

ENVIRONMENTAL EASEMENT

THIS INDENTURE made this 19<sup>th</sup> day of July, 2006, between 257 W. Genesee, LLC having an office at 600 E. 96<sup>th</sup> St., Suite 100, Indianapolis, Indiana 46240, (the "Grantor"), and The People of the State of New York (the "Grantee."), acting through their Commissioner of the Department of Environmental Conservation (the "Commissioner", or "NYSDEC" or "Department" as the context requires) with its headquarters located at 625 Broadway, Albany, New York 12233,

WHEREAS, the Legislature of the State of New York has declared that it is in the public interest to encourage the remediation of abandoned and likely contaminated properties ("brownfield sites") that threaten the health and vitality of the communities they burden while at the same time ensuring the protection of public health and the environment; and

WHEREAS, the Legislature of the State of New York has declared that it is in the public interest to establish within the Department a statutory environmental remediation program that includes the use of environmental easements as an enforceable means of ensuring the performance of operation, maintenance, and/or monitoring requirements and of ensuring the potential restriction of future uses of the land, when an environmental remediation project leaves residual contamination at levels that have been determined to be safe for a specific use, but not all uses, or which includes engineered structures that must be maintained or protected against damage to perform properly and be effective, or which requires groundwater use or soil management restrictions; and

WHEREAS, the Legislature of the State of New York has declared that environmental easement shall mean an interest in real property, created under and subject to the provisions of Article 71, Title 36 of the New York State Environmental Conservation Law ("ECL") which contains a use restriction and/or a prohibition on the use of land in a manner inconsistent with engineering controls which are intended to ensure the long term effectiveness of a brownfield site remedial program or eliminate potential exposure pathways to hazardous waste or petroleum; and;

WHEREAS, Grantor, is the owner of real property located in the City of Buffalo, Erie County, New York known and designated on the tax map of the City of Buffalo as tax parcel number 110-60-2-2, being the same as that property conveyed to Grantor by deeds on March 29, 2005 and recorded in the Land Records of the Erie County Clerk in Liber 11093 of Deeds at page 492, November 10, 2005, recorded in Liber 11108 of Deeds at page 9335, and November 18, 2005, recorded in Liber 11111 of Deeds at page 7773, comprised of approximately 8.21 acres, and hereinafter more fully described in Schedule A attached hereto and made a part hereof (the "Controlled Property"); and;

WHEREAS, the Commissioner does hereby acknowledge that the Department accepts this Environmental Easement in order to ensure the protection of human health and the environment and to achieve the requirements for remediation established at this Controlled Property until such time as this Environmental Easement is extinguished pursuant to ECL Article 71, Title 36; and

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**NOW THEREFORE**, in consideration of the covenants and mutual promises contained herein and the terms and conditions of Brownfield Cleanup Agreement Numbers B9-0695-05-06(A), B9-0695-05-06(B), and B9-0712-06-01, Grantor grants, conveys and releases to Grantee a permanent Environmental Easement pursuant to Article 71, Title 36 of the ECL in, on, over, under, and upon the Controlled Property as more fully described herein ("Environmental Easement").

1. Purposes. Grantor and Grantee acknowledge that the Purposes of this Environmental Easement are: to convey to Grantee real property rights and interests that will run with the land in perpetuity in order to provide an effective and enforceable means of encouraging the reuse and redevelopment of this Controlled Property at a level that has been determined to be safe for a specific use while ensuring the performance of operation, maintenance, and/or monitoring requirements; and to ensure the potential restriction of future uses of the land that are inconsistent with the above-stated purpose.

2. Institutional and Engineering Controls. The following controls apply to the use of the Controlled Property, run with the land are binding on the Grantor and the Grantor's successors and assigns, and are enforceable in law or equity against any owner of the Controlled Property, any lessees, and any person using the Controlled Property:

A. The Controlled Property may be used for Commercial and /or Industrial use, as long as the following long-term engineering controls are employed:

- i) Implementation of the Operation, Monitoring, and Maintenance Work Plan including the Soil/Fill Management Plan,
- ii) Use of groundwater for potable and non-potable purposes is prohibited.

B. The Controlled Property may not be used for a higher level of use such as unrestricted or residential use and the above-stated engineering controls may not be discontinued without an amendment or extinguishment of this Environmental Easement.

C. Grantor covenants and agrees that until such time as the Environmental Easement is extinguished in accordance with the requirements of Article 71, Title 36 of the ECL, the property deed and all subsequent instruments of conveyance relating to the Controlled Property shall state in at least fifteen-point bold-faced type:

**This property is subject to an environmental easement held by the New York State Department of Environmental Conservation pursuant of Title 36 to Article 71 of the Environmental Conservation Law.**

D. Grantor covenants and agrees that this Environmental Easement shall be incorporated in full or by reference in any leases, licenses, or other instruments granting a right to use the Controlled Property.

E. Grantor covenants and agrees that it shall annually, or such time as NYSDEC may allow, submit, to NYSDEC a written statement by an expert the NYSDEC may find acceptable certifying under penalty of perjury that the controls employed at the Controlled Property are unchanged from the previous certification or that any changes to the controls employed at the Controlled Property were approved by the NYSDEC, and that nothing has occurred that would impair the ability of such control to protect the public health and environment or constitute a violation or failure to comply with any Site Management Plan for such controls and giving access to such Controlled Property to evaluate continued maintenance of such controls.

3. Right to Enter and Inspect. Grantee, its agents, employees, or other representatives of the State may enter and inspect the Controlled Property in a reasonable manner and at reasonable times to assure compliance with the above-stated restrictions.

4. Reserved Grantor's Rights. Grantor reserves for itself, its assigns, representatives, and successors in interest with respect to the Property, all rights as fee owner of the Controlled Property, including:

A. Use of the Controlled Property for all purposes not inconsistent with, or limited by the terms of this Environmental Easement;

B. The right to give, sell, assign, or otherwise transfer the underlying fee interest to the Controlled Property by operation of law, by deed, or by indenture, subject and subordinate to this Environmental Easement;

5. Enforcement

A. This Environmental Easement is enforceable in law or equity in perpetuity by Grantor, Grantee, or any affected local government, as defined in ECL Section 71-3603, against the owner of the Property, any lessees, and any person using the land. Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel, or waiver. It is not a defense in any action to enforce this Environmental Easement that: it is not appurtenant to an interest in real property; it is not of a character that has been recognized traditionally at common law; it imposes a negative burden; it imposes affirmative obligations upon the owner of any interest in the burdened property; the benefit does not touch or concern real property; there is no privity of estate or of contract; or it imposes an unreasonable restraint on alienation.

B. If any person intentionally violates this Environmental Easement, the Grantee may revoke the Certificate of Completion provided under ECL Article 27, Title 14, or the Satisfactory Completion of Project provided under ECL Article 56, Title 5 with respect to the Controlled Property.

C. Grantee shall notify Grantor of a breach or suspected breach of any of the terms of this Environmental Easement. Such notice shall set forth how Grantor can cure such breach or suspected breach and give Grantor a reasonable amount of time from the date of receipt of notice in which to cure. At the expiration of such period of time to cure, or any extensions granted by Grantee, the Grantee shall notify Grantor of any failure to adequately cure the breach or suspected breach. Grantor shall then have a reasonable amount of time from receipt of such notice to cure. At the expiration of said second period, Grantee may commence any proceedings and take any other appropriate action reasonably necessary to remedy any breach of this Environmental Easement in accordance with applicable law to require compliance with the terms of this Environmental Easement.

D. The failure of Grantee to enforce any of the terms contained herein shall not be deemed a waiver of any such term nor bar its enforcement rights in the event of a subsequent breach of or noncompliance with any of the terms of this Environmental Easement.

6. Notice. Whenever notice to the State (other than the annual certification) or approval from the State is required, the Party providing such notice or seeking such approval shall identify the Controlled Property by referencing its County tax map number or the Liber and Page or computerized system tracking/identification number and address correspondence to:

Division of Environmental Enforcement  
Office of General Counsel  
New York State Department of Environmental Conservation  
625 Broadway  
Albany New York 12233-5500

Such correspondence shall be delivered by hand, or by registered mail or by Certified mail and return receipt requested. The Parties may provide for other means of receiving and communicating notices and responses to requests for approval.

7. Recordation. Grantor shall record this instrument, within thirty (30) days of execution of this instrument by the Commissioner or her/his authorized representative in the office of the recording officer for the county or counties where the Property is situated in the manner prescribed by Article 9 of the Real Property Law.

8. Amendment. This Environmental Easement may be amended only by an amendment executed by the Commissioner of the New York State Department of Environmental Conservation and filed with the office of the recording officer for the county or counties where the Property is situated in the manner prescribed by Article 9 of the Real Property Law.

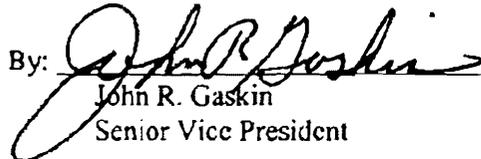
9. Extinguishment. This Environmental Easement may be extinguished only by a release by the Commissioner of the New York State Department of Environmental Conservation and filed with the office of the recording officer for the county or counties where the Property is

situated in the manner prescribed by Article 9 of the Real Property Law.

10. Joint Obligation. If there are two or more parties identified as Grantor herein, the obligations imposed by this instrument upon them shall be joint and several.

**IN WITNESS WHEREOF**, Grantor has caused this instrument to be signed in its name.

257 W. GENESEE, LLC,  
a New York limited liability company  
By: Duke HN New York, LLC,  
An Indiana limited liability company, its sole member  
By: Duke Construction Limited Partnership,  
its sole member  
By: Duke Business Centers Corporation, its sole  
general partner

By:   
John R. Gaskin  
Senior Vice President

**THIS ENVIRONMENTAL EASEMENT IS HEREBY  
ACCEPTED BY THE PEOPLE OF THE STATE OF  
NEW YORK**, Acting By and Through the Department of  
Environmental Conservation

By:   
Denise M. Sheehan, Commissioner

Grantor's Acknowledgment

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF ERIE )

On the 19th day of July, in the year 2006, before me, the undersigned, personally appeared John R. Gaskin, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Michael A. Piette  
Notary Public - State of New York

MICHAEL A. PIETTE  
NOTARY PUBLIC, State of New York  
Qualified in Niagara County  
Commission Expires January 31st, 2007

Grantee's Acknowledgment

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF Albany )

On the 17<sup>th</sup> day of August, in the year 2006 before me, the undersigned, personally appeared Deise N. Shelton, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/ executed the same in his/her/ capacity as Commissioner of the State of New York Department of Environmental Conservation, and that by his/her/ signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Mark D. Sanza  
Notary Public - State of New York

MARK D. SANZA  
Notary Public, State of New York  
No. 02SA6010701  
Qualified in Albany County  
Commission Expires July 20, 2010

No: 5006-25086

The land referred to in this Commitment is described as follows:

Parcel A

ALL THAT TRACT OR PARCEL OF LAND situate in the City of Buffalo, County of Erie and State of New York, being part of Outer Lot Number 16 and Lot Number 2 of the South Village of Black Rock, bounded and described as follows:

BEGINNING at the point of intersection of the northwest line of Genesee Street and the northeast line of Fourth Street as originally located; thence northwesterly along said line of Fourth Street 614.85 feet more or less to a south line of lands conveyed to New York State Urban Development Corporation by deed recorded in the Erie County Clerk's Office in Liber 8442 of Deeds at page 247; thence northeasterly at an interior angle of 91° 10' 34" and along the south line of said lands of the New York State Urban Development Corporation a distance of 162.00 feet; thence southerly at an interior angle of 89° 13' 29" a distance of 27.50 feet; thence easterly at an interior angle of 270° 46' 31" with the last described line a distance of 208.00 feet to the former west line of Jackson Street; thence southeasterly along said line of Jackson Street 240 feet more or less to an angle in said line of Jackson Street; thence southeasterly continuing along the southwest line of Jackson Street (a portion of which is now the southwest line of Seventh Street) 415 feet more or less to its intersection with the northwest line of Genesee Street; thence southwesterly along said line of Genesee Street 282 feet to the point of beginning.

Parcel B (257 West Genesee)

ALL THAT TRACT OR PARCEL OF LAND, situate in the City of Buffalo, County of Erie and State of New York, being part of Outer Lot 16 and part of Lot 2, South Village of Black Rock, bounded and described as follows:

BEGINNING at a point on the north line of Fourth Street as dedicated on July 27, 1982 at its intersection with the east line of former Fourth Street (now abandoned), said point being also on the west line of lands conveyed to Niagara Gas Corporation by deed recorded in the Erie County Clerks' Office in Liber 1586 of Deeds at Page 365;

THENCE: Northwesterly, along the northeast line of Fourth Street as dedicated on July 27, 1982, a distance of 202.18 feet to an angle point in the east line of Fourth Street as dedicated on July 27, 1982;

THENCE: Northerly, along the east line of Fourth Street as dedicated on July 27, 1982, at an interior angle of 139° -24'-58" with the last described line, a distance of 469.32 feet to a point on the southerly line of lands conveyed to New York State Urban Development Corporation by deed recorded in Liber 8442 of Deeds at page 247;

THENCE: Easterly, along a southerly line of said New York State Urban Development Corporation lands, a distance of 130.75 feet to a point;

THENCE: southerly, at an interior angle of 91° -33'-6" along the east line of former Fourth Street and west line of said Niagara Gas Corporation lands, a distance of 619.52 feet to the POINT OF BEGINNING.

Parcel C (4 New Seventh Street)

No: 5006-25086

The land referred to in this Commitment is described as follows:

ALL THAT TRACT OR PARCEL OF LAND situate in the City of Buffalo, County of Erie and State of New York, being part of Disposition Lot 2, Outer Lot 16 of the Village of New Amsterdam and part of the bed of Busti Terrace being more particularly bounded and described as follows:

BEGINNING at the intersection of the northwesterly right of way bounds of New Seventh Street, being 66 feet in width, with the southerly right of way bounds of former Court Street as a 6 rod road;

THENCE westerly along the southerly right of way bound of former Court Street a distance of 129.80 feet to a point;

THENCE southerly at a right angle a distance of 5.00 feet to a point;

THENCE westerly parallel with the southerly right of way bound of former Court Street, and distant 5.00 feet southerly therefrom a distance of 80.00 feet to a point on a northeasterly line of lands conveyed to the New York State Urban Development Corporation by deed recorded in Liber 8442 of Deeds at page 247;

THENCE southeasterly along said northeasterly line of lands conveyed to the New York State Urban Development Corporation, at an interior angle to the right as measured from the last described course of  $41^{\circ} 55' 39''$  for a distance of 51.26 feet to a point;

THENCE southwesterly at an exterior angle to the left as measured from the last described course of  $92^{\circ} 43' 40''$  a distance of 171.96 feet to a point lying on a southwesterly boundary of said lands conveyed to the New York State Urban Development;

THENCE southeasterly along said southwesterly boundary of lands conveyed to the New York State Urban Development and the southeasterly extension thereof, at an interior angle to the right as measured from the last described course  $90^{\circ} 46' 33''$  for a distance of 248.91 feet to a point;

THENCE continuing southeasterly at an exterior angle to the left as measured from the last described course of  $166^{\circ} 03' 00''$  for a distance of 152.16 feet to the aforementioned northwesterly right of way bounds of New Seventh Street;

THENCE northeasterly along said northwesterly right of way bounds of New Seventh Street at an interior angle to the right as measured from the last described course of  $36^{\circ} 04' 28''$  for a distance of 455.41 feet to the point of beginning.