

April 4, 2017

Melissa L. Karls  
Oak Creek City Attorney  
7300 S. 13<sup>th</sup> Street, Suite 104  
Oak Creek, WI 53154

**Subject:** Applicability of the Wisconsin Local Government Unit Liability Exemption at the Properties, which is made up of three individual properties: 610 W. Rawson, Ave., 7001 S. 6<sup>th</sup> St., and 7045 S. 6<sup>th</sup> St., Oak Creek, WI.  
DNR BRRTS Case Numbers: 04-41-039309, 04-41-052705, 02-41-107191, 03-41-001132, 02-41-246568, 07-41-528856, and 07-41-579077  
City or County Parcel Number: 7359990, 7349001002 and 7349019001

Dear Ms. Karls:

On March 7, 2017, the Department of Natural Resources (“department”) received a request for a general liability clarification letter from you (dated March 1, 2017), on behalf of the City of Oak Creek (“City”), for three properties located at 610 W. Rawson, Ave., 7001 S. 6<sup>th</sup> St. and 7045 S. 6<sup>th</sup> St., Oak Creek, WI (collectively “the Properties”). A map of the Properties is included with this letter as Attachment A.

This letter provides an explanation of the local governmental unit (“LGU”) liability exemption authorized by Wis. Stat. § 292.11(9)(e), the department’s determination about the applicability of the LGU liability exemption at the Properties, and a reminder of the City’s responsibilities associated with any elective demolition, cleanup or redevelopment activities undertaken at the Properties.

### **Documents Submitted and Reviewed**

To assist in making a determination about the applicability of the LGU liability exemption for the Properties, the department requested documentation demonstrating compliance with the relevant statute. The department received, and has reviewed, the following documents provided by the City:

- *DNR Form 4400-237, Technical Assistance, Environmental Liability Clarification or Post-Closure Modification Request, and attachments, from the City of Oak Creek. Signed by Melissa L. Karls, City Attorney, on March 1, 2017.*
- *Attachments to Form 4400-237 include: a) a two-page memo providing Properties information, the reason for the request for liability clarification, and more; b) Legal descriptions of the properties/parcels involved in the request; and c) a map of the Properties (see Attachment A).*
- *Memorandum of Understanding between the City of Oak Creek and HSA, related to the Properties, signed and dated February 8, 2017, by the Mayor of Oak Creek.*

### **Information about the Properties and Environmental Activity Summary**

According to the documents you provided, Bioversal USA, Inc., an Illinois corporation, is the owner of record for the Properties. Moshen Amiran, 308 S. Mount Prospect Rd., Des Plaines, IL, is the primary individual associated with the Properties. This ownership interest in the Properties is being foreclosed on by CO Acquisition Properties

XXII, LLC for failure to pay the mortgage. The Properties is currently the subject of a mortgage foreclosure proceeding in Milwaukee County Circuit Court, Case No. 16-CV-3339.

Per your request documents, and the department's review of the site files, two of the three parcels that make up the Properties have a history of contamination. Department records identify two historical spills at 610 W. Rawson Ave., on August 17, 1983 and June 27, 1984. The now dissolved Wisconsin Industrial Fuel Oils, Inc., owned the Properties at the time of these spill reports. In addition, an historical leaking underground storage tank discharge was reported in 1990, and that case was closed in July 1996. Another petroleum discharge was reported in July 1995, and that cleanup case is still open today.

### **Method and Purpose of Properties Acquisition**

According to the documents you provided, HSA Commercial Real Estate and/or Assigns ("HSA") has an agreement with the current owner of the Properties and its lender to acquire the Properties for purpose of redevelopment. HSA has obtained permission from Bioversal and its lender to access the Properties as part of HSA's effort to perform due diligence activities related to future redevelopment of the Properties.

The City and HSA are working together to apply for a Wisconsin Economic Development Corporation ("WEDC") site assessment grant ("SAG") to further assess and investigate the nature and extent of environmental contamination at the Properties. The City would like to have a liability clarification response from the department prior to submitting a SAG application.

The City has not acquired, nor does it intend to acquire the Properties. The City expects the prospective developer to obtain ownership of the Properties after completing its due diligence. Thus, the City does not plan to be in "possession" of the Properties, as that term is used in Wis. Stats. § 292.11.

### **Statutory Liability Determinations**

The information you submitted says: "The City of Oak Creek has entered into a Memorandum of Understanding (MOU) with HSA Commercial Real Estate and/or Assigns ("HSA") in order to coordinate an application to the Wisconsin Economic Development Corporation ("WEDC") for a Brownfield Site Assessment Grant ("SAG") on the subject Properties..." "The City is seeking to obtain a Department of Natural Resources liability clarification letter to confirm that the site assessment and investigation work contemplated by the MOU will not establish liability for the City under State of Wisconsin cleanup laws."

The department provides the following statutory responsibility clarifications and assurances to the City in response to your specific request, and additional information regarding the intended reuse plans at the Properties:

1. The City meets the definition of a "local government unit" (LGU) in Wis. Stat. § 292.11(9)(e)(1), and therefore the City is eligible for the LGU environmental responsibility exemption described and authorized in Wis. Stat. § 292.11(9)(e), were the City to acquire the Properties using a method, or for a purpose, listed in Wis. Stat. § 292.11(9)(e)(1m).
2. The City does not intend to take title to the Properties, according to information provided to the department, and, therefore, the statutory LGU liability exemption discussed in this letter does not apply at the Properties.
3. Wis. Stat. § 292.11(3) states, "A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state." The word "person" is defined in Wis. Stat. § 292.01(13) to mean,

“an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.”

4. If the City has not, and does not, cause a discharge of a hazardous substance at the Properties, then the City is not responsible under Wis. Stat. § 292.11(3) as “a person... who causes the discharge of a hazardous substance.” The department is not currently aware of any discharges at the Properties that were caused by the City.
5. At this time, the City does not possess or control the Properties, nor does it intend to do so, therefore the City is not responsible under Wis. Stat. § 292.11(3) as “a person who possesses or controls a hazardous substance which is discharged.”
6. The department will not consider the City to be in possession or control of the Properties if the City has permission to access the Properties and hires an environmental consultant to perform Properties assessment and investigation work on the Properties.
7. Wis. Stat. 292.19, titled “Responsibility of persons conducting investigations,” states: (1) “For purposes of this chapter, a person who conducts an investigation of Properties to determine the existence of, or to obtain information about, a discharge of a hazardous substance does not possess or control the hazardous substance or cause the discharge of the hazardous substance as the result of conducting the investigation. (2) If the person who conducts the investigation physically causes a discharge, sub. (1) does not apply with respect to the portion of the Properties on which the person causes the discharge.
8. If a hazardous substance discharge is caused on the Properties by a consultant hired by the City, during the performance of standard environmental assessment or investigation activities, the department will not consider the City a “causer” under Wis. Stat. § 292.11(3), unless the City was actively directing the consultant to perform an action that resulted in a discharge of a hazardous substance.
9. The department’s determinations, stated above, apply only in reference to Wis. Stat. § 292.11. Real estate transactions and due diligence activities are also potentially subject to other state and federal statutes, along with common law and contract law, related to environmental liability. The department makes no determinations or representations in this letter with respect to anything beyond the department’s interpretation of Wis. Stat. 292.11(3).

### **Reporting Hazardous Substance Discharges to the Department is Required**

If the City obtains a SAG grant from WEDC and subsequently hires an environmental consultant to assess and investigate the Properties, the reports prepared by the consultant are a public record and the department encourages the City to provide a copy to the department. If the consultant identifies any hazardous substance discharges or environmental pollution exceeding state standards, Wis. Stats. § 292.11(2) states that the owners of the Properties should notify the department “immediately.” The department interprets “immediately” to mean as soon as visual, olfactory, lab results or other evidence identifies a discharge. The department recommends notification of discharges before the final reports are prepared whenever evidence of a discharge exists. See department publication RR-560, at <http://dnr.wi.gov/files/PDF/pubs/rr/RR560.pdf> for additional information about spill and discharge reporting.

### **Future Use of the Properties**

The City and developer should discuss proposed Properties uses and improvements with the department before proceeding with development preparation work. Any continuing obligations associated with closed environmental cases at the Properties must also be complied with.

## **Demolition Requirements**

Before beginning any demolition project at the Properties, a pre-demolition inspection is required, along with the completion and filing of department form 4500-113, Notification for Demolition. See department publication WA-651, at <http://dnr.wi.gov/files/pdf/pubs/wa/wa651.pdf> for additional information about demolition activities. Storm water management permits may also be necessary for demolition and construction activities.

## **Soil Management Requirements**

All current and future owners and occupants of the Properties need to be aware that excavation of contaminant-impacted soil may pose an inhalation or other direct contact hazard and, as a result, special precautions may need to be taken to prevent a direct contact health threat to humans before, during and after excavation. The Properties owner at the time of excavation must determine whether the excavated material is considered a solid or hazardous waste and ensure that any storage, treatment or disposal is in compliance with applicable laws.

## **Federal Liability Protections**

In addition to state liability protections, an LGU is eligible for federal CERCLA liability protections in certain situations. In general, CERCLA provides liability protection to local governments that acquire Properties as a function of their governmental powers. This is called the Involuntary Acquisitions Exemption, and includes obtaining Properties through bankruptcy, tax delinquency, abandonment, and other circumstances in which the local government involuntarily acquires title by virtue of its function as a sovereign. More information is available on the US EPA web site at: <http://www.epa.gov/enforcement/state-and-local-government-activities-and-liability-protections>.

In situations involving the purchase of a Properties, an LGU can obtain CERCLA liability protections if it qualifies as a “bona fide prospective purchaser.” One key requirement for this protection is the completion of a Phase I environmental site assessment (ESA) that meets the “all appropriate inquiries” (AAI) standards under 40 CFR, Part 312. This federal standard also requires that a Phase I ESA be completed within 180 days prior to acquisition of title to a Properties. ESA’s following the American Society for Testing and Materials (“ASTM”) Standard E1527-13, meet EPA’s AAI standards.

For more information, a US EPA fact sheet, titled “CERCLA Liability and Local Government Acquisitions and Other Activities,” is available at <http://www.epa.gov/sites/production/files/documents/local-gov-liab-acq-fs-rev.pdf>.

## **Underground Storage Tanks**

Please note that the LGU exemption does not exempt underground storage tanks on Properties from compliance with federal and state requirements, including Wis. Admin. Ch. ATCP 93. If you have questions about tank requirements, contact the Wisconsin Department of Agriculture, Trade and Consumer Protection (the Bureau of Weights and Measures) directly. Wis. Admin. Ch. ATCP 93 is available at [https://docs.legis.wisconsin.gov/code/admin\\_code/atcp/090/93](https://docs.legis.wisconsin.gov/code/admin_code/atcp/090/93); department publication RR-627, title Removing Underground Storage Tanks, is at <http://dnr.wi.gov/files/PDF/pubs/rr/RR627.pdf>

## **This Letter is Based on Information Provided to the Department**

This state statutory liability determinations in this letter are based on the information provided to the department. If new or more extensive contamination is discovered at the Properties, the City should immediately notify the department in accordance with Wis. Stat. § 292.11(2).

Information on all contaminated site activities in Wisconsin is tracked in a department database that is available on the internet at <http://dnr.wi.gov/botw/SetUpBasicSearchForm.do>. The Bureau for Remediation and Redevelopment Tracking System (“BRRTS”) identification numbers for the Properties can be found at the top of this letter.

### **Department Contact Information**

The department hopes this letter provides the City with the requested clarification concerning the LGU liability exemption for the Properties. The department looks forward to working with the City on this project and others.

If you have any questions, please contact the department Project Manager for the Properties, Eric Amadi, at (414) 263-8639 or [Eric.Amadi@wisconsin.gov](mailto:Eric.Amadi@wisconsin.gov), or the land recycling specialist for Southeast Region, Margaret Brunette, at (414) 263-8557 or [Margaret.Brunette@wisconsin.gov](mailto:Margaret.Brunette@wisconsin.gov).

For questions specific to the LGU exemption, and other local government cleanup tools, contact Barry Ashenfelter at 608-267-3120 or [Barry.Ashenfelter@wisconsin.gov](mailto:Barry.Ashenfelter@wisconsin.gov).

Sincerely,



Michele R. Norman  
Team Supervisor, Southeast Region  
Remediation & Redevelopment Program

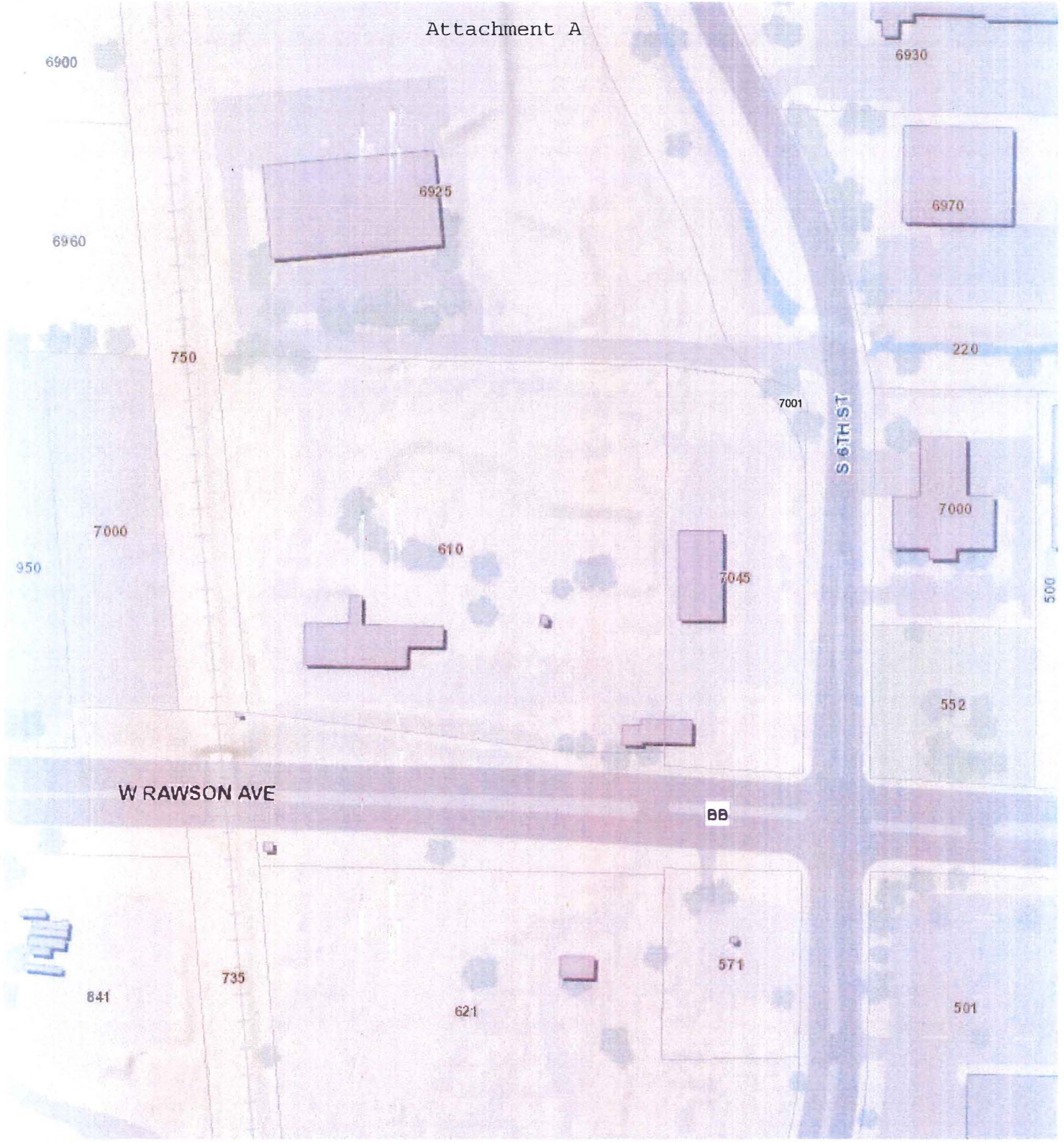
Attachments: Site Map - Attachment A

Copy: Margaret Brunette, DNR, RR SER  
Barry Ashenfelter, DNR, RR CO



# MILWAUKEE COUNTY INTERACTIVE MAPPING SERVICE

Attachment A



Projection  
 NAD\_1927\_StatePlane\_Wisconsin\_South\_FIPS\_4803

Notes

**DISCLAIMER:** This map is a user generated static output from the Milwaukee County Land Information Office Interactive Mapping Service website. The contents herein are for reference purposes only and may not be accurate, current or otherwise reliable. No liability is assumed for the data delineated herein either expressed or implied by Milwaukee County or its employees.

