

COMMONWEALTH OF MASSACHUSETTS

IN THE MATTER OF)	BROWNFIELDS COVENANT
)	NOT TO SUE AGREEMENT
109 ROUTE 6A, LLC)	
REDEVELOPMENT OF 109 ROUTE 6A,)	MassDEP RTN 4-6028
SANDWICH, 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 109 Route 6A, LLC (the "Company"). Collectively, the OAG and the Company 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 the approximately 1.2 acre property at 105-109 Route 6A, Sandwich, Massachusetts (the "Property") into a mixed-use project including office, retail and other commercial space, and a residential apartment (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 Sandwich, Massachusetts. The Parties agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth as to and is predicated upon the Company'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 claims under common law. This Agreement does not, however, address liability arising under contract law.

D. The Parties agree that the Company's ability to complete 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 Company's failure to secure independent governmental approvals for the proposed remediation shall not excuse the Company 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 Sandwich, 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. The Company is a corporation organized under the laws of the Commonwealth with a principal place of business at 147 Cranberry Highway, P.O. Box 692, Sagamore, Massachusetts 02561. The Company shall undertake the Project as described below and as discussed in Section IV, Paragraph A, Subparagraph 2.

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, or the MCP are capitalized.

C. The Property is an approximately 1.2 acre parcel at 105-109 Route 6A in Sandwich, Massachusetts. The Property is more fully described on Exhibit A, attached and incorporated by reference into this Agreement. Due to historic commercial use of the Property, the Property is contaminated with oil and diesel.

D. The Massachusetts Department of Environmental Protection ("MassDEP") has received notice of Releases of Oil and/or Hazardous Material at or from the Property (the "Releases"). MassDEP assigned Release Tracking Number ("RTN") 4-6028 to the Releases. The areas where Oil and/or Hazardous Materials have come to be located as a result of the Releases 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 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 THE COMPANY

1. The Company 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 an owner or operator pursuant to Section 5(a)(1) of 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;
 - d. its involvement with the Site has been limited to:
 - i. negotiating to purchase the Property;
 - ii. communicating with the Commonwealth and local authorities with respect to the Project and various permitting issues with respect to the Property; and
 - iii. conducting assessment and remedial actions at the Site; and
 - 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;
 - 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. The Company agrees to the following terms and conditions:
 - a. The Company shall redevelop the Property into office, retail, and other commercial units, a residential apartment, and associated improvements, pursuant to a design plan which is attached as Exhibit C and incorporated into this Agreement.
 - b. The Company shall either achieve or arrange for the achievement and maintenance of a Permanent Solution at the Site to a standard consistent with its use for office, retail, and other commercial operations, and a residential apartment in accordance with G.L. c. 21E and the MCP. The Company shall cooperate fully with MassDEP with respect to contamination at the Site.
 - c. To cooperate fully includes, without limitation:

i. providing prompt and reasonable access to the Site 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;

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 people to Oil and/or Hazardous Material, such as by fencing or otherwise preventing access to the Site if appropriate and/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 the Company or a subsequent owner and/or operator of the Site;

v. taking reasonable steps to contain any further Release or Threat of Release of Oil and/or Hazardous Material from a structure or container at the Site, upon obtaining knowledge of a Release or Threat of Release of Oil and/or Hazardous Material; and

vi. 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.

d. After the achievement of a Permanent Solution at the Site, the Company and/or its successors shall operate or lease the Property to others who shall operate the Property consistent with any Activity and Use Limitation (“AUL”) recorded for the Site or the Property, and the design plan attached as Exhibit C.

B. COVENANT NOT TO SUE BY THE COMMONWEALTH

1. Covenant as to the Company

Pursuant to G.L. c. 21E, §3A(j)(3), in consideration of the representations and commitments by the Company set forth in Section IV, Paragraph A of this Agreement, and subject to the Company’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 the Company, 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 a 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 a 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 covenant 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. Subsequent Owners and/or Operators

The Commonwealth also covenants not to sue Eligible Persons who are successors, assigns, lessees or licensees of the Company's ownership or operational interests in the Property or any portion of the Property, or who are lessees or licensees of the Company'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 the Company and the Subsequent Owner's and/or Operator's covenant not to sue the Commonwealth in Section IV, paragraph C, below.

3. Applicability of the Agreement

This Agreement shall be in effect unless and until the statutory protections available to the Company 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.

4. 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 Site that occurs after the date of execution of this Agreement;
- b. any Release of Oil and/or Hazardous Material which the Company 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 the Company's liability protection under this Agreement;
- c. any Release of Oil and/or Hazardous Material not 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 by the Company or a Subsequent Owner and/or Operator during the Company'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 the Company's liability protection under this Agreement;

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.

5. Termination for Cause

a. If the OAG or MassDEP determines that the Company 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. below. A statement made by the Company 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 the Company 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 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 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 the Company or a Subsequent Owner and/or Operator with written notice of the proposed basis for, and a 60-day opportunity to comment on, the proposed termination. The notice from the OAG shall, if appropriate, provide a reasonable period of time for the Company or a Subsequent Owner and/or Operator to cure an ongoing violation in lieu of termination of the liability relief provided by this Agreement in the sole discretion of the OAG.

d. Termination of liability relief pursuant to this section shall not affect any defense that the Company might otherwise have pursuant to G.L. c. 21E.

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

1. In consideration of the Commonwealth's covenants not to sue in Section IV, Paragraph B, the Company 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 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 the Company's covenants in this Paragraph 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 C, such claims and/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 the Company or Subsequent Owners and/or Operators to pursue claims against third parties for Response Action costs or contribution.

D. PROTECTION FROM THIRD PARTY CLAIMS

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 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 Company and any Subsequent Owner 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 the Company and/or any Subsequent Owner or Operator as owner or operator of the Property or the Site, provided, however that the Company have satisfied the notification provisions of G.L. c. 21E, §3A(j)(3), and 940 CMR 23.06(1).

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.

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

109 Route 6A, LLC

By:


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

By: _____

Name: _____

Title: _____

Date: _____

Date: _____

8/14/07

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 the Company and/or any Subsequent Owner or Operator as owner or operator of the Property or the Site, provided, however that the Company have satisfied the notification provisions of G.L. c. 21E, §3A(j)(3), and 940 CMR 23.06(1).

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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.

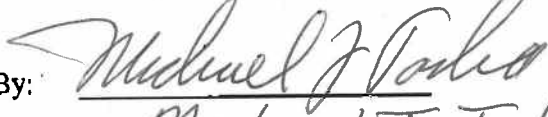
5. The terms of this Agreement shall be effective as of the date it is fully executed by all Parties.

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

109 Route 6A, LLC

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

By: 
Name: Michael J. Tash
Title: Member
Date: 8/16/07

Date: 8/14/07

Megan E Jason
Megan E Jason
Member
8/16/07

EXHIBIT A - Property Description

The land at 105-109 Route 6A in Sandwich, Barnstable County, Massachusetts, together with the buildings thereon, bounded and described as follows:

Northeasterly by a portion of N.Y.N.H. & H.R.R. Co., as shown on the hereinafter mentioned plan, four hundred and 00/100 (400.00) feet;

Southeasterly by land now or formerly of Richard J. Donovan, as shown on said plan, in two courses measuring forty-two and 87/100 (42.87) feet and one hundred seventeen and 61/100 (117.61) feet;

Southwesterly by the line of Route 6A State Highway, as shown on said plan, in two courses measuring two hundred twenty-six and 47/100 (226.47) feet and one hundred seventy-seven and 58/100 (177.58) feet; and

Northwesterly by Lot 1, as shown on said Plan, one hundred four and 28/100 (104.28) feet.

Being shown as Lot 2 on a Plan of Land entitled Subdivision of Land in Sandwich Surveyed for Fred O. Earle, Jr. Scale 1" = 40' June 17, 1954 R.S. Thomas, Eng'r Sagamore, Mass.", which said plan is duly recorded with the Barnstable County Registry of Deeds in Book 119, Page 117.

EXHIBIT B- Site Description

Environmental assessment at 105-09 Route 6A, Sandwich, Massachusetts (Property) indicates soil and water impacts on the Property by gasoline and distillate range petroleum. Current information indicates that the sources of releases at the Property are: current and/or former underground storage tanks containing gasoline and diesel fuel; aboveground storage tanks containing diesel fuel, kerosene and/or heating oil; underground storage tank(s) containing heating oil; and/or surficial spills of the contents of any of the foregoing storage tanks. These releases of gasoline and other petroleum products, together, make up the Site.

The extent of the releases at the Site is not yet completely delineated. While current information does not indicate that gasoline or distillate range petroleum hydrocarbons known to have been released at the property have migrated beyond the property boundaries, further assessment work will need to be done to establish the exact boundaries of the releases.

The Massachusetts Department of Environmental Protection (MassDEP) received oral notification of a release in November 1992, and issued a Notice of Responsibility (NOR) to Exxon on or about January 7, 1994 for this release, which was assigned released tracking number 4-6028. Geologic Services Corporation (GSC) on behalf of Exxon Company USA (Exxon), prepared a Phase I – Initial Site Investigation Report, dated December 1994, along with a Tier II Disposal Site Classification submittal. Consultants for Exxon have submitted follow-up reports and correspondence to MassDEP discussing the gasoline and distillate range petroleum released at the Site. Exxon filings identify the Site as being in Class C –1 (Temporary Solution) Response Action Outcome (RAO) status. Exxon's response actions have addressed one distinct release – gasoline -- at one portion of the Site. The RAO Monitoring Reports indicate that soil samples will continue to be collected on a biennial basis as part of ongoing Exxon work at the Site.

EXHIBIT C – Conceptual Site Design

The Property, 105-09 Route 6A, is currently occupied by a CITGO gasoline station, an oil storage and filling facility, the Marshland Restaurant, a hair salon in an outmoded building, an ice storage shed in extreme disrepair, and a non-operational car wash. 109 Route 6A, LLC's development plan for the Property is as follows:

The existing hair salon will be razed and a new two-story building will be built in its place. The two-story building will house a new hair salon and a second floor apartment. A new septic system will be built. The Applicant's estimated budget is \$350,000.00 to \$400,000.00 for these improvements.

The façade of the restaurant will be repaired and upgraded with an estimated budget of \$30,000.00 to \$40,000.00. This includes replacing siding, repainting and replacing rotted wood. These improvements will beautify the building appearance in a traditional style to complement the other buildings, but incorporating contemporary forms.

The car wash building will be converted to professional/commercial space. The estimated budget for these improvements is \$25,000.00.

The ice storage structure at the Property will be repaired at a cost of \$10,000.00 to \$15,000.00.

The parking areas near the gas service station and restaurant, presently broken and potholed, will be repaved.

The renovation of these buildings will provide a range of employment opportunities and economic benefits to all residents of Sandwich.

The Applicant will attempt to maintain an even level of capital spending from year to year, with some capital improvements occurring each year. The Applicant expects to complete these improvements within five years from date of purchase, subject to any necessary federal, state and/or local permits.