

COMMONWEALTH OF MASSACHUSETTS

IN THE MATTER OF	)	BROWNFIELDS COVENANT
	)	NOT TO SUE AGREEMENT
	)	DEP RTN 2-0149
	)	DEP RTN 2-10670
WESTBOROUGH CC, LLC	)	DEP RTN 2-14454
	)	DEP RTN 2-13130
	)	DEP RTN 2-12715
	)	
	)	

AMENDMENT TO AGREEMENT TO ADD AFFECTED THIRD PARTY

I. STATEMENT OF PURPOSE

A. This Amendment to a Brownfields Covenant Not to Sue Agreement (this "Amendment") 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"), Westborough CC, LLC ("Westborough CC"), and Tyrolit North America, Inc. ("Tyrolit"). Collectively, the OAG, on behalf of the Commonwealth, Westborough CC and Tyrolit are referred to as the "Parties."

B. This Amendment 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"). It involves the investigation, remediation and redevelopment of the property located at 12 Union Street, Westborough, MA, which had been previously owned and operated by the former Bay State Abrasives ("Bay State"), was also owned and operated by Tyrolit during the period between January, 1997 and December, 2003, and which is now owned and operated by Westborough CC.

C. This Amendment results from Tyrolit's timely request in accordance with 940 CMR 23.06 of the Brownfields Covenant Regulations to join as an Affected Third Party in that certain Brownfields Covenant Not to Sue Agreement dated December 23, 2004, by and between OAG, on behalf of the Commonwealth, and Westborough CC. The Westborough CC Brownfields Covenant Not to Sue Agreement ("Westborough CC Agreement") was entered into in support of the Westborough Commons Project ("Project"), as further described below. This Amendment amends the Westborough CC Agreement.

D. The ultimate purpose of the Project is to contribute to the physical and economic revitalization of an area of Westborough, Massachusetts. The Parties agree that this Amendment, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth against Tyrolit and is predicated upon Tyrolit's compliance with the terms and conditions of this Amendment. This Amendment also modifies the language of the Westborough CC Agreement regarding potential claims by Tyrolit, and the language regarding Tyrolit's request to join the Agreement. All terms of the Westborough CC Agreement not expressly modified by this Amendment shall remain unaltered.

D. The Commonwealth has considered the factors in 940 CMR 23.06 and believes that this Amendment is fair, consistent with G.L. c. 21E, the Brownfields Covenant Regulations, and is in the public interest.

## 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 agreements pursuant to G.L. c. 21E, §3A(j)(3), which provides liability relief under G.L. c. 21E, as amended.

B. Tyrolit North America is a corporation duly organized and existing pursuant to the laws of the state of Delaware, and is presently located at 10325 Capital Avenue, Oak Park, Michigan 48237. Tyrolit North America is the former owner of the Property, having acquired it from the successors-in-interest of Bay State Abrasives, Inc. Tyrolit North America operated the Property during the period from 1997 through 2003.

C. Westborough CC is a limited liability company, duly organized and existing pursuant to the general laws of the Commonwealth, having offices at 195 St. Paul Street, Rochester, New York. Westborough CC is undertaking the Project in accordance with the Agreement.

## III. STATEMENT OF FACT AND LAW

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

B. Unless otherwise expressly provided, terms used in this Amendment 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 Amendment which are defined in the Brownfields Covenant Regulations, G.L. c. 21E, or the MCP are capitalized.

C. Westborough CC is the principal redeveloper of the proposed Project. The Project involves an assemblage of parcels comprising approximately 57 acres associated with the premises located at 10 Union (a/k/a 12 Brigham), 11 Brigham and 12 Union Street in Westborough, Massachusetts, which was formerly the location of Bay State and, more recently, Tyrolit North America. The Bay State/Tyrolit facility housed the main manufacturing operations, including the Main Plant Building, the Freight House Building, the Research and Engineering Building, a conference center, associated paved parking area, and three (3) inactive solid waste landfills (collectively, the "Property"). Exhibit A to this Amendment depicts the former Bay State/Tyrolit facility in the condition it was in at the time of the Westborough CC Agreement. The Project, as described in the Westborough CC Agreement, includes the building of a vibrant community-oriented mixed use development with between 200,000 and 300,000 square feet of retail space and open space including a public park. A copy of Westborough CC's Conceptual Plan for the Project is attached to this Amendment as Exhibit B to this Amendment.

D. The Property was sold to Westborough CC by Tyrolit in December, 2003 in a transaction the terms of which accommodated plans to redevelop the Property or portions thereof for the Project.

E. In November, 2004, during the notification process undertaken by Westborough CC in furtherance of its application to the OAG for approval of and entry into what eventually became the Westborough CC Agreement, Tyrolit filed a timely request to join in the Westborough CC Agreement, citing, among other factors, that Tyrolit: (1) performed, at its sole expense, substantial investigation and remediation of the Property involving historical releases predating acquisition of Tyrolit's interest in the Property; (2) acquired, at its sole expense, environmental insurance coverages affording relief for the expense of addressing historic contamination claims, without which the Property would be difficult to market and improvements to Property would be difficult to finance; (3) absorbed, at its sole expense, the entirety of self-insured retentions associated with these insurance coverages arising after the closing on Westborough CC's acquisition of the Property; and (4) cooperated with Westborough CC in permitting it to represent Tyrolit in various local zoning and subdivisions proceedings in advance of the acquisition of Westborough CC's interest in the Property, in the interest of facilitating Westborough CC's determination to proceed with the acquisition and to obtain the necessary local approvals for the Project. Subsequent to Westborough CC's acquisition of the Property, Tyrolit has continued to cooperate with Westborough CC in the proposed redevelopment, and has supported the Project with cash contributions to Westborough CC's redevelopment expenses and other consideration.

F. In February, 2005, Tyrolit issued its Notice of Rights of Affected Third Parties ("Third Party Notice") by publication in *The Westborough News*, by notice in *The Environmental Monitor* published by the MEPA Unit of the Executive Office of Environmental Affairs, and by

mailing (certified, return receipt requested) to all known abutters to the Property and other parties known to have an interest or potential interest in the Matters Addressed and Property Addressed, as defined below, by this Amendment.

G. The Department of Environmental Protection ("DEP") has assigned Release Tracking Numbers ("RTNs") to each of five (5) Disposal Sites with respect to various Releases of Oil and/or Hazardous Material associated with the Property as follows: RTN 2-0149 (Releases associated with the overall Site, including Landfills 1, 2, 3, and 4); RTN 2-10670 (Releases associated with Landfill 5); RTN 2-12715 (Releases originally associated with a notice of Substantial Release Migration ("SRM") where it was later determined that the condition of SRM did not exist); RTN 2-14454 (releases associated with the former Nason Lumber area, located south of the former manufacturing building but north of Rutter's Brook); RTN 2-13130 (Releases associated with the former above-ground storage tank farm that was located north of the former manufacturing building). Exhibit C to this Amendment depicts the portions of the Site affected by the existing RTNs. RTN 2-0149 was issued a Tier 1C permit effective on 6/12/97 and on 3/29/02, Tyrolit filed a Class C RAO Temporary Solution regarding RTN 2-0149. RTN 2-10670 was classified as Tier II on 8/9/96; RTNs 2-10670 and 2-12715 have been combined with RTN 2-0149. For purposes of this Amendment, the Releases of Oil and/or Hazardous Material assigned RTNs 2-0149, 2-10670, and 2-12715, constitute the "Site," as that term defined in 310 CMR 40.0006. Based on available information, the Site does not include land owned by CSX Transportation, Inc. to the north of the Property.

H. With respect to RTNs 2-14454 and 2-13130, Tyrolit filed Class A-2 Response Action Outcome ("RAO") Statements with DEP on 4/29/03 and 3/23/04, respectively. To the extent RTNs 2-14454 and 2-13130 have achieved Permanent Solutions, and these Permanent Solutions are maintained and any other relevant conditions set forth on G.L. c. 21E, § 5C, are satisfied, Tyrolit, as the party performing the Response Actions, shall rely on the liability endpoints regarding those disposal sites pursuant to the provisions of G.L. c. 21E, § 5C. The Releases described in RAO Statements for RTNs 2-14454 and 2-13130, therefore, are not to be included in the "Site," as defined in Section III, Paragraph G, above.

#### 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

1. Tyrolit is a former owner and operator of the Property, and, as such, may be liable pursuant to G.L. c. 21E, §5.

2. Tyrolit represents that during and after the transfer of the Property to Westborough CC, Tyrolit has provided the various accommodations and support for the Project

as set forth above in Section III, Paragraph E.

3. Tyrolit agree to the following terms and conditions:

a. Tyrolit shall cooperate with Westborough CC in the development of the Project pursuant to the Westborough CC Agreement, including, without limitation, maintaining the Seller's Environmental Insurance and satisfying the Self Insured Retention required under the Seller's Environmental Insurance, and in satisfying the Self Insured Retention for Purchaser's Environmental Insurance, all as provided in the Purchase and Sale Contract between Westborough CC, through its predecessor-in-interest, and Tyrolit North America, dated June 27, 2003, in accordance with which Westborough CC exercised the option to purchase the Property in December, 2003;

b. Tyrolit shall cooperate with Westborough CC in achieving and maintaining either a Permanent Solution or a Remedy Operation Status ("ROS") at the Site, as provided for in the Westborough CC Agreement; and

c. Tyrolit shall cooperate with DEP, including, without limitation, responding in a timely manner to any request made by DEP to produce information as required pursuant to G.L. c. 21E, and complying with the Release notification provisions established by G.L. c. 21E and the MCP.

4. Tyrolit represents that it is not at the time of execution of this Amendment subject to any outstanding administrative or judicial environmental enforcement action arising under any applicable federal, state or local law or regulation.

5. Westborough CC's representations and commitments remain as described in the Agreement.

B. COVENANT NOT TO SUE BY THE COMMONWEALTH

1. Covenant as to Tyrolit

In consideration of the facts set forth in Section III and the representations and commitments by Tyrolit set forth in Section IV of this Amendment, and subject to Tyrolit's compliance with the terms and conditions of this Amendment and to the Termination for Cause provisions of this Amendment described below in Section IV, Paragraph B, subparagraph 4, the Commonwealth covenants not to sue Tyrolit, pursuant to G.L. c. 21E, for Response Actions costs, contribution, or natural resources damages resulting from a release of Oil and/or Hazardous Materials occurring prior to execution of this Amendment, or injunctive relief for the Matters Addressed at the Property Addressed by this Amendment. This covenant shall vest on the effective date of this Amendment as defined in Section IV, Paragraph E, subparagraph 5. This Amendment shall not affect any liability established by contract. For purposes of this Amendment, the Property Addressed shall be the Site as defined in Section III, Paragraph G, 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 existing Class C Response Action Outcome ("RAO") Statement and any subsequent ROS Submittal or Permanent Solution RAO Statement submitted to DEP with respect to the Site, so long as the Response Actions upon which the RAO Statement or ROS Submittal relies meet the Standard of Care in effect as of the time of submittal of the RAO Statement or ROS Submittal.

2. Applicability of the Amendment

Upon vesting, this Amendment shall remain in effect, provided Tyrolit continues to comply with the terms and conditions of this Amendment, unless and until statutory protections available to Tyrolit pursuant to G.L. c. 21E, §5C, are in effect. This Amendment is subject to the Termination for Cause provisions described below in Section IV, Paragraph B, subparagraph 5.

3. Reservations of Rights

This Amendment shall not apply to the following:

- a. any new Release of Oil and/or Hazardous Material at, or from, the Property that occurs after the date of execution of this Amendment;
- b. any Release of Oil and/or Hazardous Material at the Site that has not been discovered as of the time of submittal of the existing Class C RAO Statement, a subsequent ROS Submittal, or a Permanent Solution RAO Statement to DEP that would have been discovered had an assessment of the Site covered by or addressed in the RAO Statement or ROS Submittal been performed consistent with the Standard of Care in effect as of the time of submittal of the RAO Statement or ROS Submittal;
- c. 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 of Tyrolit pursuant to G.L. 21E during the period of Westborough CC's or of a Subsequent Owners' and/or Operators' ownership or operation of the Property;

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

e. 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 the Westborough CC Agreement, (ii) for exacerbation of injury to, destruction of, or loss of natural resources due to a Release of Oil and/or Hazardous Material occurring either before or after the execution of the Westborough CC Agreement, and (iii) for the costs of any natural resource damage assessment relating to conditions first caused after the execution of the Westborough CC Agreement.

#### 4. Termination for Cause

a. In the event that the OAG or DEP determine that Tyrolit submitted materially false or misleading information as part of its notification of request to join in the Westborough CC Agreement, the OAG may terminate the liability protection offered by this Amendment in accordance with subparagraph 4.c. of this Section IV, below. A statement made by Tyrolit regarding the anticipated benefits or impacts of the proposed project will not be considered false or misleading for purposes of this subparagraph if such statement was asserted in good faith at the time it was made.

b. In the event that the OAG or DEP determine that Tyrolit has violated the terms and conditions of this Amendment, including but not limited to, failure to cooperate with Westborough CC in development of the Project, failure to cooperate with Westborough CC or with a Subsequent Owner and/or Operator, as that term is defined in the Westborough CC Agreement, in achieving and maintaining a Permanent Solution or ROS at the Site in accordance with the Westborough CC Agreement, failure to cooperate with Westborough CC in responding in a timely manner to a Notice of Audit Finding or to any such other Notice requiring that Westborough CC or a Subsequent Owner and/or Operator perform additional work to achieve and/or maintain a Permanent Solution or ROS at the Site, the OAG may terminate the liability protection offered by this Amendment in accordance with subparagraph 4.c., below. The OAG shall also have the right to terminate the liability protections offered by this Amendment in accordance with subparagraph 4.c., below, if Westborough CC fails to achieve and/or maintain a Permanent Solution or ROS at the Site, and no other person or entity takes over performance of Response Actions at the Site. 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 Westborough CC or a Subsequent Owner and/or Operator, such termination shall affect the liability protection applicable only to Westborough CC or to such Subsequent Owner and/or Operator.

c. Before terminating the liability relief provided by this Amendment, the OAG will provide Tyrolit with written notice of the proposed basis for, and a 60-day opportunity to comment on, the proposed termination. The notice from the OAG may provide a reasonable period of time for Tyrolit to cure an ongoing violation in lieu of termination of the liability relief provided by this Amendment in the sole discretion of the OAG.

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

### C. COVENANT NOT TO SUE BY TYROLIT

In consideration of the Brownfields Covenant Not to Sue in Section IV, Paragraph B of this Amendment, Tyrolit, for itself and its affiliates, successors and assigns, covenants not to sue and not to assert any claims or causes of action against the Commonwealth, including any department, agency, or instrumentality, and/or its authorized officers, employees, or representatives with respect to the Site or this Amendment, 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 for "takings" under the Fifth Amendment to the United States Constitution under the Massachusetts Constitution, or under G.L. c. 79;
3. any claims arising out of Response Actions at the Site and/or the Property, including claims based on DEP's selection of Response Actions, oversight of Response Actions, or approval of plans for such 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. PROTECTION FROM THIRD PARTY CLAIMS

With regard to the Matters Addressed at the Property Addressed, Tyrolit is 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 5, or third party claims brought pursuant to G.L. c. 21E for property damage claims under common law or G.L. c. 21E, §5 based solely on the status of Tyrolit as an owner or operator of the Property and/or the Site.

### E. MODIFICATION OF AGREEMENT LANGUAGE



1. Effective upon execution of this Amendment by all Parties, the protections against third party claims for Westborough CC and Subsequent Owners and/or Operators described in Section IV, Paragraph D of the Agreement affect potential claims brought by all third parties, including Tyrolit.

2. The OAG accepts, through the terms of this Amendment, Tyrolit's November 1, 2004 request to join the Agreement, which was described in Section IV, Paragraph F of the Agreement.

#### F. GENERAL PROVISIONS

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

2. Should any term or condition of this Amendment or its application to any person or circumstance be found to be unenforceable by any court of competent jurisdiction, the remainder of this Amendment 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 Amendment and to carry out its terms and conditions.

4. This Amendment 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 Commonwealth's covenant not to sue Tyrolit, as described in Section IV, Paragraph B, subparagraph 1, and the protections from third party claims provided to Tyrolit in Section IV, Paragraph D shall be effective upon the date Westborough CC achieves a Permanent Solution or ROS for both soil and water borne contamination at the Site.

#### G. REQUEST TO JOIN THIS AMENDMENT

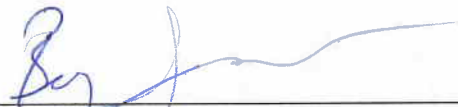
1. Tyrolit's request that OAG permit Tyrolit to join in the Westborough CC Agreement (or that OAG execute, on behalf of the Commonwealth, a similar Brownfields Agreement pursuant to Chapter 21E, §3A(j)(3)) is resolved by virtue of this Amendment to the Westborough CC Agreement.

2. In response to Tyrolit's Third Party Notice seeking comment from potentially Affected Third Parties on Tyrolit's request, CSX Transportation, Inc. ("CSXT") made a request to join in this Amendment on May 24, 2005. The OAG, upon consideration of the factors in 940 CMR 23.06, has rejected CSXT's request.

**In the matter of the Westborough CC, LLC Brownfields Covenant Not to Sue Agreement  
Amendment to Add Affected Third Party Tyrolit North America, Inc. to Agreement**

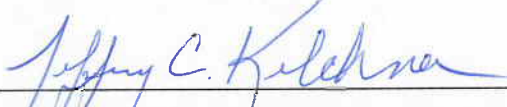
AGREED:

OFFICE OF THE ATTORNEY GENERAL

By:   
Benjamin J. Ericson  
Assistant Attorney General  
Brownfields Unit Chief  
Office of the Attorney General  
One Ashburton Place, 18<sup>th</sup> Floor  
Boston, MA 02108

Date: 1/2/07

TYROLIT NORTH AMERICA, INC.

By:   
Name (printed): Jeffrey C. Kelchner  
Title: President

Date: 1/8/07

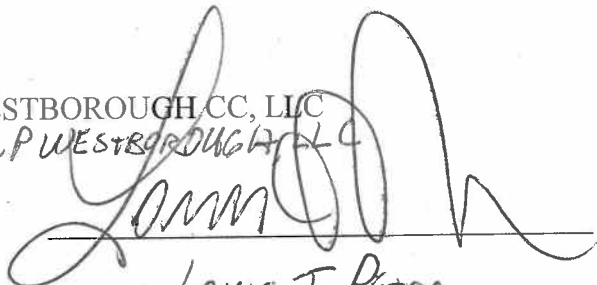


**In the matter of the Westborough CC, LLC Brownfields Covenant Not to Sue Agreement  
Amendment to Add Affected Third Party Tyrolit North America, Inc. to Agreement**

WESTBOROUGH CC, LLC

BY: LP WESTBOROUGH CC, LLC

By: \_\_\_\_\_



Name (printed): LOUIS J. PETRA

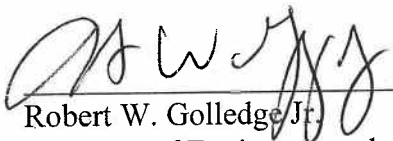
Title: MEMBER

Date: 3/29/07

**In the matter of the Westborough CC, LLC Brownfields Covenant Not to Sue Agreement  
Amendment to Add Affected Third Party Tyrolit North America, Inc. to Agreement**

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

By:

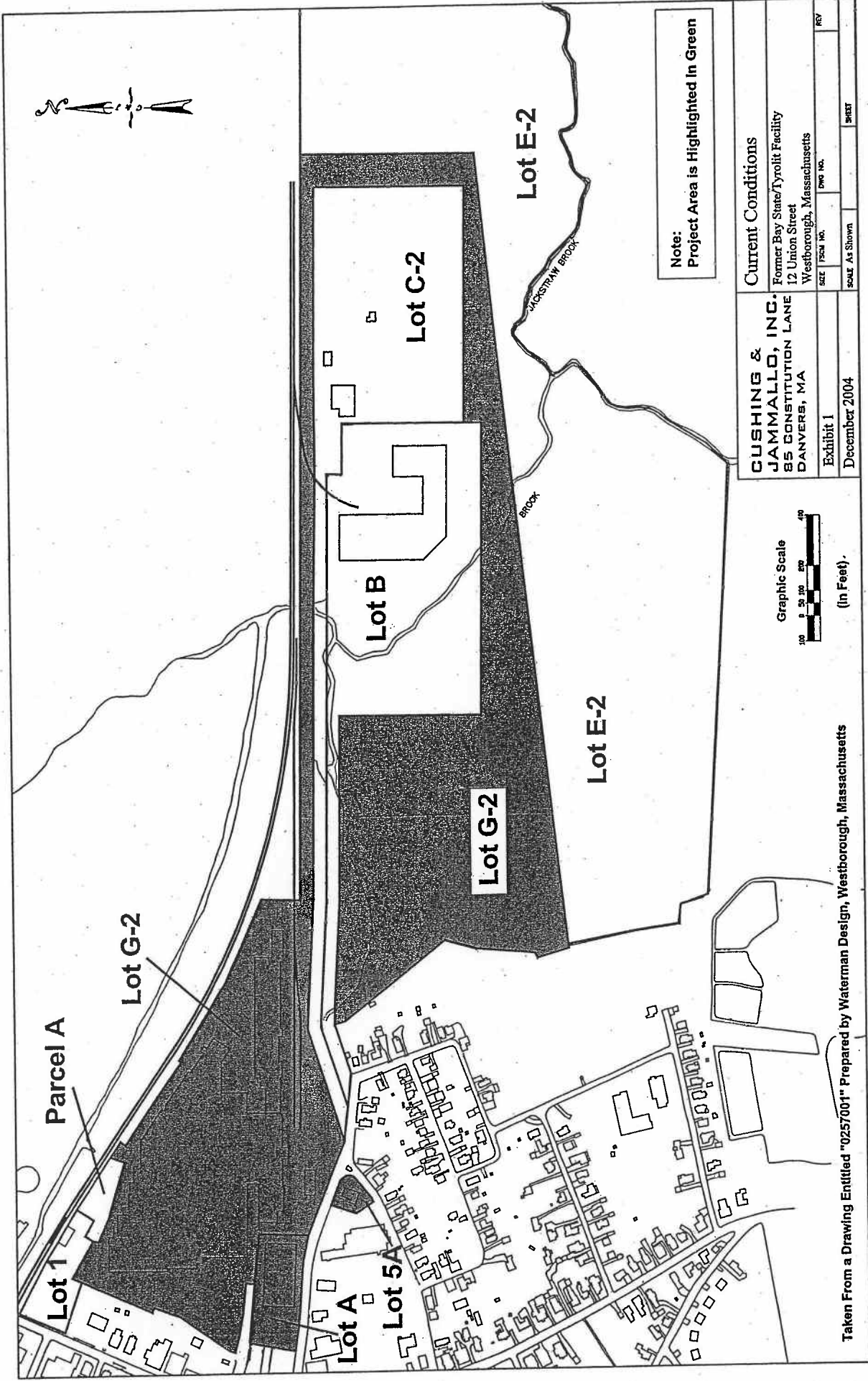
  
\_\_\_\_\_  
Robert W. Golledge Jr.  
Secretary of Environmental Affairs

Date:

12/21/06

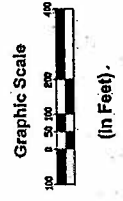


# Exhibit A



Note:  
Project Area is Highlighted in Green

<b>CUSHING &amp; JAMMALLO, INC.</b> 85 CONSTITUTION LANE DANVERS, MA	<b>Current Conditions</b> Former Bay State/Tyrolit Facility 12 Union Street Westborough, Massachusetts	
	SEE 1504 NO.	DWG NO.
Exhibit 1	SCALE As Shown	SHEET
December 2004		



Taken From a Drawing Entitled "0257001" Prepared by Waterman Design, Westborough, Massachusetts





# Exhibit B

Civil Engineers & Landscape Architects:

Waterman Design Associates, Inc.  
 31 Barr Alan Street  
 Westborough, MA 01581

Architects: Garrison Architects  
 100 North Main Street  
 Westborough, MA 01581

Transportation Engineers: Waterman Design Associates, Inc.  
 31 Barr Alan Street  
 Westborough, MA 01581

Geotechnical Engineers: Waterman Design Associates, Inc.  
 31 Barr Alan Street  
 Westborough, MA 01581

Environmental Consultants: Waterman Design Associates, Inc.  
 31 Barr Alan Street  
 Westborough, MA 01581

Engineering Consultants: Waterman Design Associates, Inc.  
 31 Barr Alan Street  
 Westborough, MA 01581

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Waterman Design Associates, Inc.  
 31 Barr Alan Street  
 Westborough, MA 01581  
 508.735.0000  
 www.watermandesign.com

WESTBOROUGH GROUP CC, LLP  
 195 St. Paul Street  
 Rochester, New York

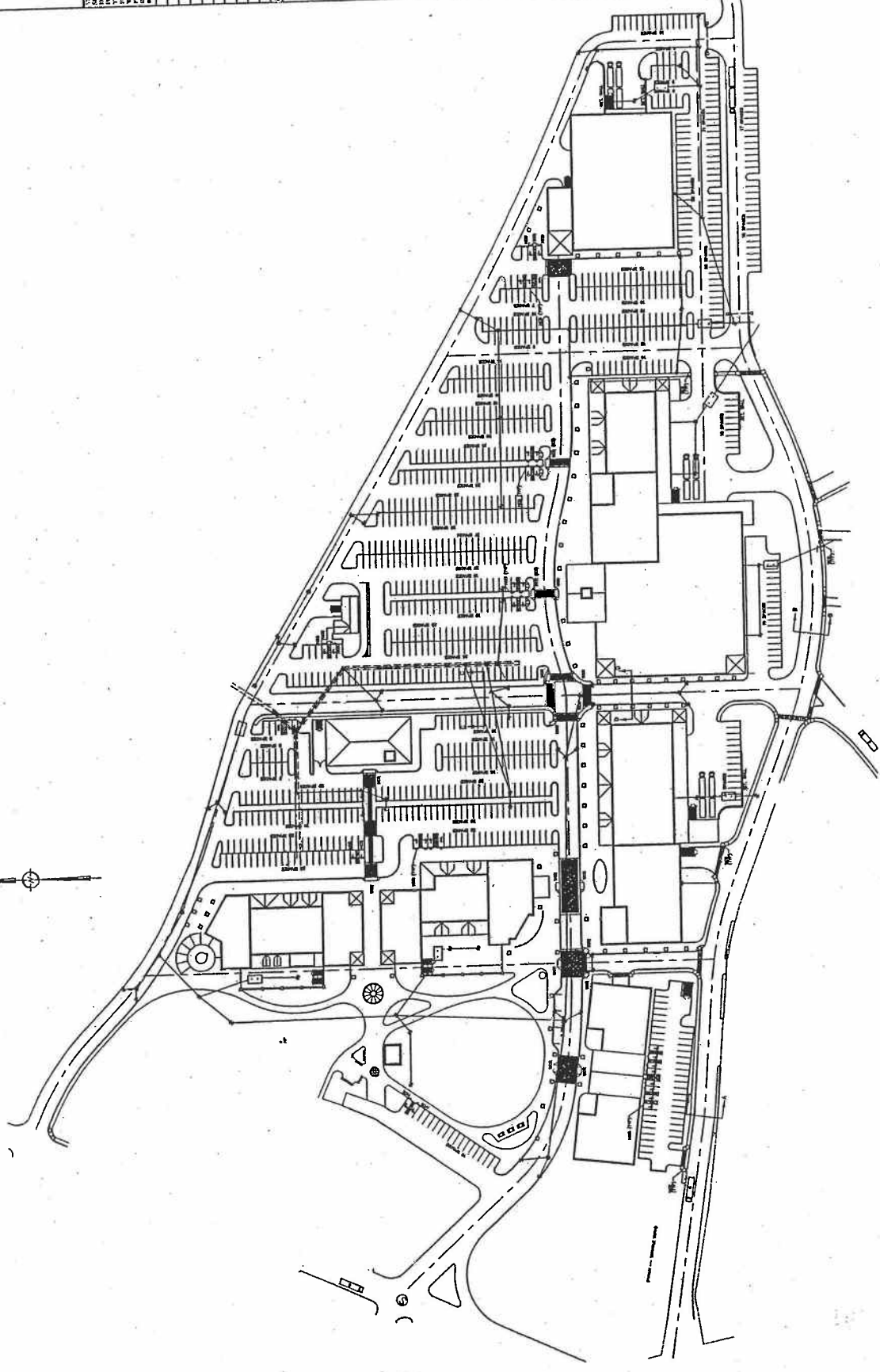
WESTBOROUGH GROUP CC, LLP  
 195 St. Paul Street  
 Rochester, New York

Westborough Commons  
 Conceptual Plan  
 WESTBOROUGH COMMONS  
 Westborough, MA  
 (Worcester County)

SPECIAL PERMIT

DATE:	SCALE:	DATE:	SCALE:
10/15/11	AS SHOWN	10/15/11	AS SHOWN
PROJECT:	PROJECT:	PROJECT:	PROJECT:
WESTBOROUGH COMMONS	WESTBOROUGH COMMONS	WESTBOROUGH COMMONS	WESTBOROUGH COMMONS
FILE NO.:	FILE NO.:	FILE NO.:	FILE NO.:
0000000000	0000000000	0000000000	0000000000
DRAWING NO.:	DRAWING NO.:	DRAWING NO.:	DRAWING NO.:
0000000000	0000000000	0000000000	0000000000

Exhibit 3



THIS DRAWING IS NOT FOR CONSTRUCTION UNLESS THE ORIGINAL IS REFERENCED BY THE CONTRACT DOCUMENTS.



# Exhibit C

