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VIA EMAIL AND U.S. FIRST-CLASS MAIL

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Re: Redevelopment of Town of Chapel Hill Police Dept. Property, 828 Martin Luther King Jr. Blvd.

Dear Nick and Megan:

This firm is environmental legal counsel to the Town of Chapel Hill (the "Town") regarding the above-referenced property (the "Property"). We write to respond to your letter dated June 2, 2021, on behalf of the Town. This letter is organized by several general topics below.

Before addressing the subject matter of your letter, by way of background, we were first retained to provide legal counsel to the Town regarding conditions on the Property in 2013 when the presence of fill containing coal combustion residuals (a/k/a CCRs or coal ash) was first identified. We routinely provide legal counsel to parties regarding environmental liabilities and corrective actions, and the redevelopment of property where soils or groundwater have been impacted by historical releases of oil or other hazardous substances, or where fill materials are present. Consequently, we are very familiar with the applicable Inactive Hazardous Sites and Brownfields programs administered by the North Carolina Department of Environmental Quality ("DEQ") that are referenced below. We have represented a number of municipalities with brownfields, redevelopment projects like this one.

Representation and Source Issues

As an initial matter, your letter raises several threshold questions that we hope you will be willing to clear up, not just for Town leaders and staff, but also for the benefit of members of the public interested in conditions on the Property, and its future uses. First, it is customary that an attorney will identify who their client is in a letter like yours. Is the Southern Environmental

Law Center ("SELC") representing one or more clients in its various communications with Town leaders and staff about the Property, and if so, are you willing to let us know who those clients are? Or, is the SELC, in sending this most recent letter and other communications, representing itself? The fact that the SELC has made multiple requests for information, provided advice to Town leaders and staff on this and other occasions, and commented before Town council on several occasions regarding the Property, makes it all the more useful to know who the SELC is representing in doing so. Thus, as an initial matter if you could clear this up for us, it would be greatly appreciated.

Secondly, in your letter, you address a wide variety of scientific and technical subjects that are outside the scope of expertise of most if not all environmental attorneys, myself included. The same is true regarding questions you have previously posed in writing to Town staff. Those include the conduct of environmental risk assessments, geotechnical site conditions, and the suitability of certain remedial options (*e.g.*, installation of retaining walls). Obviously you are getting input from one or more persons or firms on those subjects, who hopefully have the requisite education, knowledge and licenses to address those subjects. Are you willing to let us know who are the sources of the comments and opinions on scientific and technical subjects stated in your letter? And would you be willing to share with us the CV's for those persons? If so, that would also be greatly appreciated.

Risk Assessment, Reuse of the Property and Related Matters[1]

Next, we address below the portion of your letter regarding: (i) risk assessments, (ii) risk-based cleanup standards, and (iii) the process of obtaining approval of a remedial action plan from DEQ, whether that occurs via a Brownfields Agreement or through other environmental programs administered by DEQ. Our intention here is to try to clear up any confusion your letter may have caused the interested public regarding these subjects, and how they apply to this Property and its future uses.

The Inactive Hazardous Sites Program

First, the Property is listed in an inventory of inactive hazardous sites maintained by the Inactive Hazardous Sites Branch in DEQ, under the N.C. Inactive Hazardous Sites Act. The Inactive Hazardous Sites Branch oversees and approves assessment and remediation of such sites, per that law. As you know, under that law, any person who discharged or deposited a hazardous substance and other responsible parties are liable for assessment and remediation, pursuant to standards promulgated by DEQ (and by extension the federal Environmental Protection Agency or "EPA"). N.C. Gen. Stat. § 130A-310.7.

[1] Steve Hart at Hart & Hickman assisted with this portion of this letter, given the scientific and technical aspects of the subject matter.

One point that appears to get lost in the public discussion regarding the Property and its history is the Town is not a responsible party under the N.C. Inactive Hazardous Sites Act for any past discharge of any hazardous substance on or near the Property. The same is true of any private party that may be involved in redeveloping the Property or who owns any portion of it in the future. The act of using fill on the Property, which included coal combustion residuals ("CCRs"), occurred long before the Town bought the Property. The Town of course has an interest in ensuring the Property does not pose any unacceptable risk to human health and the environment, now and in the future. It is for that reason that the Town has voluntarily allocated considerable financial resources to the study of conditions on the Property and to interim remedial measures, which you acknowledge the Town has undertaken. However, the Town is not legally responsible for the assessment and remediation of the Property.

It also deserves note that, while the Property is listed as an inactive hazardous site in DEQ's above-referenced inventory, it is inconsistent with applicable law for anyone to refer to it as a former "waste dump," as you repeatedly do in your letter. As you must know from the SELC's interest in coal ash, the act of placing fill containing CCRs on the Property by law is not considered to have been an act of disposing of a waste. Rather, it was a beneficial use of CCRs. In fact, that practice would not be treated as an act of disposing of a waste in most instances under current law. In referring to another site in your letter, you refer to "coal ash structural fill." That is the appropriate term to use for this Property as well, not a "waste dump." We ask that you stop using terms for this Property that are inconsistent with the terms used under current law for sites containing coal ash structural fill.

The Brownfields Program

It is contemplated the redevelopment of this Property may take place pursuant to the State Brownfields Program, administered by the Brownfields Program section at DEQ, pursuant to the N.C. Brownfields Property Reuse Act of 1997. The purpose of that law is to encourage redevelopment of environmentally-impaired properties, in a manner that does not pose an unacceptable risk to public health or the environment. On October 1, 2019, DEQ's Brownfields Program Manager issued a letter to the Town indicating the Property is provisionally eligible for the Brownfields Program.[2] Regardless of whether any redevelopment of the Property is done under the Brownfields Program or not, it would have to be done in a manner that does not pose an unacceptable risk to human health and the environment.

[2] The fact that that letter was issued to the Town verifies it is not a responsible party for the conditions on the Property under the Inactive Hazardous Sites program mentioned above. DEQ by law cannot enter a Brownfields Agreement for a site with a party responsible for site conditions under the Inactive Hazardous Sites program. A "prospective developer" eligible to enter a Brownfields Agreement is any party with a bona fide, demonstrable desire to develop or redevelop a brownfields property and who did not cause or contribute to the contamination on the property. N.C. Gen. Stat. § 130A-310.31(10).

In your letter, you complain that a Town presentation focused more on redevelopment than remediation. This is the type of statement that could cause confusion to the interested public. Choosing between redevelopment or reuse on the one hand, or remediation on the other hand, of impaired property is a false choice. Properties are redeveloped all the time *in conjunction with* remediation or other corrective action necessary to protect human health and the environment.

Your letter also reflects confusion over the process of negotiating a Brownfields Agreement with DEQ, and DEQ's role. You say an unidentified Town staff member said the Town will choose a redevelopment plan first and then figure out how to make the site safe later, once the Town and developer enter into a Brownfields Agreement. We do not know what Town staff member you are referring to, however, let's clear this up for all who are interested.

The applicant for a Brownfields Agreement - the "prospective developer" - must demonstrate to DEQ's Brownfields Program administrators that the redevelopment (construction) and future uses (post-construction) of the site in question will not pose an unacceptable risk to public health and the environment. DEQ's Brownfields Program is not merely "shepherding" a site like this Property through their program, as you imply. They are charged with ensuring public health and the environment are protected, under risk-based clean-up goals.

This occurs through a three-step process under the Brownfields Program outlined below:

1. First, prior to negotiating and entering a Brownfields Agreement, the property is studied and the potential risks to public health and the environment are assessed. This is done by licensed environmental professionals retained by the prospective developer working in close coordination with DEQ, which approves work plans and all study and assessment findings.

2. Next, DEQ prepares a Brownfields Agreement that considers the redevelopment plans for the property and the results of prior studies and assessments. The agreement, which is entered into by the developer and DEQ, is a legally binding instrument recorded on the property title that provides a framework for safe site redevelopment and future use. Most importantly, the Brownfields Agreement specifies allowed site uses, required cleanup and mitigation measures, and a series of permanent land use controls and obligations (*e.g.*, prohibiting future groundwater use, prohibiting certain land uses) which run with the land to ensure the short- and long-term protection of public health and the environment.

3. Finally, prior to the start of physical redevelopment, a detailed Environmental Management Plan ("EMP") is prepared by the developer and reviewed and approved by DEQ. The EMP provides further detail on the cleanup and mitigation measures that will be

implemented during redevelopment. The EMP contains the specific steps to implement the Brownfields Agreement's requirements and addresses impacts to soil, groundwater, surface water, sediment and air quality. That process will be followed in this case, if in fact a Brownfields Agreement can be reached, and regardless of whether the Town is a party to the agreement with DEQ or not. Further, the Brownfields Agreement by law contains provisions that allow DEQ to ensure that the site as used in the future does not pose a threat to public health or safety. It is a binding agreement in perpetuity, which allows DEQ to require more of the developer and future landowners after the agreement is entered if new information in the future indicates the site conditions pose an unacceptable risk to public health or the environment.

Risk Assessment and Acceptable Health Risk Levels

You suggested that the Town must conduct a thorough risk assessment, and determine what level of risk it finds acceptable, and only then explore future land use options. This too requires some discussion to avoid confusion for the interested public.

First, as you are aware, the Town previously completed risk assessments for the lower portion of the Property along the Bolin Creek Trail to evaluate risks to users of the trail. This was done before the Town financed interim remedial measures to mitigate those risks.

Further, Hart & Hickman, the Town's environmental consulting firm, is currently in the process of performing a Property-wide risk assessment for the Town that will include the upper portion of the Property where the police department building and parking lot are located. A screening level ecological risk assessment will also be performed. This risk assessment will be comprehensive and involve evaluating potential risks to current users of the Property and potential future users of the Property, including possible residential and non-residential users, construction workers, and recreators. The risk assessment will be used to evaluate potential redevelopment options and determine what actions may be needed to make the Property safe for different redevelopment options, including implementation of engineering and institutional controls (*e.g.,* land use deed restrictions).

This comprehensive risk assessment will be consistent with what you have suggested should be done. It deserves note, however, that the scope of this risk assessment will be broader and more costly than what is typically done and which is necessary. Usually the risk assessment is based upon a specific redevelopment plan and future land use. It is unusual to conduct a risk assessment based upon a series of hypothetical reuses of a property. The interested public needs to understand the Town here is doing more in risk assessment than what is customary.

Any plan for reuse of the Property and/or remedial plan must be consistent with public health risk-levels established by EPA and implemented by DEQ. Otherwise, no plan for remediation or reuse of the Property will be approved by DEQ. Notably the regulatory risk levels set by EPA and DEQ are based upon a broad body of science and study, resulting in

toxicity values with built-in factors of safety, and are based upon very conservative assumptions about human exposure to contaminants. You suggested the Town needs to determine what level of risk it deems acceptable. This work has been done by the experts with EPA and DEQ, and the results again are universally applied. Neither the Town, nor any responsible party or prospective developer has to recreate that body of science, nor does the Town have the capability to do so.

In your letter, you provide advice on several engineering, geotechnical and technical subjects regarding risk mitigation and possible remedial measures. Your letter has been provided to the experts engaged to address these subjects. Again, it would be helpful to know the people and firms who are the source of this advice. It should also be noted that most if not all the points you make on these technical subjects have already been identified, and will be addressed by the experts in the relevant fields retained by the Town in due course.

Public Information and Input

Finally, we want to address your complaint that the public has not had sufficient time to participate in the "planning process" regarding future use of the property. As mentioned, we have represented several municipalities regarding redevelopment of municipally-owned properties where soils or groundwater were impacted by oil or hazardous substances. We could not disagree more with your complaint about the degree of available information and the opportunities for public comment. As you know, the Town has dedicated a page on its website to this Property. Virtually every study, letter and other documentation regarding the Property is available on that webpage. To date, there have been at least six public facing council meetings or sessions regarding this Property, with opportunity for public comment, with due notice in advance of each such meeting. SELC representatives have in fact spoken at several of these meetings. Neither I nor Mr. Hart with Hart & Hickman can think of any precedent for a municipality in North Carolina providing the amount of information and documents online, and the opportunities for public input that Chapel Hill has provided regarding this Property.

Notably, all of this has occurred *before* commencement of negotiating a Brownfields Agreement and application for the necessary permitting under the Town's development ordinance. Both of those processes will provide the interested public with ample, additional opportunities to comment in the future, after more detailed information about remedial efforts and redevelopment of the Property are submitted to relevant authorities and made available to the public.

With kind regards, I am

Yours truly,

Keith H. Johnson