

FILED

OCT - 2 2006

Box 173 PSG
11126/0310

ENVIRONMENTAL EASEMENT

ERIE COUNTY
CLERK OFFICE

THIS INDENTURE made this 26th day of June, 2006, between 9505 MAIN ST. LLC having an office at 9505 Main Street, Clarence, New York 14031 (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 parcels Section 132.19, Block 2, Lot 1, Section 132.19, Block 2, Lot 2 and Section 132.20, Block 1, Lot 13, being the same as that property conveyed to Grantor by deed on May 18, 2006 and recorded in the Land Records of the Erie County Clerk at page 9264, liber 11113 of Deeds, comprised of approximately 12 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

NOW THEREFORE, in consideration of the covenants and mutual promises contained herein and the terms and conditions of Brownfield Cleanup Agreement Number B9-0710-05-12,

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/ industrial use as long as the following long-term engineering controls are employed:

(i) any soil on the Controlled Property must be covered by a barrier layer approved by NYSDEC such as concrete, asphalt or structures or must be covered with a minimum 12 inch layer of clean soil and this barrier layer must be maintained; and

(ii) any proposed soil excavation on the Controlled Property below the barrier layer requires approval of NYSDEC in accordance with the Site Management Plan approved by NYSDEC for this Controlled Property and the excavated soil must be managed, characterized, and properly disposed of in accordance with NYSDEC regulations, directives, and the Site Management Plan.

(iii) use of groundwater underlying the Controlled Property is prohibited without treatment rendering it safe for drinking water or industrial purposes, as appropriate, provided the user first obtains permission to do so from the regulatory Agency

(iv) use of the Controlled Property for day care, child care, or medical care is prohibited without the express written waiver of the prohibition by the regulatory Agency

B. The Controlled Property may not be used for a higher level of use such as unrestricted/ 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:

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

2. 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;

3. The right to mortgage, lease, grant easements, licenses and other interests in the Controlled Property provided that same are subject to the terms of 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.

9505 MAIN ST. LLC

By: 
Robert J. Castle

Title: Manager

Date: June 26, 2006

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

SCHEDULE A

ALL THAT PIECE OR PARCEL OF PROPERTY situate in Lot No. 18 in the Ogden Gore Tract and in Township No. 10, Range 8, City of Buffalo, County of Erie and State of New York bounded and described as follows:

BEGINNING at a point on the easterly boundary of existing Commerce Street, 60.00 feet wide, as delineated on Parcel No. 360 of Map No. 327 and acquired by The People of The State of New York for the former construction of Furhrmann Boulevard - Hamburg Turnpike by Liber 10082 of Deeds at page 121, at its intersection with the southerly boundary of the City of Buffalo and the northerly boundary of the City of Lackawanna; thence northerly along the said easterly boundary of existing Commerce Street as delineated on said Parcel No. 360 and forming an interior angle of $107^{\circ} 10' 09''$, a distance of 298.86 feet to a point on the southeasterly boundary of Ship Canal Parkway; thence northeasterly along the last mentioned boundary of Ship Canal Parkway and forming an interior angle of $136^{\circ} 57' 30''$, a distance of 58.01 feet to a point on the southerly boundary of Ship Canal Parkway, 66.00 feet wide; thence along the last mentioned boundary Ship Canal Parkway the following 6 courses and distances (1) easterly and forming an interior angle of $136^{\circ} 57' 30''$, a distance of 588.56 feet to a point on a southwesterly boundary of Ship Canal Parkway; thence (2) southeasterly along the last mentioned boundary of Ship Canal Parkway and forming an interior angle of $135^{\circ} 00' 00''$, a distance of 43.04 feet to a point on a westerly boundary of Ship Canal Parkway, 71.00 feet wide; thence (3) southerly along the last mentioned boundary of Ship Canal Parkway, a distance of 118.07 feet to a point on a southwesterly boundary of Ship Canal Parkway; thence (4) southeasterly along the last mentioned boundary of Ship Canal Parkway and forming an interior angle of $225^{\circ} 00' 00''$, a distance of 7.07 feet to a point; thence (5) southerly and southeasterly on a curve to the left, having a radius of 233.00 feet, an arc distance of 366.00 feet to a point of tangency on a southerly boundary of Ship Canal Parkway, 66.00 feet wide; thence (6) easterly and along the last mentioned boundary of Ship Canal Parkway, a distance of 346.02 feet to a point on the southwesterly boundary of Hanna Drive; thence southeasterly along the last mentioned boundary of Hanna Drive and forming an interior angle of $135^{\circ} 00' 00''$, a distance of 50.11 feet to a point on the westerly boundary of Hanna Drive, 66.00 feet wide; thence southerly along the last mentioned boundary of Hanna Drive and forming an interior angle of $135^{\circ} 00' 00''$, a distance of 417.57 feet to a point on the said southerly boundary of the City of Buffalo and the said northerly boundary of the City of Lackawanna; thence westerly along the said southerly boundary of the City of Buffalo and the said northerly boundary of the City of Lackawanna and forming an interior angle of $68^{\circ} 54' 51''$, a distance of 1,394.64 feet to the point of beginning.

klc