



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

December 10, 2008

Bishop's Creek Community Development Corporation
c/o Attorney George J. Marek
Quarles & Brady, LLP
411 East Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202

File
FID 341055770
OBCTS 02-41-306192

Subject: Lease Liability Clarification Letter as to Environmental Liability for Bishop's Creek Family Housing, LLC, when leasing property from Bishop's Creek Community Development Corporation

Dear Mr. Marek:

The purpose of this letter is to provide Bishop's Creek Family Housing, LLC ("Family Housing") with clarifications as to the environmental liabilities associated with leasing property from Bishop's Creek Community Development Corporation ("CDC"). The Wisconsin Department of Natural Resources ("Department") has completed its review of the request for a lease liability clarification letter submitted by you, on behalf of the parties to the lease. The property to be leased is located at 4763 N. 32nd Street, Milwaukee, and is referred to hereafter as "the Property." A Certified Survey Map (CSM) of the Property is attached to this letter as "Exhibit A" and includes a Legal Description of the Property. The Property is Lot 1 of CSM No. 8099, located in the City of Milwaukee, comprised of 0.768 acres, and adjacent to Lots 2 and 3 of CSM No. 8099. Family Housing will lease Lot 1 from CDC and use it to construct a surface parking lot for a fifty-five unit multi-family housing development that Family Housing plans to build, own and operate on Lot 2 of CSM No. 8099, which is comprised of 0.797 acres. Family Housing owns Lot 2, having purchased it from CDC. Lot 3 of CSM No. 8099, comprised of 2.618 acres, is owned by CDC, and is planned for development for commercial and other uses.

You have requested that the Department determine whether Family Housing would be held responsible under the Hazardous Substance Spills Law, s. 292.11, Wis. Stats., for a hazardous substance that was discharged on the Property prior to Family Housing's lease agreement with CDC. You provided me with an updated version of the lease agreement ("Ground Lease") by e-mail on November 26, 2008. You stated that the Ground Lease was not yet final, but that you believed there would be no material changes from the draft you provided to me and the final version. In addition, Michael Simpson, who represents Family Housing, has requested the Department to determine the potential liability of Family Housing's construction lender and permanent lender if Family Housing is unable to continue as Tenant, and if the lender is required to take over the Tenant's responsibilities under the Ground Lease.

Determination

As you are aware, s. 292.55(1)(d)1., Wis. Stats., authorizes the Department to issue a letter to a person seeking assistance concerning the liability of a person owning or leasing a property for environmental pollution of the property. The Department has reviewed the following documents in order to make this determination:

1. Lease letter request application—submitted to me on October 7, 2008.
2. Ground Lease, submitted with application for lease letter.
3. Bishop's Creek Certified Survey Map, submitted with application for lease letter.
4. Letter to the Department from Michael Simpson, requesting that the lease letter also address the potential liability of Family Housing's lenders if they became Tenants under the Ground Lease—dated October 24, 2008.
5. Revised Ground Lease, submitted to me on November 26, 2008.
6. Phase I Environmental Site Assessment Report, contained in Department files and reviewed by John J. Hnat, Southeast Region project manager.
7. Phase II Environmental Site Assessment Report, contained in Department files and reviewed by John J. Hnat, Southeast Region project manager.
8. Additional reports and information in Department files, reviewed by John J. Hnat, Southeast Region project manager.

In your application for the lease letter, you stated that Family Housing has never owned Lot 1 and "has not caused and is not in any way responsible for existing contamination at Lot 1." You also stated that Family Housing "is not in any way affiliated with the owner of Lot 1" (CDC). The determinations made by the Department in this letter assume that these statements are true. If the statements are not true, the determinations in this letter may need to be revised.

The Ground Lease (Lease) between CDC (Landlord) and Family Housing (Tenant) sets out the responsibilities of CDC and Family Housing for environmental issues at the Property. As noted, the copy of the Lease provided to the Department is unsigned but is expected to be substantially the same as the final, signed version of the Lease. The determinations made by the Department in this letter assume that there will be no material changes made to the version of the Lease submitted to me on November 26, 2008. If a different version of the Lease is signed by the parties, the Department's determinations may need to be modified depending on the terms of the final Lease. Section 16 of the Lease concerns the environmental condition of the leased property (the Property). Section 16 generally provides that Landlord (CDC) is responsible to remediate the environmental conditions existing on the Property before the effective date of the Lease, including a Remediation Plan to be approved by the Department. Section 16.2 of the Lease provides that Landlord (CDC) shall be responsible for any environmental condition arising on the Property on or after the effective date of the Lease, even if arising from contamination existing on the Tenant's property prior to the effective date and migrating onto the Property. The Lease also states that Landlord and Tenant each indemnify the other from any claims relating to investigation or remediation of hazardous substances required at the Property.

While the Lease will bind the parties to these agreements, please be advised that it does not limit the Department's ability to pursue either the Landlord or Tenant as a party responsible to clean up contamination at the Property. Under s. 292.11(3), the Department can require a person who possesses or controls a hazardous substance discharge or a person who causes a hazardous substance discharge to restore the environment to the extent practicable and minimize the harmful effects from the discharge. Under certain circumstances, either the Landlord or Tenant, or both, could be interpreted to be "in possession or control" of a hazardous substance discharge at the Property. The terms of the Lease are generally consistent with the Department's enforcement policy. This policy is to first pursue the party who caused the discharge. If that person is unable or unwilling to conduct the cleanup, the Department would reserve its ability to pursue other responsible parties, such as those in possession or control of the hazardous substance discharge. Of course, that party could then bring a lawsuit against the other party to enforce the indemnification language in the Lease. Please be aware that the provision of the Lease that requires the Landlord to remediate contamination at the Property, even if it has migrated from the Tenant's property, is different from the usual enforcement policy of the Department, which is to pursue the owner of the property on which the source of the contamination exists.

Based on its review and subject to the preceding statements, the Department determines that Family Housing as a Tenant under the Lease, does not “possess or control,” as those terms are used in s. 292.11(3), Wis. Stats., any hazardous substance discharges that were present on the Property prior to the lease agreement, conditioned on compliance with the following standards of performance:

- Family Housing agrees to provide any responsible party, their consultants and Department personnel with reasonable access to the Property for the purposes of conducting any necessary environmental assessment or remediation activities.
- Family Housing agrees to comply with all applicable state and federal laws that apply to the excavation and disposal of contaminated soils or other materials.
- Family Housing agrees to minimize, as applicable and to the extent practicable, the placement of any structures in areas of the property impacted by environmental contamination or construct buildings or structures in such a manner as to allow remedial work to be conducted or after remedial work is concluded.
- Family Housing agrees to comply with the requirements of s. 292.11, Wis. Stats., and the NR 700 rule series, Wisconsin Administrative Code, for the discharge of any hazardous substances that may be caused by Family Housing as the lessee.

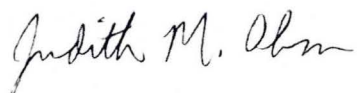
Under these conditions, the Department agrees not to hold Family Housing in its capacity as a Tenant under the Lease, responsible for investigating or remediating any hazardous substances on the Property that were existing or occurred, or migrated from or onto the Property, prior to the date of the lease agreement, unless one of the aforementioned conditions is not satisfied.

As noted, Michael Simpson, on behalf of the Tenant, has also asked the Department to determine whether the construction lender (Wells Fargo Bank, National Association) or the permanent lender (Enterprise TEAM, Inc.) would incur any liability if one of them took over as Tenant under the Ground Lease. Subject to the statements made in this letter about Family Housing’s status as Tenant (e.g., not responsible for contamination at Lot 1 and not affiliated in any way with CDC) and under the same conditions as those outlined for Family Housing as Tenant, the Department agrees not to hold Wells Fargo Bank or Enterprise TEAM as a Tenant responsible for investigating or remediating any hazardous substances on the Property that were existing or occurred, or migrated from or onto the Property, prior to the date of the lease agreement. The lenders may also be interested to know that they are generally exempt from liability for lending activities, under s. 292.21, Wis. Stats.

The Department believes that a memorandum of understanding entered into by the State of Wisconsin and the Federal Environmental Protection Agency (“EPA”) provides clarification to companies like yours that EPA is not interested in pursuing cleanup of properties where person(s) are working cooperatively with the Department.

If you have any questions concerning this letter or other related matters, please contact me at 608-266-9972.

Sincerely,



Judith M. Ohm
Attorney
Legal Services

Attachment

cc: John J. Hnat--SER

Michael Prager – RR/5

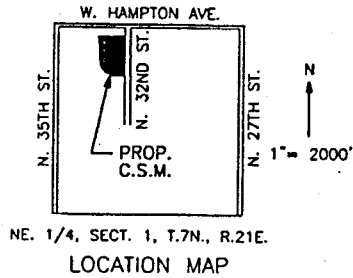
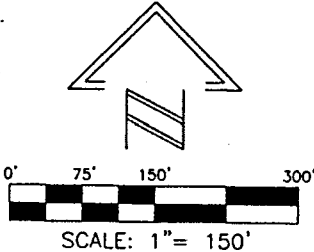
Michael H. Simpson
Reinhart Boerner Van Deuren s.c.
Attorney for Family Housing

Exhibit A
(p. 1)

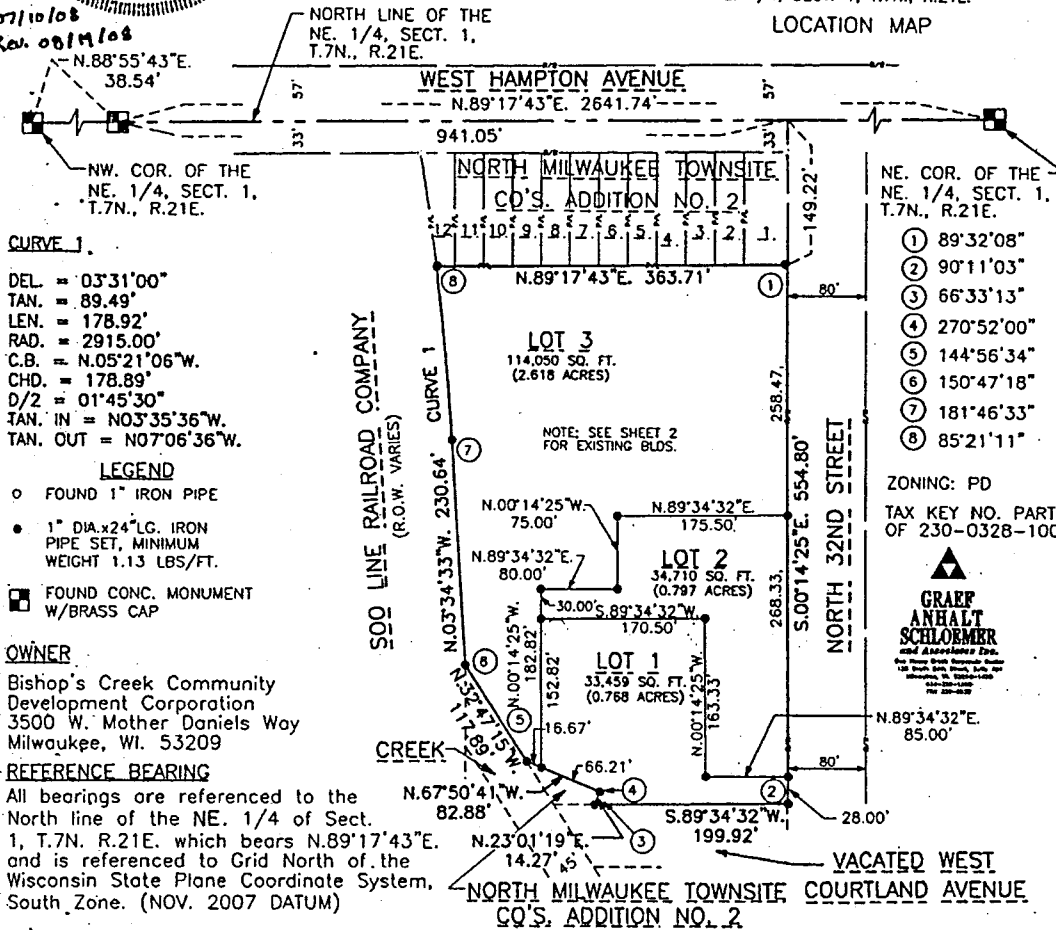
DD#2698

CERTIFIED SURVEY MAP NO. 8099

A division of part of Lot B of Block 21 of North Milwaukee Townsite Company's Addition No. 2, in the Northwest 1/4 of the Northeast 1/4, Section 1, Township 7 North, Range 21 East, in the City of Milwaukee, Milwaukee County, Wisconsin.



07/10/08
Rev. 08/11/08



CURVE 1
DEL. = 03°31'00"
TAN. = 89.49'
LEN. = 178.92'
RAD. = 2915.00'
C.B. = N.05°21'06"W.
CHD. = 178.89'
D/2 = 01°45'30"
TAN. IN = N03°35'36"W.
TAN. OUT = N07°06'36"W.

LEGEND
○ FOUND 1" IRON PIPE
● 1" DIA. x 24" LG. IRON PIPE SET, MINIMUM WEIGHT 1.13 LBS/FT.
■ FOUND CONC. MONUMENT W/BRASS CAP

OWNER
Bishop's Creek Community Development Corporation
3500 W. Mother Daniels Way
Milwaukee, WI. 53209

REFERENCE BEARING
All bearings are referenced to the North line of the NE 1/4 of Sect. 1, T.7N. R.21E. which bears N.89°17'43"E. and is referenced to Grid North of the Wisconsin State Plane Coordinate System, South Zone. (NOV. 2007 DATUM)

- NE. COR. OF THE NE 1/4, SECT. 1, T.7N., R.21E.
- ① 89°32'08"
 - ② 90°11'03"
 - ③ 66°33'13"
 - ④ 270°52'00"
 - ⑤ 144°56'34"
 - ⑥ 150°47'18"
 - ⑦ 181°46'33"
 - ⑧ 85°21'11"

ZONING: PD
TAX KEY NO. PART OF 230-0328-100
GRAEF ANHALT SCHLOEMER
and Associates, Inc.
10000 W. Wisconsin Ave., Suite 100
Milwaukee, WI 53224
(414) 441-1100

DEPARTMENT OF CITY DEVELOPMENT
CITY OF MILWAUKEE
JUL 25 2008
STAFF APPROVED

INFRASTRUCTURE SERVICES DIVISION
Marcia Lindholm 9/24/08
CENTRAL DRAFTING & RECORDS MANAGER
Timothy J. Thur 9/24/08
ENGR. IN CHARGE ENVIRON. ENGR.
CORRECT
Jeffrey Palmatier 9/24/08
CITY ENGINEER APPROVED

THIS INSTRUMENT WAS DRAFTED BY: MICHAEL J. RATZBURG JOB NO. 20080008 SHEET 1 OF 5

Exhibit A
(p. 3)

DUD#2698

CERTIFIED SURVEY MAP NO. 8099

A division of part of Lot B of Block 21 of North Milwaukee Townsite Company's Addition No. 2, in the Northwest 1/4 of the Northeast 1/4, Section 1, Township 7 North, Range 21 East, in the City of Milwaukee, Milwaukee County, Wisconsin.

SURVEYOR'S CERTIFICATE

STATE OF WISCONSIN)
MILWAUKEE COUNTY) SS

I, Michael J. Ratzburg, a registered land surveyor, do hereby certify:

That I have surveyed and mapped a division of part of Lot B of Block 21 of North Milwaukee Townsite Company's Addition No. 2, in the Northwest 1/4 of the Northeast 1/4, Section 1, Township 7 North, Range 21 East, in the City of Milwaukee, Milwaukee County, Wisconsin, more particularly described as follows:

Commencing at the northwest corner of said Northeast 1/4; thence North 88°55'43" East, on and along the north line of said Northeast 1/4, 38.54 feet; thence North 89°17' 43" East, on and along said north line, 941.05 feet; thence South 00°14'25" East, 149.22 feet to the northeast corner of said Lot B and the point of beginning; thence continuing South 00°14'25" East, on and along said east line of said Lot B, 554.80 feet; thence South 89°34'32" West, on and along the south line of said Lot B, 199.92 feet; thence North 23°01'19" East, 14.27 feet; thence North 67°50'41" West, 82.88 feet; thence North 32°47'15" West, on and along the west line of said Lot B, 117.89 feet; thence North 03°34' 33" West, on and along the west line of said Lot B, 230.64 feet to the beginning of a curve to the left, having a radius of 2,915.00 feet and a long chord of North 05°21'06" West, 178.89 feet; thence northwesterly, on and along the arc of said curve and said west line of said Lot B, 178.92 feet to a point on the north line of said Lot B; thence North 89°17'43" East, on and along said north line, 363.71 feet to the point of beginning.

Containing 182,219 square feet (4.183 acres), more or less.

That I have made such survey, land division, and map by the direction of the Bishop's Creek Community Development Corporation, owner of said land. That such map is a correct representation of all the exterior boundaries of the land surveyed and the land division thereof made.

That I have fully complied with Chapter 236 of the Wisconsin Statutes and Chapter 119 of the Milwaukee Code of Ordinances in surveying, dividing and mapping the same.



Michael J. Ratzburg
Michael J. Ratzburg, S-2236
Registered Wisconsin Land Surveyor

Date: 07/10/08
Rev. 02/19/08

CORPORATE OWNER'S CERTIFICATE

Bishop's Creek Community Development Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, as owner, certify that said corporation caused the land described on this map to be surveyed, divided, mapped and dedicated as represented on this map in accordance with the requirements of Chapter 119 of the Milwaukee Code of Ordinances.

In consideration of the approval of the map by the Common Council and in accordance with Chapter 119 of the Milwaukee Code, the undersigned agrees:

- a. That all utility lines to provide electric power and telephone services and cable television or communications systems lines or cables to all lots in the certified survey map shall be installed underground in easements provided therefore, where feasible.

Exhibit A
(p. 5)

DOC# 2618

part of **CERTIFIED SURVEY MAP NO. 8099**

A division of Lot B of Block 21 of North Milwaukee Townsite Company's Addition No. 2, in the Northwest 1/4 of the Northeast 1/4, Section 1, Township 7 North, Range 21 East, in the City of Milwaukee, Milwaukee County, Wisconsin.

STATE OF WISCONSIN

MILWAUKEE COUNTY

)
) SS
)

Personally came before me this 11th day of July, 2008, Ellen Higgins, Vice President of the above named corporation, to me known as the person who executed the foregoing instrument, and to me known to be the Vice President and _____ of the corporation, and acknowledged that they executed the foregoing instrument as such officers as the deed of the corporation, by its authority.


NOTARY PUBLIC, STATE OF WISCONSIN

My Commission Expires 12/31/2011

CERTIFICATE OF THE CITY TREASURER

STATE OF WISCONSIN

MILWAUKEE COUNTY

)
) SS
)

I, Wayne F. Whittow, being the duly elected, qualified and acting City Treasurer of the City of Milwaukee, certify that in accordance with the records in the office of the City Treasurer of the City of Milwaukee there are no unpaid taxes or unpaid special assessments on the land included in this certified survey map.

Sept. 24, 2008
Date

Wayne F. Whittow
Wayne F. Whittow, City Treasurer

COMMON COUNCIL CERTIFICATE OF APPROVAL

I certify that this Certified Survey Map was approved under Resolution File No. 080821 adopted by the Common Council of the City of Milwaukee on October 7, 2008.

Richard B. Leonard
Richard B. Leonard, City Clerk
Tom Barrett
Tom Barrett, Mayor

DOC.# 09662359

REGISTER'S OFFICE | SS
Milwaukee County, WI

RECORDED 10/21/2008 01:41PM

JOHN LA FAVE
REGISTER OF DEEDS
AMOUNT: 19.00
FEE EXEMPT 77.25 #: 0

