

COMMONWEALTH OF MASSACHUSETTS

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

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 Westborough CC, LLC ("Westborough CC"). Collectively, the OAG, on behalf of the Commonwealth, and Westborough CC will be hereinafter 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 investigation, remediation and redevelopment of an approximately 57 acre portion of the former Bay State Abrasives ("Bay State") manufacturing facilities including the premises at 10 Union (aka 12 Brigham), 11 Brigham and, 12 Union Street, Westborough, MA (the "Westborough Commons Project"). This property was also owned and operated by Tyrolit of North America, Inc. ("Tyrolit").

C. It is the intent of the Parties entering into this Agreement to set forth herein their respective duties, obligations and understanding so that the Project can contribute to the physical and economic revitalization of an area of Westborough, MA. To that end, the Parties hereby agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth as to Westborough CC and is predicated upon their compliance with the terms and conditions of this Agreement. This Agreement also addresses potential claims brought by third parties for contribution, response action costs or property damage pursuant to G.L. c. 21E, §§ 4 and 5, or for property damage under common law. This Agreement also addresses potential claims for natural resource damages. This Agreement does not, however, address liability arising under contract law.

D. The Parties agree that Westborough CC's ability to conduct the Westborough Commons Project, as proposed herein, 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 Westborough, MA.

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. 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. 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. In accordance with this Agreement, Westborough CC shall undertake the Westborough Commons 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 herein, terms used in this Agreement, which are defined in 940 CMR 23.00, *et seq.*, shall have the meaning assigned to them under such 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 Westborough Commons Project involves an assemblage of parcels comprising approximately 57 acres associated with the premises located at 10 Union (aka 12 Brigham), 11 Brigham and 12 Union Street in Westborough, Massachusetts, which was formerly the location of Bay State Abrasives ("Bay State") and, more recently, Tyrolit North America, Inc. ("Tyrolit"). 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 1 depicts the former Bay State/Tyrolit facility in its current condition.

D. 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 2 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. With respect to RTNs 2-14454 and 2-13130, Class A-2 response action outcome (“RAO”) statements were submitted to DEP on 4/29/03 and 3/23/04, respectively. For purposes of this Agreement, the releases of oil and/or hazardous material assigned RTNs 2-0149, 2-10670, and 2-12715, constitute the “Site,” as further 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.

E. To the extent RTNs 2-14454 and 2-13130 have achieved Permanent Solutions, and these Permanent Solutions are maintained, Westborough CC, as an Eligible Person, would be eligible for liability endpoints regarding those disposal sites pursuant to the provisions of G.L. c. 21E, § 5C. The releases described therein are not to be included in the “Site,” as defined in Section III, Paragraph D, above.

IV. COMMITMENTS AND OBLIGATIONS

NOW THEREFORE, in consideration of the representations made and promises exchanged by and between the Parties, each of them does hereby covenant and agree to the terms and conditions which follow.

A. REPRESENTATIONS AND COMMITMENTS

1. By Westborough CC

Westborough CC represents 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. Westborough CC further represents 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. Thus, Westborough CC represents it is an Eligible Person. Westborough CC also represents, and, for the purposes of this Agreement, the Commonwealth relies upon those representations, that Westborough CC’s involvement with the Site has been limited to the following:

- a. Evaluating the Property for purposes of acquiring the Property;
- b. Acquiring the Property;
- c. Evaluating the Property for the purpose of redeveloping the Property into the Westborough Commons Project; and
- d. 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. Westborough CC 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. Westborough CC agrees to the following terms and conditions:

a. Westborough CC shall conduct the Westborough Commons Project and provide significant public benefits by redeveloping the Property into a vibrant community-oriented mixed use development. The Project will create between 200,000 and 300,000 square feet of retail space to replace the currently derelict facility on the Property. Westborough CC shall use best efforts to generate approximately 750 new, permanent jobs. Moreover, Westborough CC will provide for open space opportunities, including a public park with an attractive communal environment. Further, the Westborough Commons Project will generate significant sales tax, payroll tax and related benefit program revenues to the Town of Westborough and the Commonwealth. A copy of Westborough CC's Conceptual Plan for the Project is attached hereto and incorporated into this Agreement as Exhibit 3.

b. Westborough CC shall either achieve and maintain, or arrange for the achievement and maintenance of, either a Permanent Solution or a Remedy Operation Status at the Site. In the meantime, Westborough CC shall maintain, or arrange for the maintenance of, the Class C RAO Temporary Solution at the Site in accordance with G.L. c. 21E and the MCP. For so long as the Class C RAO Temporary Solution remains the remediation status at the Site, Westborough CC shall take, or arrange for definitive and enterprising steps to be taken, toward achieving a Permanent Solution pursuant to 310 CMR 40.1050(5). Westborough CC shall also conduct the Periodic Evaluations of the Temporary Solution every 5 years to assess whether or not achievement of a Permanent Solution is feasible pursuant to 310 CMR 40.1050(5), or arrange that such Periodic Evaluations be conducted. Westborough CC shall submit to DEP, or arrange for the submission of, operation and maintenance and/or monitoring reports every 6 months pursuant to 310 CMR 40.0891(5).

c. Westborough CC shall cooperate fully with DEP. To cooperate fully means:

i. including, without limitation, 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) to 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 therein, and the MCP.

3. Westborough CC 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. Westborough CC

In consideration of the Representations and Commitments by Westborough CC set forth in Section IV, Paragraph A of this Agreement, and subject to Westborough CC'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 Westborough CC, pursuant to G.L. c. 21E, for response action costs, contribution, natural resources damages resulting from a release of oil or hazardous materials occurring prior to execution of this Agreement, 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 C, 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 Remedy Operation Status ("ROS") or Permanent Solution RAO submitted to DEP with respect to the Site, so long as the response actions upon which the RAO(s) or ROS relies meet the Standard of Care in effect as of the time of submittal of the RAO(s) or ROS.

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 Westborough CC, or who are agents, investors, lenders, lessees or licensees of its successors and assigns (hereinafter the "Subsequent Owners and/or Operators") having rights in the Property for which Westborough CC receive covenants herein, with respect to the Matters Addressed at the Property Addressed, as described in Section IV, Paragraph B, subparagraph 1, above. The liability relief available to such Subsequent Owner and/or Operator shall be subject to the same terms and conditions as those that apply to Westborough CC.

3. Applicability of the Agreement

This Agreement shall be in effect unless and until the statutory protections available to Westborough CC or Subsequent Owners and/or Operators 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 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 Agreement;
- b. any release of oil and/or hazardous material which Westborough CC or any Subsequent Owner and/or Operator causes or contributes to or causes to become and to remain worse than it otherwise would have been had Westborough CC or any Subsequent Owner and/or Operator not engaged in such activities, unless Westborough CC or any Subsequent Owner and/or Operator promptly corrects that condition;
- 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 existing Class C RAO, a subsequent ROS, or a Permanent Solution RAO to DEP that would have been discovered had an assessment of the Site covered by or addressed in the RAO(s) or ROS been performed consistent with the Standard of Care, in effect as of the time of submittal of the RAO(s) or ROS;
- 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 Westborough CC'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 (i) for damages for injury to, destruction of, or loss of natural resources due to a release of oil or hazardous materials occurring after the execution of this Agreement, (ii) for exacerbation of injury to, destruction of, or loss of natural resources due to a release of oil or hazardous materials occurring either before or after the execution of this Agreement, and (iii) for the costs of any natural resource damage assessment relating to conditions first caused after the execution of this Agreement.

5. Termination for Cause

- a. In the event that the OAG or DEP determine that Westborough CC submitted materially false or misleading information as part of their Application to Enter into a Brownfields Covenant Not to Sue Agreement, the OAG may terminate the liability protection

offered by this Agreement in accordance with subparagraph 5.d. of this Section IV, below. A statement made by Westborough CC 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 Westborough CC 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 (or failing to arrange for achieving and maintaining) the Permanent Solution or ROS at the Site, failure to respond (or failing to arrange for a response) in a timely manner to a Notice of Audit Finding or any such other Notice requiring 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 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 Westborough CC 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. The notice from the OAG shall, if appropriate, provide a reasonable period of time for Westborough CC or 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 Westborough CC or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

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

In consideration of the Brownfields Covenant Not to Sue in Section IV, Paragraph B of this Agreement, Westborough CC or a Subsequent Owner and/or Operator hereby 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 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 Commonwealth of Massachusetts Constitution for any "takings," provided that such 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 such activities;

4. any claims arising out of natural resource restoration activities at the Property, including claims based on the Commonwealth's selection of restoration activities, oversight of restoration activities, or approval of plans for such activities;

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

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

D. CONTRIBUTION PROTECTION AND RIGHTS OF AFFECTED THIRD PARTIES

With regard to 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, against Westborough CC or a Subsequent Owner and/or Operator, based solely on their status as owner or operator of the Site, the Commonwealth and Westborough CC agree that they and a Subsequent Owner and/or Operator are entitled to such protection from such actions or claims as provided by G.L. c. 21E for the Matters Addressed at the Property Addressed; provided, however, that this Paragraph does not affect potential claims brought by Tyrolit of North America, Inc. ("Tyrolit") until such time that the OAG has made its determination as to Tyrolit's Request to Join the Agreement, as described below in Section IV, Paragraph F.

E. GENERAL PROVISIONS

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

2. Should any term or condition of this Agreement or its application to any person or circumstance be found to be unenforceable by any court of competent jurisdiction, 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 Westborough CC and the terms of this Agreement in Section IV, Paragraph D, with respect to the Contribution Protection and Rights of Affected Third Parties, shall be effective as of the date the OAG executes this Agreement, subject to the conditions contained herein.

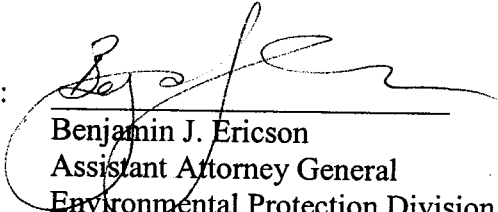
F. REQUESTS TO JOIN THE AGREEMENT

Tyrolit, by letter submitted on November 1, 2004, has requested to join the Agreement. The OAG is now considering Tyrolit's request. CSX Transportation, Inc. ("CSX") also requested to join the Agreement. The OAG, upon consideration of the factors in 940 CMR 23.06, has rejected CSX's request.

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

BY:


Benjamin J. Ericson
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108

Date:

12/23/04

In the matter of the Westborough CC, LLC
Brownfields Covenant Not to Sue Agreement

EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

BY: Ellen Roy Herzfelder
Ellen Roy Herzfelder
Secretary
Executive Office of Environmental Affairs
100 Cambridge Street
Boston, MA 02108

Date: 12/21/04

In the matter of the Westborough CC, LLC
Brownfields Covenant Not to Sue Agreement

WESTBOROUGH CC, LLC

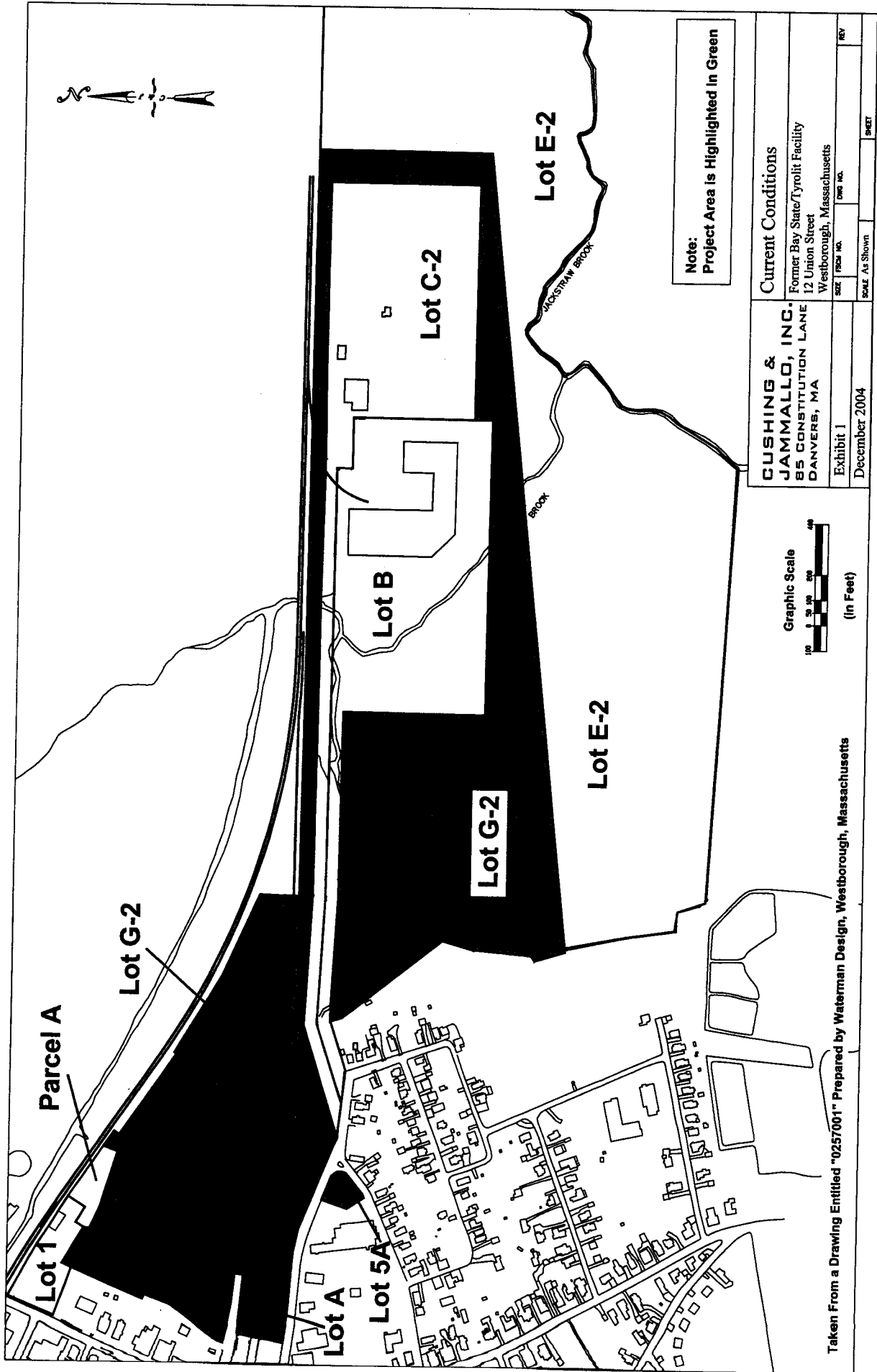
BY:

John M. Summers
MEMBER

Date: DECEMBER 17, 2004

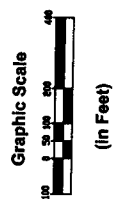
In the matter of the Westborough CC, LLC
Brownfields Covenant Not to Sue Agreement

EXHIBIT 1



Note:
Project Area is Highlighted in Green

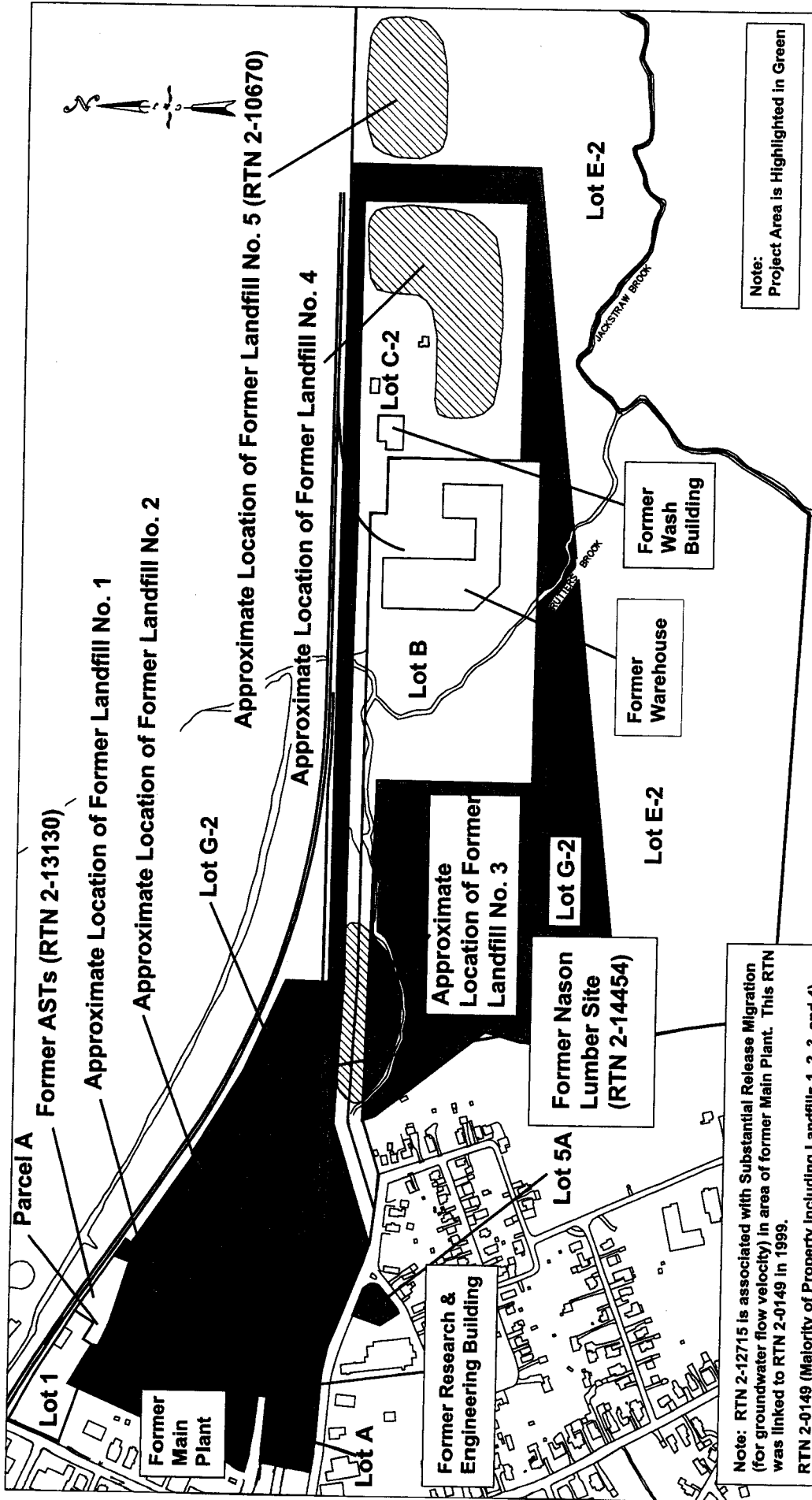
CUSHING & JAMMALLO, INC. 85 CONSTITUTION LANE DANVERS, MA		Current Conditions Former Bay State/Tyrolit Facility 12 Union Street Westborough, Massachusetts	
Exhibit 1	SCALE: As Shown	DATE: 12/01/04	REV: 1
December 2004			SHEET



Taken From a Drawing Entitled "025/001" Prepared by Waterman Design, Westborough, Massachusetts

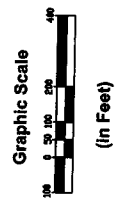
In the matter of the Westborough CC, LLC
Brownfields Covenant Not to Sue Agreement

EXHIBIT 2



Note:
Project Area is Highlighted in Green

CUSHING & JAMMALLO, INC.		Existing Release Tracking Numbers	
85 CONSTITUTION LANE DANVERS, MA		Former Bay State/Tyrolit Facility	
SEE PLAN NO.	DWG NO.	12 Union Street Westborough, Massachusetts	
Exhibit 2	December 2004	REV	
SCALE: As Shown		SHEET	



Note: RTN 2-12715 is associated with Substantial Release Migration (for groundwater flow velocity) in area of former Main Plant. This RTN was linked to RTN 2-0149 in 1999.
RTN 2-0149 (Majority of Property Including Landfills 1, 2, 3, and 4)

Base Drawing Taken From a Drawing Entitled "0257001" Prepared by Waterman Design, Westborough, Massachusetts
Disposal Site Information Taken From GZA GeoEnvironmental, Inc., Figure 2, "Site Plan" in Response Action Outcome Statement (2001)

In the matter of the Westborough CC, LLC
Brownfields Covenant Not to Sue Agreement

EXHIBIT 3

Civil Engineers & Land Surveyors:
 Waterman Design Associates, Inc.
 31 East Main Street
 Westborough, MA 01581

Architects:
 Garrison Robinson Architects, Inc.
 100 West Main Street
 Westborough, MA 01581

Transportation Engineers:
 Waterman Design Associates, Inc.
 31 East Main Street
 Westborough, MA 01581


Geotechnical Engineers:
 Waterman Design Associates, Inc.
 31 East Main Street
 Westborough, MA 01581

Environmental Engineers:
 Waterman Design Associates, Inc.
 31 East Main Street
 Westborough, MA 01581

STATEMENT OF WORK
 THIS STATEMENT OF WORK IS INTENDED TO BE USED AS A GUIDE FOR THE DEVELOPMENT OF THE PROJECT. IT DOES NOT constitute a contract or a warranty of any kind. The client is responsible for the accuracy and completeness of the information provided. The engineer is not responsible for the accuracy or completeness of the information provided by the client or other parties. The engineer's liability is limited to the amount of the fee paid for the services. The engineer's liability is not limited by the amount of the fee paid for the services.

NO.	DATE	DESCRIPTION	UNIT
1.		PROVIDE ENGINEERING DESIGN	

PREPARED BY:



Waterman Design Associates, Inc.
 31 East Main Street
 Westborough, MA 01581
 www.watermandesign.com

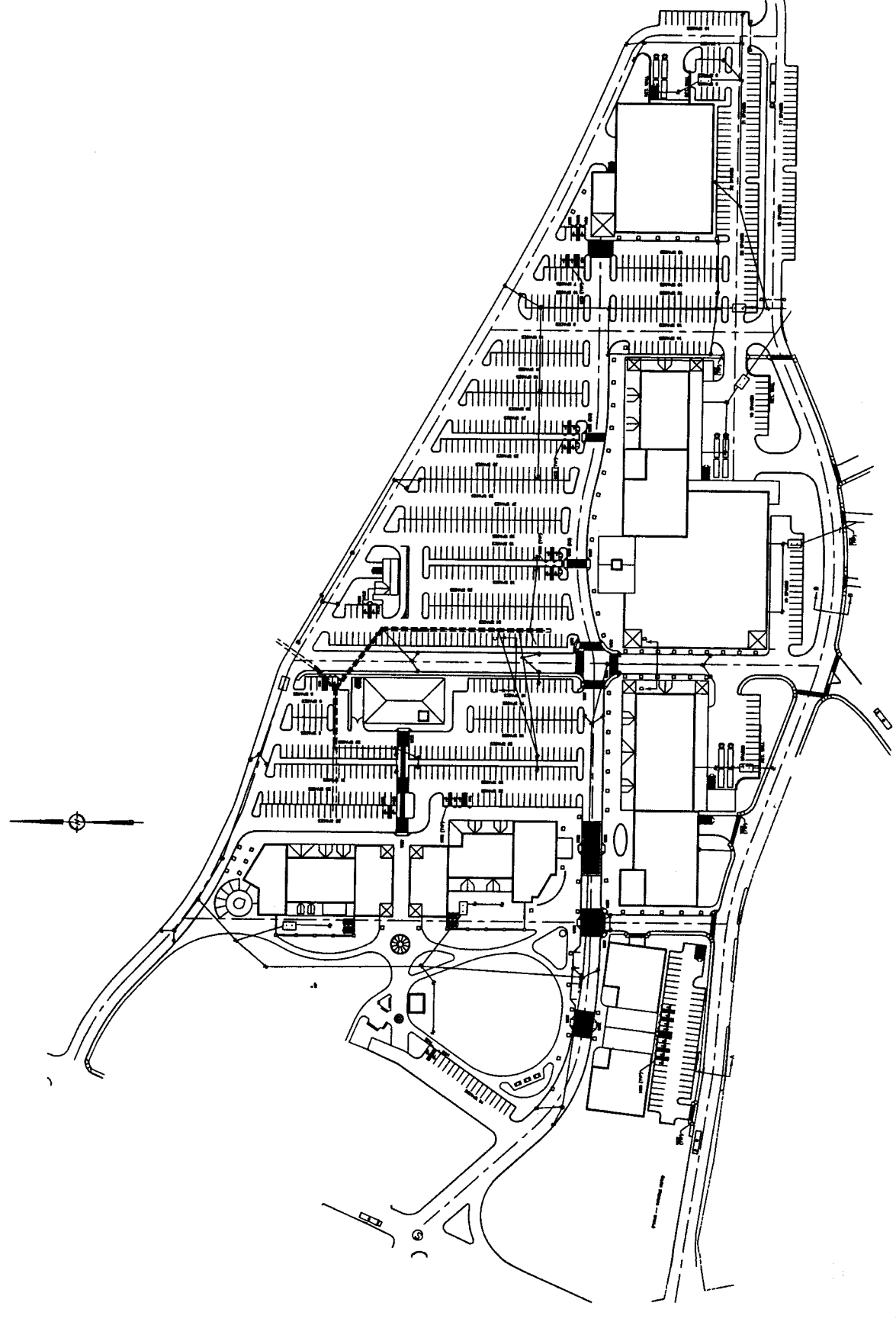
WESTBOROUGH GROUP CC, LLP
 195 St. Paul Street
 Rochester, New York

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

Westborough Commons
 Conceptual Plan
WESTBOROUGH COMMONS
 Waterman Design Associates, Inc.
 (Westborough County)

SPECIAL PERMIT

DATE:	SCALE:	BY:
PROJECT:	ISSUED:	DATE:
FILE NO.:	ISSUED BY:	DATE:
DRAWING NO.:	ISSUED BY:	DATE:



THIS DRAWING IS NOT FOR CONSTRUCTION USE. SEE THE CONTRACT DOCUMENTS FOR ALL CONDITIONS OF USE. WATERMAN DESIGN ASSOCIATES, INC. 01/20/11

Exhibit 3