



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

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October 22, 2010

Stephen D. Anderson, Esq.
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1 Canal Park, Suite 200
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Re: *Application by Town of Acton for Brownfields Covenant Not to Sue Agreement for Simeone-Caouette Property, 2 Stow Street and 90 Martin Street, Acton*

Dear Mr. Anderson:

I write in response to the Town of Acton's application for a Brownfields Covenant Not to Sue Agreement ("Agreement") for the Simeone-Caouette Property at 2 Stow Street and 90 Martin Street, Acton (the "Property"). The Town plans to acquire the Property for agricultural, open space and conservation purposes and, upon acquisition, clean up the contamination that has been discovered at the Property. If the Commonwealth were to enter into an Agreement with the Town, and the Town performed its cleanup and development obligations, the Town would be protected from any claims by the Commonwealth and third parties for response action costs, contribution, or property damage under G.L. c. 21E ("Chapter 21E"), or for property damage under the common law, relating to the contamination that has been assigned release tracking number ("RTN") 2-18007. The Agreement may also protect the Town from Commonwealth claims for natural resource damages ("NRD"), but I have not yet been able to review the application with the Commonwealth's NRD staff.

The Attorney General's Office has established criteria for entering into Brownfields Covenants. These criteria are found in the Brownfields Covenant Regulations at 940 CMR 23.03, which I attach for your reference. From the information that you provided in the October 12, 2010 Application to Enter into a Brownfields Covenant Not to Sue Agreement, it appears that the Town's project meets those criteria that can be reviewed today. We cannot yet comment on the criteria that can only be reviewed in the future, such as the Town's proof of compliance with the public notice requirements.

The principal criteria for entering into an Agreement are: (1) a proposed development plan that will contribute to the physical or economic revitalization of the community; and (2) a cleanup plan that is appropriate for the planned re-use. The creation or revitalization of open space presumptively qualifies as an eligible brownfields project that the Attorney General's



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Office will support. The Town's plan to impose a Conservation Restriction on the Property and use it for agriculture, open space and publicly accessible recreation appears to fit the development criterion squarely. The Town's promise to clean up the oil and/or hazardous material associated with RTN 2-18007 to a permanent solution under the Massachusetts Contingency Plan satisfies the cleanup requirement.

Please keep in mind that the other requirements of 940 CMR 23.03 will also need to be met. Most notably, the Town must demonstrate compliance with our regulations' public notice requirements, and accept the terms, conditions, and reservations of 940 CMR 23.08 which apply to all Brownfields Covenant Not to Sue Agreements. I attach 940 CMR 23.08 for your reference. Furthermore, this letter assumes that no comments received during the public comment period will lead this office to conclude that an Agreement is not in the public interest. Finally, a negotiated Agreement will be reviewed by Attorney General's Office and Massachusetts Department of Environmental Protection ("MassDEP") management for compliance with the regulations and to ensure that the Agreement is in the public interest.

Please do not hesitate to contact me if you have any questions. I look forward to working with you on an Agreement for the Town.

Sincerely,



Benjamin J. Ericson
Assistant Attorney General
Brownfields Unit Chief

940 CMR 23.00: Brownfields Covenant Not to Sue Agreements

23.03: Criteria for When to Execute Brownfields Covenant Not to Sue Agreements

- (1) The Commonwealth may enter into a Brownfields Covenant Not to Sue Agreement only if all of the following criteria are met:
- (a) the Applicant is a current or prospective Owner or Operator of the Site or portion of the Site that is the subject of the proposed Agreement;
 - (b) the proposed future use of the Site or portion of the Site that is the subject of the proposed Agreement is an Eligible Brownfields Project;
 - (c) a Development Plan describing the proposed use of the Site or portion of the Site that is the subject of the proposed Agreement and the proposed public benefits that such use would bring has been submitted in accordance with 940 CMR 23.04(1)(b);
 - (d) a Permanent Solution or Remedy Operation Status has been or will be achieved and maintained in accordance with the terms of M.G.L. c. 21E and the MCP (310 CMR 40.0000) for the Site or portion of the Site that is subject to the proposed Agreement; or, if the Applicant is an Eligible Person, a Temporary Solution has been or will be achieved and maintained for the Site or portion of the Site that is subject to the Agreement, if achieving a Permanent Solution is not Feasible pursuant to the provisions of 310 CMR 40.0860;
 - (e) a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire portion of a Site that is, or will be, owned or operated by the Applicant;
 - (f) there is a substantial likelihood that the proposed Eligible Brownfields Project would not occur without it being the subject of a Brownfields Covenant Not to Sue Agreement;
 - (g) the Applicant has negotiated a settlement of costs incurred by the Commonwealth in responding to a Release or Threat of Release at or from the Site that is the subject of the proposed Agreement, and for which the Applicant is potentially liable pursuant to M.G.L. c. 21E, s. 5, provided, however, that in the negotiation of an appropriate settlement, the Commonwealth has considered all relevant factors, including but not limited to: the ability of the Applicant to pay such costs; whether the Applicant is an Eligible Person; and the economic benefits to the community that the Eligible Brownfields Project will bring, including but not limited to future jobs gains and economic revitalization;

(h) the Applicant has agreed that any liability relief obtained as a result of its entering into a Brownfields Covenant Not to Sue Agreement is subject to the Applicant's being bound by the terms of 940 CMR 23.08 and by any specific terms set forth in the Agreement;

(i) an applicant who is not an Eligible Person and who is seeking liability protection against Affected Third Parties has adequately accommodated any bona fide third party claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law; and

(j) an applicant seeking liability protection against Affected Third Parties has filed proof of compliance with notice requirements in accordance with 940 CMR 23.04(2)(e).

(2) The Attorney General will enter into a Brownfields Covenant Not to Sue Agreement upon determining that the criteria set forth in 940 CMR 23.03(1) have been met and that entering into the Agreement will likely further the public interest.

(3) Whether the Commonwealth should enter into a Brownfields Covenant Not to Sue Agreement is subject to the discretion of the Attorney General, and the Attorney General reserves the right to deny an application for such an Agreement on any legally permissible grounds. In exercising his or her discretion on whether to enter into a Brownfields Covenant Not to Sue Agreement, the Attorney General may consider the following factors:

(a) whether the plans for the proposed project have ripened to the point that the project is amenable to review;

(b) the likelihood that the proposed project will actually be undertaken;

(c) the extent to which a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project is located. Applications filed by Applicants who are not Eligible Persons will be presumed not to qualify for a Brownfields Covenant Not to Sue Agreement when a Permanent Solution or Remedy Operation Status has been proposed for less than the entire Site;

(d) the extent of the public benefits offered by the Eligible Brownfields Project, and whether such benefits are commensurate with the liability protection being requested;

(e) for an Applicant who has requested to be considered an Eligible Person, the extent to which that Applicant has demonstrated that he or she

is an Eligible Person;

(f) whether the Applicant has adequately accommodated, or the proposed Agreement adequately accommodates, the rights of Affected Third Parties as appropriate under 940 CMR 23.06; and

(g) whether an Applicant has provided the Attorney General with information that the Attorney General has determined is necessary or appropriate for the Attorney General to complete his or her review.

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23.08: Liability Relief Obtained

(1) A Person who has entered into a Brownfields Covenant Not to Sue Agreement with the Commonwealth shall not be liable to the Commonwealth for claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, with respect to matters and properties expressly addressed by said Agreement, provided, however, that the Agreement shall not affect any liability established by contract. A Brownfields Covenant Not to Sue Agreement may also cover claims for natural resource damages, if an applicant so requests and the Secretary of Energy and Environmental Affairs agrees to become a signatory to the Agreement. A Brownfields Covenant Not to Sue Agreement shall not relieve any Person of liability with respect to any matter or property not expressly addressed by the Agreement. Nothing in this paragraph is intended to limit the Commonwealth's ability to provide additional liability relief through a Brownfields Covenant Not to Sue Agreement to the extent otherwise authorized by law.

(2) A Person who has provided notice in accordance with 940 CMR 23.04(2) and entered into a Brownfields Covenant Not to Sue Agreement with the Commonwealth shall not be liable to Affected Third Parties for claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, with respect to matters and properties expressly addressed by the Agreement, provided, however, that the Agreement shall not affect any liability established by contract, and that an Applicant who is not an Eligible Person shall be protected from claims by only those Affected Third Parties who received notice in hand or by registered mail, return receipt. A Brownfields Covenant Not to Sue Agreement shall not relieve any Person of liability with respect to any matter or property not expressly addressed by the Agreement.

(3) The liability protection offered by each Brownfields Covenant Not to Sue Agreement shall be subject to the following conditions:

(a) the Applicant's compliance with the Release notification provisions established by M.G.L. c. 21E and the MCP (310 CMR 40.0000);

(b) the Applicant's providing reasonable access to the portion of the Site owned or operated by the Applicant to employees, agents, and contractors of the Department of Environmental Protection for all purposes authorized by M.G.L. c. 21E, and to other persons intending to conduct Response Actions pursuant to that chapter and the MCP (310 CMR 40.0000);

(c) the Applicant's responding in a reasonably timely manner to any request made by the Department of Environmental Protection or the

Attorney General to produce information as required pursuant to M.G.L. c. 21E;

(d) the Applicant's taking reasonable steps:

1. to prevent the Exposure of people to Oil or Hazardous Materials, such as by fencing or otherwise preventing access to the Site or portion of the Site under the Applicant's control; and
2. to contain any further Release or Threat of Release of Oil or Hazardous Material from a structure or container under the Applicant's control, upon obtaining knowledge of a Release or Threat of Release of Oil or Hazardous Material;

(e) the Response Actions that the Applicant conducts at the Site being done in accordance with the MCP (310 CMR 40.0000);

(f) a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, being achieved and maintained at the Site or portion of the Site that is subject of the Agreement within the deadlines set forth in the MCP (310 CMR 40.0000), or within such other deadlines as are specified in the Agreement;

(g) the Response Actions taken at the Site or portion of the Site that is subject to the Agreement meeting the appropriate Standard of Care; and

(h) such other terms as agreed to by the Applicant in the Agreement.

(4) No Brownfields Covenant Not to Sue Agreement shall relieve the Applicant of any potential liability the Applicant may have for a Release or Threat of Release of Oil or Hazardous Material:

(a) that first begins to occur after the Commonwealth's covenant not to sue the Applicant included within said Agreement vests;

(b) from which there is a new Exposure that results from any action or failure to act by the Applicant pursuant to M.G.L. c. 21E during its ownership or operation of the Site; or

(c) that violates or is inconsistent with an Activity and Use Limitation established pursuant to M.G.L. c. 21E and the MCP (310 CMR 40.0000).

(5) Each Brownfields Covenant Not to Sue Agreement that has been entered into with an Applicant who has asserted in his or her application that he or she is an Eligible Person will so indicate, and the liability relief provided by said Agreement shall be subject to the Applicant's being an Eligible Person unless the Agreement expressly states otherwise.

(6) Each Brownfields Covenant Not to Sue Agreement shall state whether and the extent to which a Subsequent Owner or Operator will be able to make use of the liability relief provided by the Agreement. The liability relief available to a Subsequent Owner or Operator shall be subject to the same terms and conditions as those that apply to the Applicant. Liability relief that is available to an Applicant who has asserted in his or her application that he or she is an Eligible Person shall not be available to a Subsequent Owner or Operator who is not an Eligible Person, unless the Agreement expressly states otherwise.

(7) Each Brownfields Covenant Not to Sue Agreement shall state when liability relief provided by the Agreement will vest. In no event shall liability relief that would bar claims brought by Affected Third Parties against an Applicant who is not an Eligible Person vest prior to the achievement of a Permanent Solution or Remedy Operation Status for the Site or portion of the Site that is the subject of the Agreement.

(8) The liability protection offered by each Brownfields Covenant Not to Sue Agreement shall be subject to termination for cause in accordance with 940 CMR 23.09, and each such Agreement will so state.