

COMMONWEALTH OF MASSACHUSETTS

IN THE MATTER OF	)	BROWNFIELDS COVENANT
	)	NOT TO SUE AGREEMENT
175 NORTH, LLC	)	
	)	RTN – 3-33149
REDEVELOPMENT OF	)	
WAKEFIELD STATION	)	
175 NORTH AVENUE, WAKEFIELD, MA	)	
	)	
	)	
	)	
	)	

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 175 North, LLC. Collectively, the OAG and 175 North, LLC 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 .96-acre property located at 175 North Avenue in Wakefield, Massachusetts (the “Property”) into a mixed use development of retail and residential condominiums with underground parking (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 Wakefield, Massachusetts. The Parties agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth as to 175 North, LLC and is predicated upon 175 North, LLC’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 175 North, LLC’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. 175 North, LLC's failure to secure independent governmental approvals for the proposed remediation shall not excuse 175 North, LLC 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 Wakefield, 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. 175 North, LLC is a Massachusetts limited liability company.

## 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 .96-acre parcel at in Wakefield, Massachusetts. The Property was used for commercial purposes including a machine shop, window manufacturer, auto body shop, woodmaking shop, and metal die maker. Title to the Property is recorded in the County Registry of Deeds at Book 25457, Page 86. A full description of the Property is attached as Exhibit A and incorporated into this Agreement. A plan of the Property is attached as Exhibit B and incorporated into this Agreement. Due to the former commercial uses at the Property, the Property is contaminated with Oil and Hazardous Material.

D. On August 10, 2001, Intercontinental Limited Partnership, a former owner of the Property, submitted a Class A-2 Response Action Outcome ("Former RAO Statement") for MassDEP Release Tracking Number ("RTN") 3-3576, which pertained to an earlier release that occurred at the Property. Since the Former RAO Statement was filed, newly discovered reportable conditions of lead, chromium, benzo(a)pyrene, dibenzo(a, h)anthracene, C19-C36 Aliphatics, and C11-C22 aromatics in the soil and tetrachloroethylene, trichloroethylene, cis 1,2-dichloroethylene, and vinyl chloride in groundwater were identified, such conditions for which

MassDEP issued RTN 3-33149. The Releases associated with RTN 3-33149 are associated with the long term commercial uses of the Property. The Releases and/or Threats of Release of Oil and/or Hazardous Materials, as those terms are defined at 310 CMR 40.0006, that have been assigned RTN 3-33149 constitute the "Covered Releases" for the purposes of this Agreement. The areas where Oil and Hazardous Material have come to be located as a result of the Covered Releases constitutes 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 as the term "property addressed" is used in 940 CMR 23.08(1) in the Brownfields Covenant Regulations. The Site is more fully described on Exhibit C, including the remedial actions already conducted thereon, which is attached and incorporated into this Agreement.

#### 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 APPLICANT

1. 175 North, LLC represents that:
  - a. it is an Eligible Person;
  - b. 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;
  - c. 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 actions at the Site, as described in Exhibit C.
  - d. 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.
  - e. 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. 175 North, LLC agrees to the following terms and conditions:

a. 175 North, LLC shall endeavor to acquire ownership of the Property and shall develop the Property as a mixed use project with retail condominiums, residential condominiums, and parking pursuant to a design plan which is attached as Exhibit D and incorporated into this Agreement.

b. 175 North, LLC shall achieve and maintain a Permanent Solution for the Site pursuant to G. L. c. 21E and the MCP. 175 North, LLC shall submit a Permanent Solution Statement, or, if applicable, a Temporary Solution Statement, provided it can demonstrate that it cannot achieve a Permanent Solution with respect to such portion of the Site, pursuant to G. L. c. 21E and the MCP, describing such Permanent Solution or Temporary Solution, as applicable, in accordance with G.L. c. 21E, the Standard of Care defined in G.L. c. 21E, and the MCP. If 175 North, LLC cannot demonstrate that it is not feasible to achieve a Permanent Solution for any portion of the Site, 175 North, LLC shall achieve and maintain a Permanent Solution for the Site. If 175 North, LLC achieves a Temporary Solution and for so long as the Temporary Solution remains the remediation status, 175 North, LLC shall continue to comply with all requirements of G.L. c. 21E and the MCP, including the achievement of a Permanent Solution as and when it becomes feasible pursuant to the G.L. c. 21E and the MCP, including, without limitation, 310 CMR 40.1050.

c. 175 North, LLC shall cooperate fully with MassDEP and OAG with respect to the Covered Releases and the Site, including, without limitation:

i. 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;

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 175 North, LLC;

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. 175 North, LLC shall ensure that the Property is operated consistently with any Activity and Use Limitation (“AUL”) recorded with respect thereto.

e. 175 North, LLC shall provide a copy of this Agreement to any successors and assigns as well as to any lessees, sub-lessees, licensees and sub-licensees of 175 North, LLC’s interests in the Property.

B. COVENANT NOT TO SUE BY THE COMMONWEALTH

1. Covenant as to 175 North, LLC

Pursuant to G.L. c. 21E, §3A(j)(3), in consideration of the representations and commitments by 175 North, LLC set forth in Section IV, Paragraph A of this Agreement, and subject to 175 North, LLC’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 175 North, LLC, 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 the Covered Releases, so long as the Response Actions upon which the Permanent Solution Statement, and, if applicable, Temporary Solution Statement, is filed or to be filed with respect to the Covered Releases meet the Standard of Care in effect when the Permanent Solution Statement, and, if applicable, Temporary Solution Statement, was submitted to MassDEP. 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 first began ownership or operation of the Property subsequent to the effective date of this Agreement (“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 the Covered Releases. The liability relief available to Subsequent Owners and/or Operators shall be subject to (a) the same terms and conditions as those that apply to 175 North, LLC and (b) 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 175 North, LLC or Subsequent Owners and/or Operators pursuant to G.L. c. 21E, §5C are in effect. Protections in this Agreement from claims for natural resource damages shall not be affected if the statutory protections available under 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 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 that 175 North, LLC 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 175 North, LLC's liability protection under this Agreement;

c. any Release of Oil and/or Hazardous Material at the Site that has not been discovered when any past RAO Statement or future Permanent Solution Statement or Temporary Solution Statement is submitted to MassDEP that would have been discovered if an assessment of the releases covered by or addressed in the RAO Statement, Permanent Solution Statement or Temporary Solution Statement had been performed consistent with the Standard of Care in effect when the such Statement was or will be 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 by 175 North, LLC or a Subsequent Owner and/or Operator during 175 North, LLC'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 175 North, LLC's liability protection under this Agreement;

e. any Release of Oil and/or Hazardous Material not expressly described as one of the Covered Releases; 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 175 North, LLC 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 Paragraph 5. subparagraph c. below. A statement made by 175 North, LLC 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 175 North, LLC has violated the terms and conditions of this Agreement, including but not limited to failing to complete the Project, failing to achieve and maintain a Permanent Solution, or if can demonstrate that it cannot achieve a Permanent Solution, failing to achieve and maintain a Temporary Solution, for the Site, in accordance with G.L. c. 21E and the MCP, or failing to cooperate in arranging a timely response to a Notice of Audit Finding or any other notice

requiring additional work to achieve and/or maintain a Permanent Solution, or if a Permanent Solution is not feasible, a Temporary Solution for the Site, the OAG may terminate the liability protection offered by this Agreement in accordance with Subparagraph 5.c., below. In the event the liability protection is terminated solely because of a violation by a Subsequent Owner and/or Operator of one or more of the conditions set forth in Section IV.A.2.c.i through Section IV.A.2.c.vi of this Agreement, such termination shall affect the liability protection applicable only to the Subsequent Owner and/or Operator and shall not affect 175 North, LLC's liability protection.

c. Before terminating the liability relief provided by this Agreement, the OAG will provide 175 North, LLC 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 175 North, LLC 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 175 North, LLC or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

#### C. COVENANT NOT TO SUE BY 175 NORTH, LLC AND ANY SUBSEQUENT OWNER AND/OR OPERATOR

1. In consideration of the Commonwealth's covenants not to sue in Section IV, Paragraph B, 175 North, LLC 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 of 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 175 North, LLC'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 Paragraph 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.

#### D. PROTECTION FROM THIRD PARTY CLAIMS

With regard to any Covered Releases, so long as the Response Actions upon which the Permanent Solution Statement, and, if applicable, the Temporary Solution Statement relies meets the Standard of Care in effect when it was submitted to MassDEP, 175 North, LLC 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 175 North, LLC and/or any Subsequent Owner or Operator as owner or operator of the Property or the Site, provided, however that 175 North, LLC has satisfied the notification provisions of G.L. c. 21E, §3A(j)(3), and 940 CMR 23.04(2).

#### 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 and when 175 North, LLC acquires title to the Property.



Brownfields Covenant Not to Sue Agreement  
175 North, LLC  
175 North Avenue, Wakefield, Massachusetts

IT IS SO AGREED:

OFFICE OF THE ATTORNEY GENERAL

By: Nancy E. Harper  
Nancy E. Harper  
Assistant Attorney General  
Deputy Division Chief  
Environmental Protection Division  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

175 NORTH, LLC

By: Matthew Maguire  
Name: Matthew Maguire  
Title: Manager  
Date: 3-16-16