Operators

The Commonwealth covenants not to sue Eligible Persons who are successors, assigns, lessees or licensees of McElfatrick's or Reginald's real property interests in the Property, or who are lessees or licensees of McElfatrick's or Reginald's successors and assigns (the "Subsequent Owners and/or Operators"), pursuant to G.L. c. 21E, for Response Action costs, contribution, or property damage 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 the RAO Statement submitted to DEP 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 MassDEP. The liability relief available to Subsequent Owners and/or Operators shall be subject to the same terms and conditions as those that apply to McElfatrick and the Subsequent Owner's and/or Operator's covenant not to sue the Commonwealth in Section IV, paragraph C, below.

4. Applicability of the Agreement

This Agreement shall be in effect unless and until the statutory protections available to McElfatrick, Reginald or Subsequent Owners and/or Operators pursuant to G.L. c. 21E, §5C are in effect. This Agreement is subject to the Termination for Cause provisions described below in Section IV, Paragraph B, subparagraph 5.

5. Reservations of Rights

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

- a. any 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 McElfatrick, Reginald, or any Subsequent Owner and/or Operator causes, contributes to, or causes to become worse;
- c. any Release of Oil and/or Hazardous Material at the Site that has not been discovered when an RAO Statement is submitted to MassDEP that would have been discovered if an assessment of the Site 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 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 McElfatrick's, Reginald's or a Subsequent Owner's and/or Operator's ownership or operation of the Property;

e. any Release of Oil and/or Hazardous Material not expressly described in Section IV, Paragraph B, subparagraph 1, above; and

f. any claims for damages for injury to, destruction of, or loss of natural resources.

6. Termination for Cause

a. If the OAG or MassDEP determines that McElfattrick or Reginald 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 6.c., below. A statement made by McElfattrick 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. In the event that the OAG or MassDEP determines that McElfattrick, Reginald or a Subsequent Owner and/or Operator has violated the terms and conditions of this Agreement, including, but not limited to, failure to pursue development of the Project, failure to achieve or arrange for the achievement and maintenance of a Permanent Solution at the Site in accordance with G.L. c. 21E and the MCP, or failure to arrange for a timely response to a Notice of Audit Finding or any such other Notice requiring additional work to achieve or maintain a Permanent Solution at the Site, the OAG may terminate the liability protection offered by this Agreement in accordance with subparagraph 6.c., below. In the event that the liability protection is terminated solely because of the actions or inactions of a Subsequent Owner and/or Operator, including, without limitation a violation of one or more of the conditions set forth in 940 CMR 23.08(3)(a) through (d), the termination shall affect the liability protection applicable only to that Subsequent Owner and/or Operator.

c. Before terminating the liability relief provided by this Agreement, the OAG will provide McElfattrick, Reginald, 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 discretion, deems it appropriate, the notice shall provide a reasonable period of time for McElfattrick, Reginald, or a Subsequent Owner and/or Operator 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 McElfattrick, Reginald, or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

C. COVENANT NOT TO SUE BY MCELFATRICK, REGINALD AND ANY SUBSEQUENT OWNER AND/OR OPERATOR

1. In consideration of the Commonwealth's covenants not to sue in Section IV, Paragraph B, McElfattrick and Reginald covenant 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 Release that is subject to the Commonwealth's covenants not to sue in Section IV, Paragraph B (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 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 McElfatrick's and Reginald's covenants in this Paragraph C. In the event that, despite these covenants, any Subsequent Owner and/or Operator of the Property 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 Site or this Agreement, including without limitation any or all of the claims listed in this Section C, such claims and/or causes of actions shall have no effect on the rights, benefits, and protections McElfatrick, Reginald, or other Subsequent Owners and/or Operators have secured under this Agreement.

D. CONTRIBUTION PROTECTION AND RIGHTS OF AFFECTED THIRD PARTIES

With regard 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 the RAO Statement submitted to DEP 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 MassDEP, McElfatrick, Reginald and any Subsequent Owner and/or Operator are entitled to the protection G.L. c. 21E, §3A(j)(3), provides from claims for contribution, cost recovery or equitable share brought by third parties pursuant to G.L. c. 21E, §§ 4 and/or 5, or third party claims brought for property damage claims under common law or G.L. c. 21E, §5, based solely on the status of McElfatrick, Reginald or any Subsequent Owner and/or Operator as owner or operator of the Property or the Site, provided, however, that:

1. McElfattrick and Reginald have satisfied the notification provisions of G.L. c. 21E, §3A(j)(3), and 940 CMR 23.06(1); and

2. the OAG has provided Affected Third Parties an appropriate opportunity to join this Agreement pursuant to 940 CMR 23.06(2) and (3).

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.

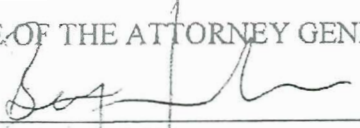
5. The terms of this Agreement shall be effective as of the date it is fully executed by all Parties, except that the Commonwealth's covenant not to sue Reginald, as described in Section IV, Paragraph B, subparagraph 2, and the protections from third party claims provided to Reginald in Section IV, Paragraph D shall be effective upon the date McElfattrick or Reginald achieves a Permanent Solution for the Site.

6. The Commonwealth reserves the right to terminate or seek modification of this Agreement if comments received during the public comment period disclose facts or considerations which, in the Commonwealth's judgment, indicate that this Agreement is inappropriate, improper, or inadequate.

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

By:

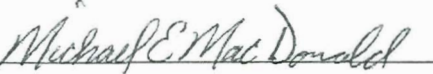

Benjamin J. Ericson
Assistant Attorney General
Brownfields Unit Chief
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Date:

1/16/07

McELFATRICK, LLC

Signed:



Name (printed):

MICHAEL E. MACDONALD

Title:

VP Colonial Theatre Holdings, Inc.
ITS MANAGING MEMBER.

Date:

1/17/07.

REGINALD LLC

Signed: _____

Name (printed): _____


Title: _____

Date: _____

01/16/07 TUE 18:56 FAX

OFFICE OF THE ATTORNEY GENERAL

By:


 Benjamin J. Ericson
 Assistant Attorney General
 Brownfields Unit Chief
 Office of the Attorney General
 One Ashburton Place
 Boston, MA 02108

Date:

1/16/07

McELFATRICK, LLC

Signed: _____

Name (printed): _____

Title: _____

Date: _____

REGINALD LLC

Signed: Marshall Kaser

Name (printed): MARSHALL KASER

Title: President

Date: Jan. 17, 07

Exhibit A: Description of Property

109 South Street, Pittsfield, Massachusetts

Parcel 1:

Beginning at a point in the supposed easterly line of South Street one hundred four and thirty-eight one-hundredths (104.38) feet southerly from a stone bound in the southwest corner of land conveyed by Electa Colt et al to the Union for Home Work by deed dated April 30, 1888 and recorded in the Berkshire Middle District Registry of Deeds in Book 268, Page 355, which stone is supposed to be in the easterly line of South Street, and is at the northwest corner of property conveyed by Catherine Pingree Dawes et al to Ralph M. O'Connell et al, June 6, 1921, and recorded in the Berkshire Middle District Registry, Book 399, Page 470, to which said deed of said Dawes, reference hereby made for a more particular description of the location of said stone bound and place of beginning;

thence deflecting to the left ninety (90) degrees and two (2) minutes, and running thence south sixty-six (66) degrees east, said course being parallel to the Colonial Theatre property and one hundred (100) feet distant therefrom, one hundred and seventy-five (175) feet along the southerly line of land conveyed by Ralph M. O'Connell and Arthur C. Johnson to Osceola lodge by deed dated July 18, 1921, and recorded in said Registry, Book 399, Page 506, to a point, said point being now marked by a stone bound;

thence northerly in a line parallel with the said east line of South Street, said course being north twenty-four (24) degrees, two (2) minutes east, one hundred one and thirty-two one-hundredths (101.32) feet along the easterly line of said land conveyed to Osceola Lodge to a point in the southerly line of property formerly of said Union for Home Work lot, said point being now marked by a stone bound, and being one hundred seventy-five and two one-hundredths (175.02) feet easterly from the stone bound first above mentioned;

thence easterly in said southerly line of said Union for Home Work lot, one hundred twenty-three and thirty-five one hundredths (123.35) feet to land formerly of Alexander C. Joslin, and now or formerly supposed to be of Allen H. Bagg;

thence southerly twenty-four (24) degrees, eight (8) minutes west one hundred ninety-nine and seventeen hundredths (199.17) feet to said Bagg land and land of Hinsdale to a stone bound;

thence north sixty-six (66) degrees west, two hundred ninety-seven and ninety-nine hundredths (297.99) feet on said Hinsdale land and land formerly occupied by Talcott and conveyed by him to Wright, June 1, 1895, recorded in Book 292, Page 635, to a stone bound supposed to be in the easterly line of South Street;

thence north twenty-four (24) degrees and two (2) minutes east, one hundred (100.00) feet to the point of beginning.

PARCEL 2:

Being a parcel of land adjoining the rear of Parcel No. 1, and bounded and described as follows:

Beginning at the southeast corner of the premises conveyed by Osceola Lodge, No.125, easterly line of said premises and being a westerly line of Parcel No. 1 aforesaid, one hundred one and thirty-two hundredths (101.32) feet to the northeasterly corner of said premises;

thence westerly sixty (60) feet in the northerly line of said premises to a point;

thence southerly in a straight line one hundred two and thirty-seven hundredths (102.37) feet to the northerly line of Parcel No. 1, aforesaid;

thence easterly in said northerly line sixty (60) feet to the place of beginning.

Parcel No. 2 is the easterly portion of the land conveyed by said O'Connell and Johnson to said Osceola Lodge by deed dated July 18, 1921, and recorded in said Registry, in Book 399, Page 506.

Also all its right, title and interest to any land northerly, southerly, westerly, and easterly of and adjoining above two parcels which it may own.

Parcels 1 and 2 are the same premises conveyed to One Hundred Nine South Street, LLC by Reginald, LLC, by deed dated August 10, 2004 and recorded with said Registry in Book 3013, Page 320 [see Certificate of Merger recorded with said Registry in Book 3287, Page 113].

Exhibit B: Description of Site
109 South Street, Pittsfield, MA

Description of the Release(s) at issue:

December 2004—Release Tracking Number 1-0015607 (as documented in Class B-1 Response Action Outcome (the “RAO”) filed with DEP on or about April 25, 2005) associated with a release of hydraulic oil beneath the building floor slab from several hydraulic lifts and associated tanks and piping

December 2004—release of #2 heating oil associated with an underground storage tank at the northwest corner of the building. The remedial activities associated with this release was conducted as a Limited Removal Action under the direction of an LSP and is also described in the RAO.