

1 **BILL NO. R-20-02-24**

2
3 **RESOLUTION NO. R-10-20**

4
5 **A RESOLUTION OF THE**
6 **COMMON COUNCIL OF THE CITY OF FORT WAYNE,**
7 **INDIANA,**
8 **APPROVING AND AUTHORIZING THE EXECUTION OF A**
9 **REMEDICATION AND INDEMNIFICATION AGREEMENT WITH**
10 **RESPECT TO A NEW ECONOMIC DEVELOPMENT PROJECT**
11 **IN THE CITY TO BE UNDERTAKEN BY THE LOFTS AT**
12 **HEADWATERS PARK, LLC AND FORT WAYNE GARAGE**
13 **ASSOCIATES, ONE, LLC**
14 **(THE LOFTS AT HEADWATERS PARK PROJECT)**

15 WHEREAS, the Fort Wayne Redevelopment Commission (the
16 "Commission"), governing body of the City of Fort Wayne, Indiana, Department of
17 Redevelopment (the "Department") and the Redevelopment District of the City of Fort
18 Wayne, Indiana, exists and operates under the provisions of the Redevelopment of Cities
19 and Towns Act of 1953 which has been codified in Indiana Code 36-7-14 et seq., as
20 amended from time to time (the "Act"); and

21 WHEREAS, the Commission has previously designated and declared in
22 accordance with the Act an area in the City of Fort Wayne, Indiana (the "City"), known
23 as the Civic Center Urban Renewal Area, to be a redevelopment area and an allocation
24 area (the "Area"), adopted a redevelopment plan for the Area, and established an
25 allocation fund for the Area; and

26 WHEREAS, The Lofts at Headwaters Park, LLC, an Indiana limited
27 liability company, and Fort Wayne Garage Associates, One, LLC, an Indiana limited
28 liability company (collectively, the "Developer"), have proposed the development of a
29 mixed-use building including residential and retail uses with a parking garage, as more
30 particularly described on Exhibit A attached hereto (the "Project"), on Real Estate

1 located generally on the northeast corner of Clinton and Superior Streets in Fort Wayne,
2 Indiana, legally described on Exhibit B attached hereto (the "Project Real Estate"); and

3 WHEREAS, the Commission has determined that the completion of the
4 Project is in the best interests of the citizens of the City and, to stimulate and induce the
5 completion of the development of the Project, the Commission desires, subject to further
6 proceedings as required by law, to use good faith efforts to provide certain economic
7 development incentives; and

8 WHEREAS, to set forth the understanding of the Developer, the City and
9 the Commission regarding (i) the Developer completing the Project and (ii) the economic
10 incentives the City, through the Commission, agrees to provide the Developer in
11 exchange for the Developer completing the Project, the Developer and the Department
12 have entered into an economic development agreement (the "Agreement"); and

13 WHEREAS, the Agreement contemplates that the Department shall enter
14 into a Remediation and Indemnification Agreement with regard to certain environmental
15 contamination existing upon the Project Real Estate, which Remediation and
16 Indemnification Agreement the Commission approved on February 10, 2020, through
17 Resolution 2020-08 in substantially the form attached hereto as Exhibit C; and

18 WHEREAS, the Commission has investigated the Project Real Estate and
19 determined that the Project Real Estate has environmental contamination that occurred
20 during or prior to the time that the Department owned the Project Real Estate for which
21 the Department may be liable under applicable laws; and

22 WHEREAS, the Commission has determined that the Project will promote
23 opportunities for employment of the citizens of the City and attract new business
24 enterprises to the City; and

25 WHEREAS, the Commission is pursuing a remediation plan through the
26 Indiana Brownfields Program of the Indiana Finance Authority and the Indiana
27

1 Department of Environmental Management to obtain Site Closure as defined within the
2 Remediation and Indemnification Agreement; and

3 WHEREAS, the Commission has requested approval of the execution and
4 delivery of the Remediation and Indemnification Agreement from the Common Council
5 of the City of Fort Wayne, Indiana ("Common Council") in light of the findings and
6 actions of the Commission; and

7 WHEREAS, the Common Council has determined that the execution and
8 delivery of the Remediation and Indemnification Agreement is in accordance with the
9 terms and conditions of the Agreement and the findings of the Commission, will promote
10 the completion of the Project and is in the best interests of the citizens of the City;

11 NOW, THEREFORE, BE IT RESOLVED BY THE COMMON
12 COUNCIL OF THE CITY OF FORT WAYNE, INDIANA, AS FOLLOWS:

13
14 1. The Common Council hereby determines that the completion of
15 the Project is in the best interests of the citizens of the City and promotes the goals and
16 objectives of the Commission in the Area as expressed in the redevelopment plan for the
17 Area pursuant to the Act.


18 2. The Common Council hereby determines that the Project Real
19 Estate has environmental contamination that occurred during or prior to the time that the
20 Department owned the Project Real Estate for which the Department may be liable under
21 applicable laws.

22 3. The Common Council hereby determines that the Project will
23 promote opportunities for employment of the citizens of the City and attract new
24 business enterprises to the City.

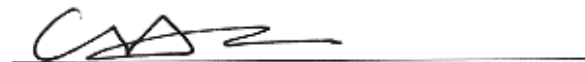
25 4. To stimulate and induce the development of the Project in
26 accordance with the determinations contained in this resolution, the Common Council
27 hereby approves and authorizes the Commission to execute and deliver the Remediation
28

1 and Indemnification Agreement referenced in the Agreement in substantially the form
2 attached hereto as Exhibit C.

3 5. This Resolution shall be in full force and effect after its adoption
4 by the Commission.

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6 
7 _____
8 Council Member

9 APPROVED AS TO FORM AND LEGALITY:

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12 _____
13 Carol Helton, City Attorney

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EXHIBIT A

Description of Project

Lofts at Headwaters – Project Description:

- Located on existing Headwaters Parking Lot, at northeast corner of Superior and Clinton.
- Six-story mixed-use building.
- Estimated cost of approximately \$67,750,000.
- Approximately 15 townhomes along Clinton Street and Barr Street.
- Approximately 217 apartments on upper floors.
- Approximately 12,000 square feet of leasable commercial space along Superior Street.
- Approximately 651-space parking garage:
 - The parking garage will have one level underground and two levels above-ground.
 - In addition to the aforementioned spaces, each townhome will have a private 2-car garage accessed through the parking garage.
 - Virtually no portion of the parking garage will be visible from public rights-of-way.
- An indoor/outdoor amenities area for apartment residents will be located on top of the parking garage, overlooking Headwaters Park.
- Club Soda will not be touched. A public plaza with outdoor restaurant seating will be created between the project and Club Soda, and the Superior Street façade of the new building will be scaled to reflect the height and massing of Club Soda.
- Duck Street (the street that provides access to the lot off of Clinton) will remain in the same location and will be accessible to the public. However, the building will span over the top of Duck Street, essentially turning it into a tunnel. The northern wall of the new building will be located approximately at the southern extent of the existing Headwaters Pavilion parking lot.

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2 **EXHIBIT B**

3 **Legal Description of Project Real Estate**

4 PARCEL I:

5 Lots Number Two (2), Three (3), Four (4), Five (5), Six (6) and Seven (7) in the Original Plat to
6 the Town, (now the City) of Fort Wayne, together with Lots Numbered Five Hundred Eight Four
7 (584), Five Hundred Eight Five (585), Five Hundred Eighty Six (586), Five Hundred Eighty Seven
8 (587), Five Hundred Eighty Eight (588) and Five Hundred Eight Nine (589) in Hanna's Addition to
the City of Fort Wayne and ½ vacated alley for all parcels; and also excepting the west ten (10)
feet of Lot Five Hundred Eighty Nine (589) in Hanna's Addition.

9 PARCEL II:

10 VACATED DUCK STREET BETWEEN CLINTON STREET AND BARR STREET

11 Beginning at the northeasterly corner of Lot Numbered 584 in Hanna's Addition, as recorded in
12 the plat thereof in the Office of the Recorder of Allen County, Indianan; thence southwesterly,
13 along the southerly right-of-way line of Duck Street, to the easterly right-of-way line of Clinton
14 Street; thence northwesterly, along the easterly right-of-way line of Clinton Street, to the northerly
right-of-way line of Duck Street; thence southeasterly and northeasterly, along the northerly right-
of-way line of Duck Street, to the westerly right-of-way line of Barr Street; thence southeasterly,
along the westerly right-of-way line of Barr Street, to the point of beginning of this description.
Excepting the South 32 feet thereof.

15 PARCEL III:

16 VACATED DUCK STREET BETWEEN CLINTON STREET AND BARR STREET

17 LESS AND EXCEPTING that portion conveyed to the Fort Wayne Board of Park Commissioners
18 by Quit Claim Deed recorded December 29, 1999 as Instrument No. 990094251 and described
as follows:

19 Beginning at the northeasterly corner of Lot Numbered 584 in Hanna's Addition, as recorded in
20 the plat thereof in the Office of the Recorder of Allen County, Indianan; thence southwesterly,
21 along the southerly right-of-way line of Duck Street, to the easterly right-of-way line of Clinton
22 Street; thence northwesterly, along the easterly right-of-way line of Clinton Street, to the northerly
right-of-way line of Duck Street; thence southeasterly and northeasterly, along the northerly right-
of-way line of Duck Street, to the westerly right-of-way line of Barr Street; thence southeasterly,
along the westerly right-of-way line of Barr Street, to the point of beginning of this description.
Excepting the South 32 feet thereof.

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EXHIBIT C

Remediation and Indemnification Agreement

(see attached)

RESOLUTION 2020-08
FORT WAYNE REDEVELOPMENT COMMISSION

APPROVING AND AUTHORIZING THE EXECUTION OF A
REMEDICATION AND INDEMNIFICATION AGREEMENT WITH RESPECT TO A
NEW ECONOMIC DEVELOPMENT PROJECT IN THE CITY TO BE
UNDERTAKEN BY THE LOFTS AT HEADWATERS PARK, LLC
AND FORT WAYNE GARAGE ASSOCIATES, ONE, LLC
(THE LOFTS AT HEADWATERS PARK PROJECT)

WHEREAS, the Fort Wayne Redevelopment Commission (the "Commission"), governing body of the City of Fort Wayne, Indiana, Department of Redevelopment (the "Department") and the Redevelopment District of the City of Fort Wayne, Indiana, exists and operates under the provisions of the Redevelopment of Cities and Towns Act of 1953 which has been codified in Indiana Code 36-7-14 et seq., as amended from time to time (the "Act"); and

WHEREAS, the Commission has previously designated and declared in accordance with the Act an area in the City of Fort Wayne, Indiana (the "City"), known as the Civic Center Urban Renewal Area, to be a redevelopment area and an allocation area (the "Area"), adopted a redevelopment plan for the Area, and established an allocation fund for the Area; and

WHEREAS, The Lofts at Headwaters Park, LLC, an Indiana limited liability company, and Fort Wayne Garage Associates, One, LLC, an Indiana limited liability company (collectively, the "Developer"), have proposed the development of a mixed-use building including residential and retail uses with a parking garage, as more particularly described on Exhibit A attached hereto (the "Project"), on Real Estate located generally on the northeast corner of Clinton and Superior Streets in Fort Wayne, Indiana, legally described on Exhibit B attached hereto (the "Project Real Estate"); and

WHEREAS, the Commission has determined that the completion of the Project is in the best interests of the citizens of the City and, to stimulate and induce the completion of the development of the Project, the Commission desires, subject to further proceedings as required by law, to use good faith efforts to provide certain economic development incentives; and

WHEREAS, to set forth the understanding of the Developer, the City and the Commission regarding (i) the Developer completing the Project and (ii) the economic incentives the City, through the Commission, agrees to provide the Developer in exchange for the Developer completing the Project, the Developer and the Department will enter into an economic development agreement (the "Agreement"); and

WHEREAS, the Agreement contemplates that the Department shall enter into a Remediation and Indemnification Agreement with regard to certain environmental contamination existing upon the Project Real Estate; and

WHEREAS, the Commission has investigated the Project Real Estate and determined that the Project Real Estate has environmental contamination that occurred during or prior to the time that the Department owned the Project Real Estate for which the Department may be liable under applicable laws; and

WHEREAS, the Commission has determined that the Project will promote opportunities for employment of the citizens of the City and attract new business enterprises to the City; and

WHEREAS, the Commission is pursuing a remediation plan through the Indiana Brownfields Program of the Indiana Finance Authority and the Indiana Department of Environmental Management to obtain Site Closure as defined within the Remediation and Indemnification Agreement; and

WHEREAS, the Commission has determined that the execution and delivery of the Remediation and Indemnification Agreement is in accordance with the terms and conditions of the Agreement, will promote the completion of the Project and is in the best interests of the citizens of the City;

NOW, THEREFORE, BE IT RESOLVED by the Fort Wayne Redevelopment Commission that:

1. The Commission hereby determines that the completion of the Project is in the best interests of the citizens of the City and promotes the goals and objectives of the Commission in the Area as expressed in the redevelopment plan for the Area pursuant to the Act.
2. The Commission hereby determines that the Project Real Estate has environmental contamination that occurred during or prior to the time that the Department owned the Project Real Estate for which the Department may be liable under applicable laws.
3. The Commission hereby determined that the Project will promote opportunities for employment of the citizens of the City and attract new business enterprises to the City.
4. To stimulate and induce the development of the Project in accordance with the determinations contained in this resolution, the Commission hereby authorizes the President and the Executive Director of the Commission to negotiate and finalize the Remediation and Indemnification Agreement referenced in the Agreement, and hereby approves and authorizes the President and Secretary of the Commission to execute the Remediation and Indemnification Agreement referenced in the Agreement in substantially the form attached hereto as Exhibit C.
5. This Resolution shall be in full force and effect after its adoption by the Commission.

FORT WAYNE REDEVELOPMENT COMMISSION

Christopher Guerin, President

ADOPTED: 10 February 2020

Mark D. Becker, Secretary

EXHIBIT A

Description of Project

Lofts at Headwaters – Project Description:

- Located on existing Headwaters Parking Lot, at northeast corner of Superior and Clinton.
- Six-story mixed-use building.
- Estimated cost of approximately \$67,750,000.
- Approximately 15 townhomes along Clinton Street and Barr Street.
- Approximately 217 apartments on upper floors.
- Approximately 12,000 square feet of leasable commercial space along Superior Street.
- Approximately 651-space parking garage:
 - The parking garage will have one level underground and two levels above-ground.
 - In addition to the aforementioned spaces, each townhome will have a private 2-car garage accessed through the parking garage.
 - Virtually no portion of the parking garage will be visible from public rights-of-way.
- An indoor/outdoor amenities area for apartment residents will be located on top of the parking garage, overlooking Headwaters Park.
- Club Soda will not be touched. A public plaza with outdoor restaurant seating will be created between the project and Club Soda, and the Superior Street façade of the new building will be scaled to reflect the height and massing of Club Soda.
- Duck Street (the street that provides access to the lot off of Clinton) will remain in the same location and will be accessible to the public. However, the building will span over the top of Duck Street, essentially turning it into a tunnel. The northern wall of the new building will be located approximately at the southern extent of the existing Headwaters Pavilion parking lot.

EXHIBIT B

Legal Description of Project Real Estate

PARCEL I:

Lots Number Two (2), Three (3), Four (4), Five (5), Six (6) and Seven (7) in the Original Plat to the Town, (now the City) of Fort Wayne, together with Lots Numbered Five Hundred Eight Four (584), Five Hundred Eight Five (585), Five Hundred Eighty Six (586), Five Hundred Eighty Seven (587), Five Hundred Eighty Eight (588) and Five Hundred Eight Nine (589) in Hanna's Addition to the City of Fort Wayne and ½ vacated alley for all parcels; and also excepting the west ten (10) feet of Lot Five Hundred Eighty Nine (589) in Hanna's Addition.

PARCEL II:

VACATED DUCK STREET BETWEEN CLINTON STREET AND BARR STREET

Beginning at the northeasterly corner of Lot Numbered 584 in Hanna's Addition, as recorded in the plat thereof in the Office of the Recorder of Allen County, Indianan; thence southwesterly, along the southerly right-of-way line of Duck Street, to the easterly right-of-way line of Clinton Street; thence northwesterly, along the easterly right-of-way line of Clinton Street, to the northerly right-of-way line of Duck Street; thence southeasterly and northeasterly, along the northerly right-of-way line of Duck Street, to the westerly right-of-way line of Barr Street; thence southeasterly, along the westerly right-of-way line of Barr Street, to the point of beginning of this description. Excepting the South 32 feet thereof.

PARCEL III:

VACATED DUCK STREET BETWEEN CLINTON STREET AND BARR STREET

LESS AND EXCEPTING that portion conveyed to the Fort Wayne Board of Park Commissioners by Quit Claim Deed recorded December 29, 1999 as Instrument No. 990094251 and described as follows:

Beginning at the northeasterly corner of Lot Numbered 584 in Hanna's Addition, as recorded in the plat thereof in the Office of the Recorder of Allen County, Indianan; thence southwesterly, along the southerly right-of-way line of Duck Street, to the easterly right-of-way line of Clinton Street; thence northwesterly, along the easterly right-of-way line of Clinton Street, to the northerly right-of-way line of Duck Street; thence southeasterly and northeasterly, along the northerly right-of-way line of Duck Street, to the westerly right-of-way line of Barr Street; thence southeasterly, along the westerly right-of-way line of Barr Street, to the point of beginning of this description. Excepting the South 32 feet thereof.

EXHIBIT C

Remediation and Indemnification Agreement

(see attached)

REMEDIATION AND INDEMNIFICATION AGREEMENT

This Remediation and Indemnification Agreement (“**Agreement**”) is entered into by and between The Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates One, LLC (“**Purchaser**”) and the City of Fort Wayne Department of Redevelopment acting by and through the City of Fort Wayne, a municipal corporation organized and existing under the laws of the State of Indiana (“**City**”) regarding environmental contamination, as more specifically set forth in this Agreement. City and Purchaser are collectively referred to herein as “the **Parties**.”

RECITALS

WHEREAS, the City owns property at the northeast corner of Clinton and Superior Streets, Fort Wayne, Indiana (the “**Property**”), depicted on a map attached hereto as **Exhibit A**; and

WHEREAS, the Parties acknowledge that existing environmental reports completed by the City and other entities, which are available for review and have been fully reviewed by the City, regarding the Property identify the existence of certain contaminants of concern that exist at, under or emanating from the Property. Known and unknown environmental condition of the Property existing at the Effective Date is hereinafter referred to as the “**Environmental Contamination**”. Such Environmental Contamination includes but is not limited to that identified to have originated from a former manufactured gas plant that operated on the east adjacent property, which is currently under investigation and remediation through the Indiana Department of Environmental Voluntary Remediation Program, site #6040704 (“**MGP AOI 3 Contamination**”).

WHEREAS, Purchaser desires to redevelop the Property for residential, commercial and retail use (the “**Mixed Use Project**”) and for parking (the “**Parking Garage Project**”) and has received a comfort letter from the State of Indiana Brownfields Division (“**Brownfields**”) regarding planned redevelopment given the Environmental Contamination, Brownfield #4181211. The Brownfields Comfort Letter attached hereto as **Exhibit B** is herein after referred to as the “**Comfort Letter**”.

WHEREAS, Purchaser and City have entered into Economic Development Agreement (the “**Contract**”), pursuant to which the City is selling the Property to Purchaser and the City agrees as a part of that sale to enter into this Agreement regarding responsibility for the Environmental Contamination.

NOW, THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

1. **Effective Date.**

This Agreement is effective as of the conveyance of the Property to Purchaser under the Contract and any amendments thereto, referred to in the Contract as the “**Development Closing**”

("Effective Date"). Should the Contract be terminated by either Party, then this Agreement shall also automatically terminate without further notice or action due by either Party.

2. **Cooperation.**

The Parties agree to cooperate with one another as necessary to implement recommendations and reasonable steps requested by Brownfields and/or the Indiana Department of Environmental Management (collectively referred to herein as "IDEM") to fulfill the terms of this Agreement.

3. **Investigation and Remediation.**

- a. City assumes sole responsibility for and shall perform or cause to be performed all reasonable and necessary response activities related to the Environmental Contamination of the Property, including but not limited to as set forth in Purchaser's Phase I, the Comfort Letter, or as otherwise provided by law.
- b. City agrees to enter the Property into the IDEM Voluntary Remediation Program ("VRP") as it relates to the Environmental Contamination on the Property other than the MGP AOI 3 Contamination. City agrees to adequately characterize, consider, and implement reasonable and necessary risk-based remedial options in connection with the Environmental Contamination to obtain Site Closure, as defined herein, which shall primarily involve source area excavation and to assume responsibility for and implement or cause to be implemented the recommendations and reasonable next steps in the Comfort Letter. **Site Closure** shall mean any measures that may be required to obtain from IDEM Certificate of Completion and Covenant Not to Sue through the VRP as it relates to the Environmental Contamination on the Property other than the MGP AOI 3 Contamination. Per written agreement of the parties, this provision can be amended or waived if necessary to meet development goals.
- c. If reasonably appropriate, Site Closure may be achieved by use of an Environmental Restrictive Covenant ("**ERC**") so long as such proposed ERC does not interfere with the intended residential redevelopment of the Property. Such restrictions may include those required by the Comfort Letter, **Exhibit B**. The imposition of any additional restrictions is subject to Purchaser's discretion and approval, which shall not be unreasonably withheld, conditioned, or delayed if such restrictions do not unreasonably interfere with the use of the Property for residential purposes.
- d. City shall in good faith achieve Site Closure as timely as is feasible, given regulatory agency oversight. City also agrees to communicate and coordinate with Purchaser on a regular basis regarding investigation and

remediation activities, sampling results at the Property, and communications with IDEM.

- e. City shall be listed as the owner and generator of all wastes and will be responsible for signing all manifests required for the transportation and disposal of hazardous wastes.

4. **NIPSCO.**

City shall enter into an agreement with NIPSCO as the responsible party for MGP AOI 3 Contamination that is agreeable to both Purchaser and City regarding the MGP AOI 3 Contamination.

5. **Vapor Mitigation.**

City shall be responsible for the reasonable costs of any vapor mitigation measures required by IDEM to allow residential land use prior to and after Site Closure for the term of the Parking Structure Lease Agreement entered into by the parties on _____, 2019, and any amendments thereto. Such mitigation measures may include, but are not limited to, vapor intrusion mitigation for future residential construction. Costs associated with vapor mitigation measures may include, but are not limited to (i) design development, (ii) materials and equipment, (iii) installation, (iv) monitoring/testing required under an operation and maintenance program approved by IDEM, (v) reporting required by IDEM, (vi) reasonable maintenance costs associated with normal use and proper maintenance of the system and (vii) utility costs associated solely with a mitigation measure. The Parties agree that in that instance vapor mitigation is necessary, Purchaser will engage and contract for such systems and services to comply with IDEM requirements and development needs, which costs shall be reimbursed to Purchaser by the City within thirty (30) days of submittal of claim. Purchaser will confer with the City regarding the appropriate mitigation measure and cost before such measures are communicated to IDEM or implemented and will endeavor to implement any vapor mitigation measures in an efficient and cost effective manner. The Parties further agree that operation and maintenance expenses associated with a vapor intrusion mitigation system or portion of a vapor intrusion mitigation system serving or located within the footprint of the Mixed Use Project are the responsibility of the Purchaser. The City at its sole cost may have installed at the Property one or more designated meters to determine utility costs to facilitate the determination and payment of utility costs under this section.

6. **Site Access.**

Purchaser grants City, its agents, affiliates and contractors all access to the Property necessary for the investigation and remediation activities described in paragraph 3 above ("Work"); provided, however that City or its agents shall notify Purchaser prior to any planned access. Purchaser or its authorized agent shall have the right, but not the obligation, to be present during and to observe all Work. The Work shall not unreasonably impede, disrupt or disturb any of Purchaser's activities on the Property, including but not limited to the redevelopment activities by Purchaser.

7. **Performance Standard.**

City (which for the purposes of this paragraph includes all employees, consultants, contractors, agents, or other designees of City entering the Property under this Agreement) shall perform the Work and all other actions on the Property in a good and workmanlike manner and in accordance with applicable federal, state, and local laws, regulations, rules, ordinances, and other legal requirements. City shall not cause material disruptions to Purchaser or Purchaser's development restricting Purchaser's tenants' business operations.

8. **Indemnity Agreement.**

City shall defend (with Counsel chosen by City but reasonably acceptable to Purchaser) and indemnify Purchaser its affiliates, members, managers, directors, officers, employees and agents ("Indemnified Parties") against and from all government and third party claims, liabilities, penalties, judgments, suits, actions, costs, expenses or damages arising out of or with respect to the Environmental Contamination. City shall have no obligation to the Indemnified Parties with respect to such matters to the extent they were caused by or result from the willful misconduct or negligence of Purchaser that create an environmental condition in, on or about the Property. This indemnity shall survive the termination of this Agreement and the Contract. This defend and indemnify obligation shall terminate two (2) years after both Site Closure is achieved and a Covenant Not to Sue is issued for the MGP AOI 3 Contamination.

9. **Insurance.**

Prior to entering the Property pursuant to this Agreement, City or City's contractor performing such work shall deliver to Purchaser a certificate of insurance evidencing that: (i) City or City's contractor, as appropriate, has in effect a general liability and property damage insurance policy with a combined single limit of at least One Million Dollars (\$1,000,000.00) worth of coverage for any one occurrence, and (ii) Purchaser has been named as an additional insured on such insurance policy to the extent of the obligations hereunder.

10. **Notices/Communications.**

All formal notices required to be made under this Agreement shall be effective when deposited in the mail, first class postage prepaid, or electronically mailed with receipt acknowledged. All notices under this agreement shall be directed as follows.

To Purchaser:

Rex M. Barrett
The Lofts at Headwaters Park, LLC
Fort Wayne Garage Associates One, LLC 3755 E. 82nd Street, Suite 300
Indianapolis, IN 46240
E-mail: rmb@barrettandstokely.com

cc: Allison Wells Gritton
Wooden McLaughlin, LLP
211 North Pennsylvania Street
One Indiana Square, Suite 1800
Indianapolis, IN 46204
E-mail: Allison.Gritton@WoodenLawyers.com

To City:

Executive Director, Department of Redevelopment
City of Fort Wayne
Citizens Square
200 East Berry Street, Suite 320
Fort Wayne, IN 46802

Terri Czajka
Ice Miller, LLP
One American Square
Suite 2900
Indianapolis, IN 46280-0200

City of Fort Wayne Law Department
Citizens Square
200 East Berry Street, Suite 430
Fort Wayne, IN 46802

Each Party may change its authorized representative by giving written notice to the other authorized representative listed in this subparagraph. In addition, Parties anticipate and desire regular communication between the Parties and among the Parties, the regulatory agency and others as necessary to plan and support the redevelopment of the Property. These communications may be by any appropriate method that allows timely relay of information and shall include all necessary staff of the Parties, regulatory agency, contractors *etc.* The individuals listed herein shall be provided regular updates and summaries of such communications.

11. Miscellaneous

- a. **Entire Agreement.** This Agreement represents the entire agreement between the Parties with respect to the subject matter hereof and supersedes any prior agreement relating to any subject matter covered herein other than the Contract. No change, amendment or modification to, or extension of or waiver of, any provision of or consent provided under this Agreement shall be valid unless made in writing and signed by all necessary parties.
- b. **Assignment.** This Agreement is binding upon the Parties and their successors and permitted assigns, except City's obligations may not be

assigned without Purchaser's express written consent in advance of the proposed assignment.

- c. **No Third-Party Beneficiaries.** This Agreement is intended for the exclusive benefit of the Parties hereto and their permitted successors and assigns; and nothing contained in this Agreement shall be construed to confer any rights, remedies or benefits upon any party other than the Parties to this Agreement.
- d. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana.
- e. **Captions and Headings.** The captions and headings throughout this Agreement are for convenience and reference only and shall not affect the Agreement's meaning or interpretation.
- f. **Severability.** If a court of competent jurisdiction determines that any provision of this Agreement or its application is invalid or unenforceable, the remaining provisions of this Agreement shall not be affected and shall remain valid and enforceable to the fullest extent permitted by law so long as the essential purposes of this Agreement can still be achieved.
- g. **No Waiver.** A failure to enforce any provision of this Agreement shall not waive the right to enforce such provision or any other provision in the future.
- h. **Counterparts.** This Agreement may be executed in any number of counterparts and transmitted via electronic means, including facsimile or emailed color scan, all of which together shall constitute one original Agreement.
- i. **Rule of Construction.** Each of the Parties has read this Agreement, has obtained and used the advice of counsel to understand the terms of this Agreement, and has executed this Agreement of its own independent will and volition. As this Agreement is the result of negotiation in which all Parties have participated, none of the Parties shall be deemed to have drafted the agreement for purposes of its construction.

[Remainder of page intentionally blank.]

Executed by the undersigned duly authorized representatives to be effective as of the Effective Date set forth above.

THE LOFTS AT HEADWATERS PARK, LLC

By: _____

Date: _____

Rex M. Barrett, Manager

FORT WAYNE GARAGE ASSOCIATES ONE, LLC

By: _____

Date: _____

Rex M. Barrett, Manager

**CITY OF FORT WAYNE
DEPARTMENT OF REDEVELOPMENT**

By: _____

Date: _____

Christopher Guerin, President

Exhibit A
The Property

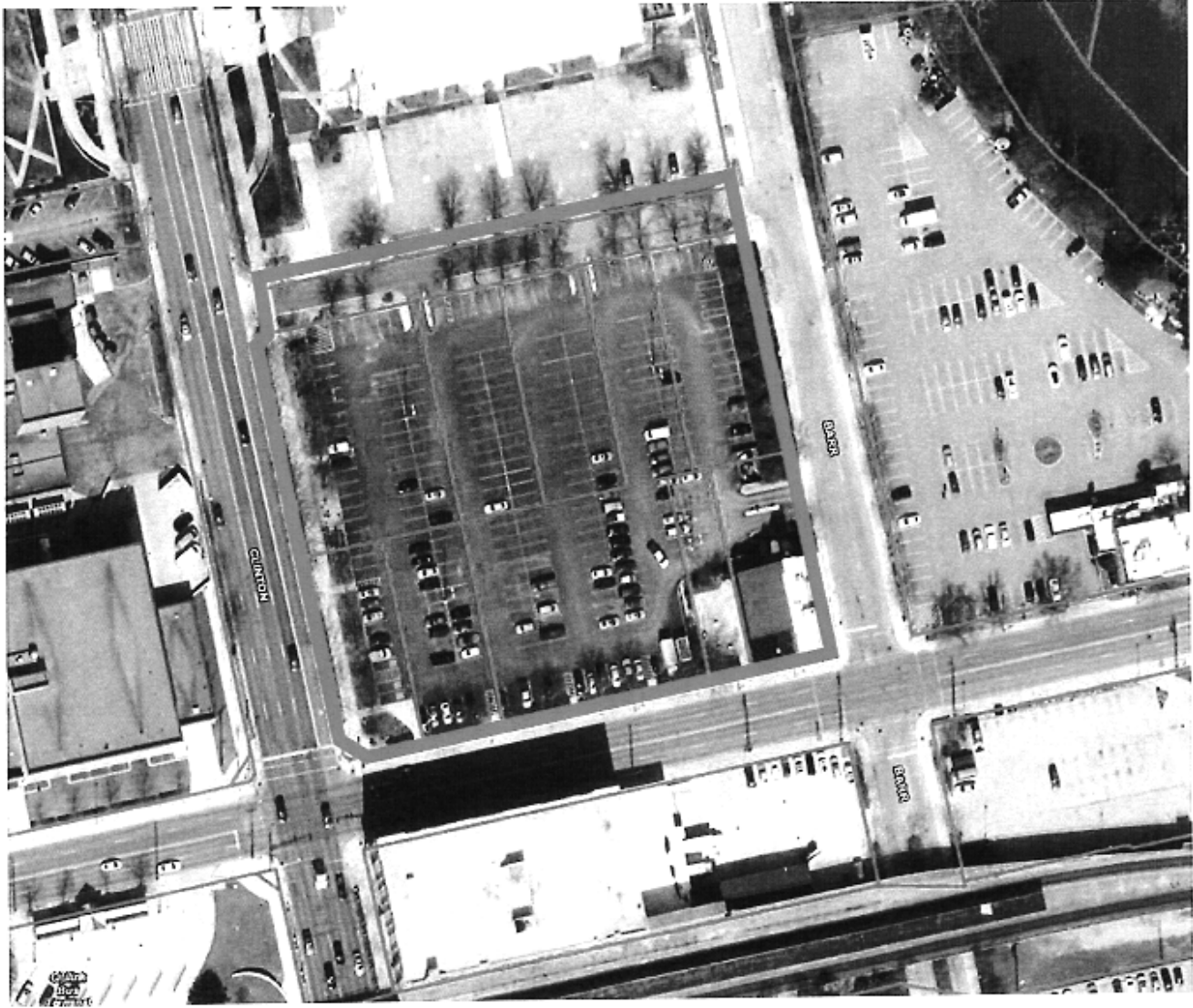


Exhibit B

Comfort Letter

(See attached)



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We Protect Hoosiers and Our Environment.

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Eric J. Holcomb
Governor

Bruno L. Pigott
Commissioner

August 30, 2019

Mr. Rex Barrett
The Lofts at Headwaters Park, LLC
Fort Wayne Garage Associates, One, LLC
3755 East 82nd Street, Suite 300
Indianapolis, Indiana 46240

Re: **Comfort Letter-**
Bona Fide Prospective Purchaser
Club Soda Parking Lot
235 East Superior Street
Fort Wayne, Allen County
FID #14283
LUST #199604515
Brownfield #4181211

Dear Mr. Barrett:

In response to the request by Wooden McLaughlin LLP (Wooden McLaughlin) on behalf of The Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates, One, LLC (collectively, Prospective Purchaser) to the Indiana Brownfields Program (Program) for assistance concerning the property located at 235 East Superior Street, Fort Wayne (Site), the Indiana Department of Environmental Management (IDEM) has agreed to provide this Comfort Letter to outline applicable limitations on liability with respect to hazardous substances and petroleum products found on the Site. This letter does not provide a release from liability, but provides specific information with respect to some of the criteria the Prospective Purchaser must satisfy to qualify for relief from potential liability related to hazardous substances contamination under the bona fide prospective purchaser (BFPP) exemption under Indiana Code (IC) § 13-25-4-8(b) (incorporating section 101(40) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et. seq.*, and 42 U.S.C. § 9607(r)) and potential liability for petroleum contamination under the BFPP exemption under IC § 13-23-13 and IC § 13-24-1. This letter will also address the reasonable steps IDEM recommends the Prospective Purchaser undertake to prevent or limit human, environmental, and/or natural resource exposure to previously released hazardous substances and/or petroleum found at the Site and help to establish whether environmental conditions might be a barrier to redevelopment or transfer.

Site Description and History

The 2.919-acre Site is comprised of eleven parcels. The majority of the Site is currently utilized as a parking lot, with the southeastern corner of the Site occupied by the commercial building, Club Soda. The northernmost parcel of the Site (02-12-02-276-006.000-074) bisects parcel 02-12-02-276-005.000-074, the southernmost portion of which is included in the Site



(the remainder of parcel 02-12-02-276-005.000-074 is located to the north of Site). Parcel 02-12-02-276-005.000-074 also contains a portion of the vacated Duck Street. Refer to Table 1, below, for State parcel identification numbers and a description of historical uses and the enclosed map of the Site for a depiction of the parcels.

TABLE 1
Site Parcel Information

Parcel Number	Street Address	Former Use
02-12-02-276-005.000-074 (Southern Portion)	333 South Clinton Street	Heavy Hardware, Blacksmith, Wagon Shed, Auto Wrecking, AC Borgman & Son (Vet Surgeon), RW Oil Co. (Filling Station), Clinton Service and Sales Garage, International Harvester, Dry Cleaner, Holy Trinity Church, Three Rivers Ambulance Authority
02-12-02-276-006.000-074		
02-12-02-276-007.000-074	401 South Clinton Street	Livery, Feed Yard, Auto, Builders Supplies Warehouse, Horse Shed, B&J Oil Co. (Filling Station), Clem's Diner, Auto Inn (Filling Station), Betty's Diner, Margee's Place
02-12-02-276-008.000-074	201 East Duck Street	Residence, Fire Brick Shed, Tile Shed
02-12-02-276-009.000-074	220 Duck Street	Residence, Klinger Trucking Co., United Moving & Storage Inc., Drukemiller Tractor Co (Warehouse), Seat Cover Charlie (Body Shop), Unique Clean Up, Interior Surface Cover, A&A Coatings Inc., Midwest Collision & Repair
02-12-02-276-010.000-074	230 Duck Street	Residence, S&B Auto Parts, Corbin Carriage
02-12-02-276-011.000-074	404 Barr Street	Foundry, Boiler Shop, Stock Warehouse, Frank Gruber Boiler Works, Klinger Trucking Company, Boregmann AC and Son (Warehouse), Summit City news (Warehouse), Stuckey Brothers Service Department and Warehouse, Howard Midwest Inc., Peerless Cleaners (Office), Dura-Wear Enterprises (Uniform Shop)
02-12-02-276-012.000-074	201 East Superior Street	Residence, livery, Auto Repair, Filling Station
02-12-02-276-013.000-074	211 East Superior Street	Residence, Auto Transmission Repair, Truck Sales, Wayne Tractor & Equipment Co. Superior Garage Relay Truck Sales, Hoosier Motor Parts Company, Cockrell Tractor Company, International Harvester Company, Seat Cover Charlie Car Care, Finex Car Furnishings
02-12-02-276-014.000-074	219 East Superior Street	Residence, Blacksmith, Neon Sign Shop, Summit City Welding Company, Mechanical Shop
02-12-02-276-015.000-074	225 East Superior Street	Residence
02-12-02-276-016.000-074	235 East Superior Street	Residence, Junk Warehouse, Rag Warehouse, Club Soda

The Site consisted of stables, a warehouse, and residential land from at least 1890 until commercial and industrial development commenced sometime prior to 1902. The Site was generally used for commercial and industrial purposes through 1996. All former building structures, with the exception of the existing three-story building (Club Soda), were demolished in the late 1980s and mid to late-1990s. The Site has generally consisted of asphalt-paved

parking lots since 1995; however, Club Soda has occupied the building on the southeast portion of the Site since the historic building was remodeled in 1998.

The Club Soda building, which operates as a restaurant, is approximately 8,180 square feet. A basement extends beneath the eastern portion of the building. A freight elevator is located near the northwest portion of the building. De minimis quantities of paints were observed in the basement during a Site inspection. Dining areas and a bar comprised the first and second floors of the building. A kitchen area comprised the third floor of the building. A grease trap was located in the northwest portion of the kitchen. No floor drains or evidence of manufacturing operations were observed in the building.

The Three Rivers Ambulance Authority (TRAA) formerly operated on the property adjoining the Site to the north.¹ Two underground storage tanks (USTs), a diesel and a waste oil UST, were removed from the former TRAA property in March 1996. Contamination was discovered when removing the USTs and the facility was assigned Leaking Underground Storage Tank (LUST) Incident number 199604515 and facility identification number 14283. Due to there being residual contamination following removal of the USTs, an environmental restrictive covenant (Original ERC) was recorded on the deed for the TRAA property. Land use restrictions in the Original ERC include:

- Do not use or allow the use of the real estate for residential purposes.
- Do not use or allow the use or extraction of ground water at the real estate for any purpose.
- Restore soil disturbed as a result of excavation and construction activities in such a manner that the remaining contaminants of concern do not present a threat to human health or the environment.
- Maintain the integrity of the existing hard surfaces.

The former TRAA facility received a No Further Action (NFA) determination on March 12, 2015.

The Site consists of a block within the City of Fort Wayne central business district. Headwaters Park (which includes the footprint of the former TRAA facility) adjoins the Site to the north. South Barr Street is located along the east Site boundary, with a parking lot and Hall's Gas House/Takaoka restaurant beyond.² East Superior Street is located along the south Site boundary, with commercial parking lots, the Wayne Township Trustee's Office³, and A Party Apart (party supply rental) beyond. South Clinton Street is located along the west Site boundary, with Headwaters Park and the Allen County Jail beyond. The confluence of the Maumee, St. Mary's, and St Joseph Rivers is located approximately quarter of a mile east of the Site.

¹ The former TRAA property boundary included the northernmost parcel of the Site (02-12-02-276-006.000-074) and the portion of parcel 02-12-02-276-005.000-074 that is on the Site.

² This property is part of the former Fort Wayne Manufactured Gas Plant (MGP).

³ This property is part of the former Fort Wayne MGP Areas of Interest (AOI) – 2.

The Northern Indiana Public Services Company (NIPSCO) enrolled the former MGP facility located at 305 East Superior Street (located east of the Site between South Barr Street and the St. Mary's River), into the IDEM Voluntary Remediation Program (VRP) in June 2004 (IDEM VRP project #6040704). The MGP operated continuously or intermittently from at least 1850 until 1948.

In 1992, investigations of the MGP began after a black substance was observed when the level of the St. Mary's River was lowered to work on a downstream dam. Since that time, several investigations have been performed to characterize the nature and extent of the MGP residuals in the area. In addition to these investigations, several interim removal efforts have been completed, including the removal of coal-tar and tar-impacted soils from former gas holder foundations. In-situ stabilization of approximately 30,000 cubic yards of soil has been conducted on the east side of South Barr Street. A dense non-aqueous phase liquid (DNAPL) collection system was installed near the waterfront.

NIPSCO and IDEM identified five areas of interest (AOIs) associated with the former MGP property. The parcels of land located west of the former MGP footprint between South Barr Street and South Clinton Street, including the Site, were designated as AOI-3. Ground water monitoring wells associated with VRP assessment and remediation activities of the former MGP property are currently located on the Site.

The redevelopment plan for the Site is an apartment complex with an associated parking garage and commercial space. The apartment buildings will be situated along the west and east sides of the Site and a commercial building will be developed along the south side. The parking garage will be located in the center of the Site with three levels (below grade level, 1st level and 2nd level) and the lower level will extend beneath the apartment and commercial buildings. The existing surface parking lot will be demolished during the redevelopment project. The existing Club Soda building will remain at the corner of Barr Street and Superior Street.

Due Diligence

As part of this request, the Prospective Purchaser provided the Program with a *Phase I Environmental Site Assessment* dated June 3, 2019 (June 2019 Phase I ESA) prepared for Barrett & Stokely, Inc. by SES Environmental (SES) (IDEM Virtual File Cabinet (VFC) Document #82788892). On July 17, 2019, the Prospective Purchaser obtained a letter from SES allowing it to rely on the June 2019 Phase I ESA. The June 2019 Phase I ESA was conducted utilizing the American Society for Testing and Materials (ASTM) Practice E1527-13, Standard Practice for Environmental Site Assessment, which satisfies the federal "All Appropriate Inquiries" (AAI) rule set forth in 40 CFR Part 312. In an effort for the Prospective Purchaser to qualify as a BFPP, Rex Barrett, Managing Member with Fort Wayne Garage Associates, One, LLC and The Lofts at Headwaters Park, LLC, provided answers to the user-specific questions to ensure its satisfaction of the federal AAI rule.

The June 2019 Phase I ESA identified the following controlled recognized environmental condition (CREC) associated with the Site:

- An ERC (the Original ERC referenced above) was recorded on February 20, 2015 on the deed for the north adjacent property (former TRAA facility; parcel 02-12-02-276-005.000-074, the southernmost portion of which is part of the Site), due to documented petroleum impact to soil and ground water. A Covenant Restricting Use of Property Serving Combined Sewer Overflow Reduction Tunnel, recorded on August 31, 2018, was also recorded on the deed for the north adjacent property and states future development shall not involve the construction of buildings, foundations, wells or other activities that involve the penetration of areas north of Duck Street more than 70 feet below ground surface (bgs) unless prior approval from the City of Fort Wayne has been received.

The June 2019 Phase I ESA identified the following recognized environmental conditions (RECs) associated with the Site:

- The Site has been used for commercial and industrial purposes since at least 1902. Past site occupants and operations of potential concern have included filling stations, automobile repair facilities, trucking facilities, boiler shops, machine shops, foundries, and dry cleaners.
- A MGP formerly operated at the east and southeast adjacent properties, beyond Barr Street, from at least 1850 through 1948 has impacted Site.

Pursuant to ASTM E2600-15 Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions, SES conducted a Tier 1 evaluation to assess the presence or likely presence of vapor-phase chemicals of concern in soil at the Site that might result from contaminated soil and/or ground water either on or near the Site. SES identified a potential vapor encroachment condition (VEC) associated with the Site and one potential VEC associated with off-Site properties. Refer to Tables 1 and 2, below, for descriptions of the identified potential VECs.

TABLE 1
On-Site Potential Vapor Encroachment Conditions

VEC #	On-Site Location	Description	Chemical of Concern	Rationale
1	Site	Various industrial operations since at least 1902	Petroleum and Solvents	Former Site occupants and operations of potential concerns have included filling stations, automobile repair facilities, trucking facilities, boiler shops, machine shops, foundries, and dry cleaners.

TABLE 2
Off-Site Potential Vapor Encroachment Conditions

VEC #	Location	Description	Chemical of Concern	Rationale
2	East Adjacent Property (305 East Superior Street) and Southeast Adjacent Property	Former MGP Operations	Petroleum and PAHs	Former MGP operated from the late 1800's to 1948 on the east adjacent property; and southeast adjacent property. The former MGP has contaminated the Site.

Environmental Conditions

As part of the request for assistance in determining any existing environmental contamination and potential liability at the Site, Program staff reviewed the following additional documents. These documents may be viewed electronically by searching online by the noted document number in IDEM's VFC accessible through IDEM's website.

- *Phase II Investigation*, dated August 22, 2005, prepared by Haley & Aldrich, Inc. (Haley & Aldrich) (Document #40745060, 40749342)
- *Quarterly Groundwater Sampling Report & Closure Strategy (QGWSR & Closure Strategy), Former Three Rivers Ambulance Authority (TRAA)*, dated December 12, 2013, prepared by SES (Document #69383422)
- *Fourth Quarter 2017: Groundwater Monitoring Report, Old Fort Wayne Former Manufactured Gas Plant (MGP)*, dated January 29, 2018, prepared by Applied Geology and Environmental Science, Inc. (AGES) (Document #80602122)
- *Draft Environmental Review Report*, dated August 16, 2017, prepared by SES (Document #82669025, page 535)
- *Draft Environmental Screening Investigation Report*, dated November 17, 2017, prepared by SES (Document #82669025, page 596)
- *Opinions and Recommendations*, dated September 12, 2018, prepared by SES (Document #82669025, page 891)
- *Memorandum: Old Fort Wayne Former MGP Site, AOI-3 City of Fort Wayne Redevelopment Commission*, dated October 4, 2018, prepared by Haley & Aldrich (Document #82669025, page 900)

- *Phase I Environmental Site Assessment*, dated November 9, 2018, prepared by SES (Document #82669025)
- *Work Plan: Soil Vapor Assessment, Old Fort Wayne Former MGP Site, AOI-3 City of Fort Wayne Redevelopment Commission*, dated November 16, 2018, prepared by Haley & Aldrich (Document #82655397)
- *Draft Memorandum on Soil Vapor Assessment Results Old Fort Wayne Former MGP Site AOI-3 City of Fort Wayne Redevelopment Commission*, dated April 24, 2019, prepared by Haley & Aldrich (Document #82824871)
- *Additional Environmental Investigation*, dated May 9, 2019, prepared by SES (Document #82774038)
- *Further Site Investigation and Remedial Action Evaluation Report*, dated June 9, 2019, prepared by Heartland Environmental Associates Inc. (Heartland) (Document #82800635)
- *Fort Wayne Mixed Use Building*, dated June 20, 2019, prepared by Civil & Environmental Consultants, Inc. (CEC) (Document #82800641)

For purposes of this letter, sample analytical results were compared to IDEM's *Remediation Closure Guide* (RCG) (March 22, 2012 and applicable revisions) screening levels as follows: soil samples collected at depths between 0 and 10 feet bgs were compared to RCG residential and commercial/industrial direct contact screening levels (RDCSLs and IDCSLs, respectively) soil samples collected between 0 and 18 feet bgs were compared to the excavation worker direct contact screening levels (EX DC SLs); and, soil samples collected at depths greater than 18 feet bgs were not evaluated for purposes of closure because of the unlikely risk of exposure to soil at that depth. Ground water samples were compared to residential tap ground water screening levels (Res TAP GWSLs) and residential vapor exposure ground water screening levels (Res VE GWSLs), as well as commercial/industrial vapor exposure ground water screening levels (Indus VE GWSLs). Exterior soil gas samples were compared to calculated RCG residential exterior soil gas screening levels (Res SGe SLs) and calculated commercial/industrial exterior soil gas screening levels (Indus SGe SLs).

Phase II Investigation – August 2005

The Phase II investigation was conducted to provide information identified as a data gap from the Conceptual Site Model (CSM) previously submitted to VRP. The Phase II investigation included: DNAPL delineation, soil boring installation, test pits, sediment sampling, ground water sampling, soil vapor testing, and indoor air sampling. A total of 11 monitoring wells (MW04-06, MW04-07, MW04-08, MW04-09, MW94-1, MW94-2, MW94-12, MW98-1, MW98-2, and MW99-3) were installed on AOI-3 (that includes the Site) as part of the CSM activities. Of the on-Site monitoring wells, only one (MW94-12) of the ten monitoring wells

installed in the deep aquifer with the remaining nine installed within the shallow aquifer. Ground water flow across the Site was determined to be in a northeast direction toward the MGP and the St. Mary River in the shallow and intermediate aquifers and to the north in the deep aquifer. The former MGP operations are not believed to have occurred west of Barr Street with impacts observed on AOI-3 believed to be the result of DNAPL migration from source areas located on AOI-1 (the former MGP). This hypothesis is supported by the contaminant distribution observed during the investigation. The impacts on AOI-3 were observed in the area of MW04-06, MW04-07 and MW99-3.

QGWSR & Closure Strategy TRAA – December 2013

On September 11, 2013, SES conducted quarterly ground water sampling of monitoring wells (MW-1 through MW-5) at the former TRAA facility. Monitoring well MW4 was located on the northern portion of the Site. The ground water samples were analyzed for volatile organic compounds (VOCs), lead scavengers, polycyclic aromatic hydrocarbons (PAHs), total and dissolved lead. No constituents analyzed in ground water were detected at levels above applicable RCG screening levels.

The report included soil sample data collected in 2011-2012. During that time 23 soil borings were advanced on the former TRAA property. The soil sample previously collected at MW4 (6-8 feet bgs) contained lead at a concentration of 2,700 mg/kg, which was above the EX DCSL of 1,000 mg/kg. The soil sample collected from MW2/B9 (6-8 feet bgs) contained lead at a concentration of 690 mg/kg, which was above the RDCSL of 400 mg/kg. No other constituents analyzed in soil were detected at levels above applicable RCG screening levels.

Draft Environmental Review – August 2017

SES conducted an environmental review of the Site. The review consisted of a visual site inspection; review of historical records including city directories, historical fire insurance maps, and historical aerial photographs; and review of regulatory records for the site and adjacent properties.

Draft Environmental Screening Investigation Report – November 2017

An environmental screening investigation was conducted in September 2017 to further assess oil (MGP contamination) and ground water conditions on the Site. Soil gas sampling was conducted on the Site. The investigation consisted of eight soil borings (GP-1 through GP-8), eight temporary ground water monitoring wells (GP-1 through GP-8), five exterior soil gas sampling points (SGe-1 through SGe-5), and the sampling of four existing MGP monitoring wells (MW94-2, MW-98-2, MW04-06, and MW04-08). The samples were collected in the following areas:

- GP-1 was advanced at the north-central portion of the Site. Auto repair operations were historically located in this area.

- GP-2 and GP-4 were advanced at the northwest portion of the Site. GP-2 was advanced at the approximated location of three historical gasoline USTs and GP-4 was advanced at the approximate location of a historical fuel dispensing area. A soil gas sample, SGe-3, was collected in this area.
- Boring GP-3 was advanced at the northeast portion of the Site. Foundry operations were historically conducted in this area.
- GP-5 was advanced at the southwest portion of the Site at the approximate historical location of two gasoline USTs. A soil gas sample, SGe-1, was collected in this area.
- GP-6 was advanced at the west-southwest portion of the Site at the approximate former location of a gasoline UST. A soil gas sample, SGe-1, was collected in this area.
- GP-7 was advanced at the south-central portion of the Site. Machine shop operations were historically located in this area.
- GP-8 was advanced at the southwest portion of the Site. Auto repair operations were historically located in this area.
- The central portion of the Site is known to be impacted with benzene, toluene, ethylbenzene, xylenes (BTEX) and PAH constituents. DNAPL is also known to be present. Four shallow MGP monitoring wells, already located in the central portion of the Site, were sampled to screen for chlorinated VOCs and Resource Conservation and Recovery Act (RCRA) 8 metals associated with historical foundry, machining, and repair operations. Soil gas samples, identified as SGe-4 and SGe-5, were also collected in this area.

A geophysical survey was conducted across the Site to identify utilities and/or buried structures such as USTs. No anomalies consistent with the presence of an UST were identified.

Soil samples were analyzed for VOCs, PAHs, and lead to screen for petroleum and solvent contamination. Samples of fill material⁴ and samples collected at the former machine shop, foundry, and auto repair areas were also analyzed for PCBs and RCRA 8 metals. Benz(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, lead, mercury, and chromium were detected in soil at level above their respective RDCSLs. (Because the chromium was not speciated between trivalent chromium (chromium III) and the more toxic hexavalent chromium (chromium VI), IDEM, in the most conservative approach, compared the analytical results to the chromium VI screening level). No other constituents analyzed in soil were detected at levels above applicable RCG screening levels. Refer to Table 2, below, for a summary of soil analytical data above applicable RCG screening levels.

⁴ Fill material was present across the Site at a depth between 8 and 16 feet bgs. The fill material contained cinder, slag, ash, glass, pottery, concrete and brick.

TABLE 2
September 2017 Soil Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Contaminant Detected	Sample Location (Depth bgs) & Results (parts per million (ppm))						RDCSL	IDCSL	EX DCSL
	GP1 (10-12)	DUP (GP1 (10-12))	GP2 (6-8)	GP3 (2-4)	GP4 (6-8)	GP7 (6-8)			
Benz(a) anthracene	<0.49	<0.42	15.2	1.91	7.10	<0.34	15	210	12,000
Benzo(a) pyrene	0.184	0.248	15.0	2.04	6.36	<0.070	1.5	21	500
Benzo(b) fluoranthene	<0.49	<0.42	18.7	2.62	7.96	<0.34	15	210	12,000
Chromium*	21	42	7.9	9.5	14	8.9	4.2	63	2,700
Lead	640	<u>1,380</u>	744	166	247	14	400	800	1,000
Mercury	<u>31</u>	<u>27</u>	<u>21</u>	<u>8.4</u>	<u>10</u>	<1	3.1	3.1	3.1

Notes: **bold** = above RCG Residential Direct Contact Screening Level
italics = above RCG Commercial/Industrial Direct Contact Screening Level
underline = above RCG Excavation Worker Direct Contact Screening Level
 bgs = below ground surface

*= Because the chromium was not speciated between chromium III and the more toxic chromium VI, IDEM, in the most conservative approach, compared the analytical results to the chromium VI screening level.

Ground water sampling was conducted using conventional purging and sampling methods in accordance with industry standard practices. Ground water was analyzed for VOCs, PAHs, and lead. Samples collected at former machine shop, foundry, and auto repair areas were also analyzed for RCRA 8 metals. Total cadmium, total chromium, total lead, arsenic, benzene, 1-methylnaphthalene, and naphthalene were detected in ground water at levels above their Res TAP GWSLs. Total cadmium and lead were detected in unfiltered ground water at concentrations above their respective Res TAP GWSLs. However, dissolved (filtered) concentrations of cadmium and lead from these same locations were below laboratory detection limits. Because the chromium was not speciated between chromium III and the more toxic chromium VI, IDEM, in the most conservative approach, compared the analytical results to the chromium VI screening level. The dissolved chromium laboratory detection limits were higher than the Res TAP GWSL (0.35µg/L) therefore, this data is inconclusive as to actual chromium levels. No other constituents analyzed in ground water were detected at levels above applicable RCG screening levels. Ground water elevation was determined to be from approximately 14 feet bgs to 16 feet bgs and flowed to the northeast in the shallow and intermediate aquifers and to the north in the deep aquifer across the Site. Refer to Table 3, below, for a summary of ground water analytical data above applicable RCG screening levels.

TABLE 3
September 2017 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Contaminant Detected	Sample Location & Results (parts per billion (ppb))			Res TAP GWSL	Res VE GWSL	Indus VE GWSL
	GP5	MW04-06	MW04-08			
Arsenic	NA	<10	100	10		NE
Benzene	<5	<u>1,350</u>	<5	5	28	120
1-Methylnaphthalene	<1.0	35.5	<1.0	11		NE
Naphthalene	2.12	192	<1.0	1.7	110	460

Notes: **bold** = above RCG Residential Tap Ground Water Screening Level
italics = above RCG Residential Vapor Exposure Ground Water Screening Level
underline = above RCG Commercial/Industrial Vapor Exposure Ground Water Screening Level
 NE = not established
 NA = not analyzed

Soil gas sampling points were installed to screen for vapor phase contaminants. Samples were collected from approximately six feet bgs and analyzed for VOCs. No constituents were detected in exterior soil gas at levels above their calculated residential exterior soil gas screening level, which was calculated using the 0.03 attenuation factor based on the collection of samples from greater than five feet bgs.

Phase I ESA – November 2018

SES conducted a Phase I ESA on the Site and identified the following CREC:

- An ERC (the Original ERC referenced above) was recorded on February 20, 2015 on the deed for the north adjacent property (former TRAA facility; parcel 02-12-02-276-005.000-074), the southernmost portion of which is part of the Site, due to documented petroleum impact to soil and ground water. A Covenant Restricting Use of Property Serving Combined Sewer Overflow Reduction Tunnel, recorded on August 31, 2018, was also recorded on the deed for the north adjacent property and states future development shall not involve the construction of buildings, foundations, wells or other activities that involve the penetration of areas north of Duck Street more than 70 feet below ground surface (bgs) unless prior approval from the City of Fort Wayne has been received.

SES identified the following RECs associated with the Site:

- The Site has been used for commercial and industrial purposes since at least 1902. Historical Site occupants and operations of potential concern have included filling stations, automobile repair facilities, trucking facilities, boiler shops, machine shops, foundries, and dry cleaners. Historical investigations conducted at the Site have

revealed the presence of fill material beneath the Site and soil and ground water contamination at concentrations exceeding acceptable IDEM RCG screening levels. Furthermore, an ERC was recorded in 2015 for off-site areas north of Duck Street due to the presence of residual soil and ground water contamination associated with former UST operations. A 2017 investigation conducted at the Site also revealed elevated VOCs in soil-vapor samples collected from areas at the southwest corner to Duck Street and South Clinton Street, along Barr Street, and on the central portion of the Site.

- The MGP that formerly operated intermittently at the east and southeastern adjacent properties, from at least 1850 through 1948, has impacted ground water beneath the Site. Results of ground water testing indicate DNAPL and non-aqueous phase liquid (NAPL) is present in several wells located along the east site boundary; concentrations of BTEX and PAH compounds exceed Res TAP GWSLs in wells on the central and east portions of the Site; and, concentrations of PAH compounds exceed Res TAP GWSLs at two intermediate wells on the central portions of the Site.

Draft Memorandum on Soil Vapor Assessment Results – April 2019

The objective of the soil vapor investigation on the Site was to assess potential vapor intrusion pathways in those areas of the Site overlying MGP contamination on which residential use is being proposed and further evaluate environmental conditions on the Site for the potential installation of vapor mitigation systems in certain proposed new buildings. On January 16, 2019, four permanent soil vapor probes (SV18-01 through SV18-04) were installed using direct push methods (Geoprobe®). Soil vapor probes SV18-01 and SV18-02 were located within the target area of the higher concentrations of MGP residuals compounds. Soil vapor probes SV18-03 and SV18-04 were located within the footprint of the proposed residential living space and spaced out in the proposed location of five townhouse units where MGP contaminants either were not encountered or were observed only at low concentrations. The depths of the soil vapor probes were approximately 5.5 feet bgs.

Soil vapor samples were collected from the soil vapor probes during two sampling events completed on February 7-8 and March 18-19, 2019. Prior to sample collection, shut-in and helium leak testing were performed. Soil vapor probes SV18-01, SV18-02, and SV18-04 passed the helium leak tests, meaning no helium was detected in the Tedlar® bag samples collected from each point. Soil vapor probe SV18-03 failed four separate leak tests. After four failed tests, it was decided that the leak could not be remedied and the decision was made to collect the soil vapor sample and report the results with comments. Following the helium leak testing, soil vapor probes were purged and samples were collected in Summa canisters and analyzed by EPA method TO-15 for the analytical laboratory's standard VOC TO-15 list. The analytical results for the February and March 2019 sampling events detected no VOCs in soil gas above Res SGe SLs.

Additional Environmental Investigation – May 2019

On April 25, 2019, SES advanced three soil borings (SB-1 through SB-3) to delineate lead in soil around MW4 (associated with the former TRAA facility) and collected a ground water sample from existing monitoring well (MW94-2) to re-evaluate chromium VI levels. The three soil borings were advanced to the east, south, and west of MW4. One soil sample was collected from each boring and analyzed for lead. Lead was detected in all three soil samples, but at levels below its RDCSL.

Monitoring well MW94-2 was analyzed for chromium VI, which was detected in ground water at a level above its Res TAP GWSL. Refer to Table 4, below, for a summary of ground water analytical data above applicable RCG screening levels.

TABLE 4
April 2019 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Contaminant Detected	Sample Location & Results (parts per billion (ppb))	Res TAP GWSL	Res VE GWSL	Indus VE GWSL
	MW94-2			
Hexavalent Chromium	0.39	0.35		NE

Notes: **bold** = above RCG Residential Tap Ground Water Screening Level
 NE = not established

FSI & Remedial Action Evaluation Report – June 2019

In May 2019, Heartland advanced 21 soil borings (B-1 through B-21) to a maximum depth of 25 feet bgs on the Site. Eight of the soil borings were advanced in the western and northern portions of the Site to investigate historic commercial and industrial operations. The remaining 13 borings were advanced in the eastern portion of the Site to further evaluate impacts from the former MGP. Three soil samples from each soil boring were submitted for analysis of VOCs and PAHs. Soil samples were collected from the initially encountered subsurface interval (2 feet to 4 feet bgs), the interval exhibiting the highest photo-ionization detector (PID) reading and/or the interval immediately above the first encountered ground water saturated zone, and at the intermediate shallow sampling depth (8 feet to 10 feet bgs) for purposes of characterizing soil conditions for redevelopment planning. Additionally, soil samples collected from the initially encountered subsurface interval and the intermediate soil sampling depth were also submitted for analysis of RCRA 8 metals and chromium VI.

Arsenic, lead, mercury, benz(a)anthracene, benzo(a)pyrene, benzo(a)fluoranthene, and indeno(1,2,3-cd)pyrene were detected in soil at levels above their respective RDCSLs. Only lead, mercury and benzo(a)pyrene were above their respective IDSCSLs and/or EX DCSLs. No other constituents analyzed in soil were detected at levels above applicable RCG screening

levels. Refer to Table 5, below, for a summary of soil analytical data above applicable RCG screening levels.

TABLE 5
May 2019 Soil Concentrations Exceeding Applicable IDEM RCG Screening Levels

Sample Location (Depth bgs)	Contaminant Detected & Results (parts per million (ppm))						
	Arsenic	Lead	Mercury	Benz(a) anthracene	Benzo(a) pyrene	Benzo(b) fluoranthene	Indeno (1,2,3-cd) pyrene
B-1(2-4)	7.4	477	<0.26	0.069	0.041	0.038	0.023
B-1(8-10)	13.1	<u>1,730</u>	2.5	1.3	1.0	0.88	0.53
B-2(2-4)	21.4	<u>4,390</u>	0.45	<0.034	<0.034	<0.034	<0.034
B-2(8-10)	14.3	76.1	0.71	0.38	0.027	0.039	0.021
B-3(2-4)	11.3	64.0	<0.23	0.071	0.056	0.052	0.032
B-3(8-10)	17.6	416	2.0	5.0	3.0	2.9	1.5
B-4(2-4)	7.6	329	<u>6.4</u>	0.45	0.39	0.41	0.26
B-4(8-10)	11.3	346	2.8	1.2	1.2	0.92	0.63
B-5(2-4)	10.5	118	<0.23	0.15	0.12	0.13	0.078
B-5(8-10)	12.5	43.2	<0.23	0.052	0.043	0.039	0.025
B-8(8-10)	10.3	16.5	<0.27	<0.0065	<0.0065	<0.0065	<0.0065
B-9(2-4)	6.2	82.2	0.52	3.2	2.7	2.0	1.5
B-9(8-10)	5.5	51.9	0.45	6.2	4.4	3.2	2.2
B-10(2-4)	10.8	7.3	<0.24	<0.0056	<0.0056	<0.0056	<0.0056
B-12(2-4)	13.3	3.8	<0.21	<0.0053	<0.0053	<0.0053	<0.0053
B-13(2-4)	13.3	184	0.32	1.7	1.8	1.5	1.1
B-13(8-10)	11.5	72.1	2.1	0.49	0.37	0.33	0.20
B-14(2-4)	12.6	216	1.2	39.6	19.3	16.0	6.5
B-15(2-4)	12.8	13.1	<0.22	0.11	0.081	0.088	0.054
B-16(2-4)	8.1	156	2.8	73.2	43.1	27.7	18.4
B-18(2-4)	6.4	113	1.6	5.3	3.8	3.2	2.2
B-18(8-10)	6.4	45.8	0.55	5.6	3.4	3.2	1.7
B-19(8-10)	17.6	<u>1,580</u>	<u>5.4</u>	19.1	11.3	7.4	5.3
B-21(2-4)	20.7	<u>1,660</u>	0.63	0.82	0.75	0.73	0.55
RDCSL	9.5	400	3.1	15	1.5	15	15
IDCSL	30	800	3.1	210	21	210	210
EX DC SL	920	1,000	3.1	12,000	500	12,000	12,000

Notes: **bold** = above RCG Residential Direct Contact Screening Level
italics = above RCG Commercial/Industrial Direct Contact Screening Level
underline = above RCG Excavation Worker Direct Contact Screening Level
 bgs = below ground surface

Arsenic (dissolved), benzene, 1,2,4-trichlorobenzene, benz(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, dibenzo(a,h)anthracene, 1-methylanaphthalene, 2-methylanaphthalene, and naphthalene were detected in ground water at levels above their respective Res TAP GWSLs. Benzene and naphthalene were also above their respective Res VE GWSLs and Indus VE GWSLs. No other constituents analyzed in ground water were detected at levels above applicable RCG screening levels. Refer to Table 6, below, for a summary of ground water analytical data above applicable RCG screening levels.

TABLE 6
May 2019 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Sample Location	Contaminant Detected & Results (parts per billion (ppb))									
	Arsenic Dissolved	Benzene	1,2,4-Trichlorobenzene	Benz(a)anthracene	Benzo(a)pyrene	Benzo(b)fluoranthene	Dibenzo(a,h)anthracene	1-Methylanaphthalene	2-Methylanaphthalene	Naphthalene
B-5	19.5	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-9	14.9	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	1.7
B-10	<10.0	155	89.6	2.8	1.9	1.5	<0.10	423	510	3,580
B-11	58.3	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	7.4
B-12	<10.0	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	4.6
B-14	11.8	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-15	18.3	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-16	<10.0	52.2	<5.0	<0.10	<0.10	<0.10	<0.10	10.4	1.4	53.2
B-17	<10.0	142	<50.0	<0.10	<0.10	<0.10	<0.10	129	49.0	499
B-18	14.9	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-20	15.0	1,310	<5.0	6.0	5.3	5.5	0.47	58.0	74.2	4.8
B-21	11.2	2,360	<5.0	<0.10	<0.10	<0.10	<0.10	14.4	3.1	501
Res TAP GWSL	10	5	70	0.3	0.2	2.5	0.25	11	36	1.7
Res VE GWSL	NE	28	NE	NE	NE	NE	NE	NE	NE	110
Indus VE GWSL	NE	120	NE	NE	NE	NE	NE	NE	NE	460

Notes: **bold** = above RCG Residential Tap Ground Water Screening Level
italics = above RCG Residential Vapor Exposure Ground Water Screening Level
underline = above RCG Commercial/Industrial Vapor Exposure Ground Water Screening Level
 NE = not established

After reviewing available analytical data, Heartland recommended soil hotspot removal and a combination of soil vapor extraction (SVE) and ground water treatment.

Mixed Use Building – June 2019

CEC reviewed the development project plans for the Site. A portion of the existing parking lot lies within the 100-year flood plain of the St. Mary's River, but outside the 100-year floodway of the river. As a result, a Department Natural Resources (DNR) Construction in a Floodway Permit is not required. In addition, an IDEM 401/404 permit is not required. However, an IDEM National Pollutant Discharge Elimination System (NPDES) Rule 5 permit is required since the project disturbs more than 1.0 acre of property. The Rule 5 Permit pertains to land disturbance measures (erosion control) only and is not focused on the flood plain. The 100-year Base Flood Elevation (BFE) is approximately 757.0'. The proposed design for the apartments, office, retail, and the 1st level of the parking garage are for them to be elevated two feet above the Base Flood Elevation, or 759.0'. In the lower level of the garage and below the 100-year BFE, a sump pit and fitted with a pump will be installed to collect any snow/rain runoff from cars. In addition, the exterior garage walls will be fully water proofed and engineered to resist exterior hydraulic pressure.

Technical Summary

The investigations on Site have identified lead and mercury in fill and/or soil at levels above EX DCSLs. The fill and/or soil with detections above EX DCSLs need to be removed and properly disposed in accordance with applicable Federal, State, and local laws and regulations.⁵ If the fill and/or soil containing contamination above EX DCSLs is not removed, it will need to be capped to prevent both direct contact exposure and storm water infiltration.

The investigations on Site detected multiple contaminants in ground water at levels above their respective Res TAP GWSLs. Some of the ground water sample locations near the central eastern portion of the Site were also found to contain contaminants at levels above their respective Res VE GW SLs and/or Indus VE GWSLs. The depth to ground water at the Site was at approximately 14 to 16 feet bgs. In 2017 and 2019, exterior soil gas samples were collected at approximately 5.5 and 6 feet bgs, respectively. No contaminants in the exterior soil gas samples were detected at or above their respective Res SGe SLs.

A *Modification of ERC* is needed to terminate the restrictions currently applicable to the two northernmost parcels of the Site that are subject to the Original ERC recorded on the deed for the former TRAA property, while leaving the Original ERC applicable to the rest of the former TRAA property. An ERC also needs to be recorded on the deed for the Site after the Prospective Purchaser has acquired the Site in order to eliminate exposure to the contamination detected in soil and ground water on the Site.

⁵ Current redevelopment plans include the removal of the top 12 feet of fill and/or soil due to the results of a geophysical survey indicating unsuitability of the current subsurface for the construction of buildings.

Liability Clarification

IDEM's "*Brownfields Program Comfort and Site Status Letters*" Non-rule Policy Document, W-0051 (April 18, 2003) (Comfort and Site Status Letter Policy), provides that IDEM may issue a letter to a stakeholder involved in redevelopment of a brownfield if the stakeholder satisfies certain eligibility criteria outlined below. IDEM concludes, based in part on information provided by the Prospective Purchaser, that:

- (1) no state or federal enforcement action at the Site is pending;⁶
- (2) no federal grant requires an enforcement action at the Site;
- (3) no condition on the Site constitutes an imminent and substantial threat to human health or the environment;
- (4) neither the Prospective Purchaser nor an agent or employee of the Prospective Purchaser caused, contributed to, or knowingly exacerbated the release or threat of release of any hazardous substance or petroleum at the Site, and;
- (5) the Prospective Purchaser is eligible for an applicable exemption to liability, specifically the bona fide prospective purchaser (BFPP) exception to liability for hazardous substance contamination found in IC §13-25-4-8(b) and for petroleum contamination under IC §§ 13-23-13 and 13-24-1, provided the applicable statutory criteria are met.

As discussed below, the Prospective Purchaser has demonstrated to IDEM's satisfaction that it is eligible for the State BFPP exemption from liability for hazardous substance and petroleum contamination provided it takes the "reasonable steps" required by statute, recommendations for which are also discussed below.

Bona Fide Prospective Purchaser

Under IC § 13-25-4-8(a), except as provided in IC § 13-25-4-8(b), (c), or (d), a person that is liable under § 107(a) of CERCLA is liable to the state in the same manner and to the same extent. IC § 13-25-4-8(b) references certain exceptions to liability imposed by IC § 13-25-4-8(a), including the exception in Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), which states that a BFPP whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the BFPP does not impede the performance of a response action or natural resource restoration. 42 U.S.C. § 9607(r). Thus a prospective purchaser that qualifies as a bona fide prospective purchaser and does not impede the performance of a response action or natural resource restoration would not be liable under IC § 13-25-4-8(a). Similarly, such a bona fide prospective purchaser would not be liable under IC §§ 13-23-13 and 13-24-1 for petroleum contamination existing on the Site.

⁶ No state or federal enforcement action is pending at the Site. However, the Site is an active area of interest associated with the of-site former MGP VRP site. The Program has discussed the proposed transaction and redevelopment plans with VRP staff who do not object to the agency's use of enforcement discretion as it pertains to the Prospective Purchaser.

Under Indiana law, if the Prospective Purchaser qualifies as a bona fide prospective purchaser and does not impede the performance of a response action or natural resource restoration, IDEM is prohibited from pursuing the Prospective Purchaser even if cleanup requirements change or if IDEM determines that a response action related to existing known hazardous substances or petroleum contamination from prior releases at the Site is necessary. Furthermore, IDEM is prohibited from pursuing such a prospective purchaser for response costs relating to the past release of hazardous substances or petroleum contamination at the Site. Therefore, IDEM will not require the Prospective Purchaser to respond to the past release of hazardous substances or petroleum contamination found at the Site beyond the scope of the statutorily-required reasonable steps outlined below, even if cleanup requirements change or if IDEM determines that a response action is necessary in the future. This decision, however, does not apply to past or present hazardous substance or petroleum contamination that is not described in this letter, future releases, or applicable federal requirements under CERCLA or the Resource Conservation and Recovery Act, 42 U.S.C. § 6901.

To meet the statutory criteria for liability protection as a BFPP under Indiana law, a landowner must meet certain threshold criteria and satisfy certain continuing obligations. IDEM notes that the Prospective Purchaser will acquire the Site after January 11, 2002 (and after June 30, 2009), and the disposal of hazardous substances and petroleum at the Site will have occurred prior to that date. See 42 U.S.C. § 9601(40)(A); § IC 13-11-2-148(h); IC § 13-11-2-151(g); IC § 13-11-2-150(f). Based on information reviewed by IDEM, IDEM concludes that the Prospective Purchaser has conducted all appropriate inquiries into the previous ownership and uses of the Site. See 42 U.S.C. § 9601(40)(B)(i). Furthermore, the Prospective Purchaser has represented that it is not potentially liable or affiliated with any person that is potentially liable for contamination at the Site, and IDEM has no information to the contrary. See 42 U.S.C. § 9601(40)(H). Therefore, the Prospective Purchaser meets the threshold requirements of CERCLA §§ 9601(40) (A), (B) and (H) to qualify for the status of BFPP under 42 U.S.C. § 9601(40).

The continuing obligations the Prospective Purchaser must undertake to qualify as a BFPP under Indiana law and maintain such status are outlined in 42 U.S.C. §§ 9601(40)(C)-(G) and include exercising "appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to – (i) stop any continuing release; (ii) prevent any threatened future release; and, (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance." 42 U.S.C. § 9601(40)(D). By extension, under IC §§ 13-11-2-148(h), 13-11-2-150(f), and 13-11-2-151(g), the continuing obligations the Prospective Purchaser must undertake to maintain BFPP status are outlined in 42 U.S.C. §§ 9601(40) (C)-(G) and include exercising appropriate care with respect to petroleum products found at the facility by taking reasonable steps to – (i) stop any continuing release; (ii) prevent any threatened future release; and, (iii) prevent or limit human, environmental, or natural resource exposure to any previously released petroleum product. Furthermore, the Prospective Purchaser recognizes that in order to maintain the status of BFPP, it will have to continue to provide the cooperation, assistance and access required by 42 U.S.C. § 9601(40) (E). In addition, the Prospective Purchaser will have to maintain

compliance with land use restrictions established for the Site, and not impede the implementation or the effectiveness of any institutional control as required by 42 U.S.C. § 9601(40) (F). To maintain BFPP status, the Prospective Purchaser must also supply required notices and respond to requests for information or administrative subpoenas in accordance with 42 U.S.C. § 9601(40)(C) and 42 U.S.C. § 9601(40) (G), respectively.

Recommendations

IDEM has the following recommendations for the Site:

- Properly abate and/or manage asbestos containing-materials (ACM) and/or lead-based paint during any renovations or demolition of the existing historic Club Soda building on the Site in accordance with applicable Federal, State, and local laws and regulations.
- IDEM recommends mitigating any exposure risks associated with any contamination related to the elevator in the on-Site building that may be discovered during building construction and/or renovation activities.

Reasonable Steps

As of the date of issuance of this Comfort Letter, IDEM believes the following are appropriate reasonable steps for the Prospective Purchaser to undertake with respect to the hazardous substances and petroleum contamination found at the Site in order to qualify as a BFPP, as well as to satisfy the eligibility requirements for issuance of this letter under the Comfort and Site Status Letter Policy:

- Implement and maintain the land use restrictions required by this letter.
- If not undertaken because the redevelopment plans to do not proceed as currently anticipated, in accordance with a work plan approved by the Program, remove and properly dispose of contaminated fill and/or soil exceeding RCG IDCSSLs and/or EX DCSSLs in the "Restricted Locations" surrounding borings GP1, GP2, GP3, GP4, B-1, B-2, B-4, B-16, B-19, B-21, and MW-4, which are identified via GPS coordinates and defined by a 10 foot by 10 foot polygon, as depicted on the attached *Restricted Locations Site Map* and collect confirmation samples to confirm complete removal of contaminated soil above IDCSSLs and/or EX DCSSLs or implement the two-foot capping land use restriction, outlined below.
- In the event of ground water infiltration into the subsurface level of the garage, sample any ground water that remains after the water recedes and remove any remaining ground water and/or residual contamination (e.g., sediment) in accordance with applicable disposal requirements.

- Reasonably cooperate with and do not impede any third party's undertaking of any response actions required by IDEM's VRP to address project number 6040704 or any other contamination identified on the Site resulting from an off-Site source.
- If not undertaken by a third party, properly abandon the on-Site monitoring wells according to 312 Indiana Administrative Code 13-10-2 (Permanent Abandonment of Wells) after receiving written approval from IDEM.
- Upon becoming aware of such information, communicate to IDEM any newly-obtained information about existing hazardous substance and/or petroleum contamination or any information about new (or previously unidentified) contamination. This requirement does not apply to information developed by a third party that should be separately communicated to IDEM by the third party.

Implementation of the above-mentioned reasonable steps in addition to ongoing satisfaction of the additional statutory conditions will, with respect to IDEM, satisfy the statutory conditions for State BFPP protection. Please be advised that any work performed at the subject property must be done in accordance with all applicable environmental laws in order to ensure no inadvertent exacerbation of existing contamination found on the Site which could give rise to liability.

Institutional Control

Since levels of contaminants detected in soil and ground water on-Site were above applicable RCG residential screening levels, IDEM is requiring an ERC to be recorded on the deed for the Site to ensure no exposure to on-Site contamination. As a condition of the issuance and effectiveness of this letter under the Comfort and Site Status Letter Policy, the Prospective Purchaser must abide by the land use restrictions in the enclosed ERC, which are summarized below:

- (a) Shall neither engage in nor allow drilling or excavation of soil on the northern seven parcels of the Site (parcels 02-12-02-276-006.000-074, 02-12-02-276-005.000-074, 02-12-02-276-007.000-074, 02-12-02-276-008.000-074, 02-12-02-276-009.000-074, 02-12-02-276-010.000-074, 02-12-02-276-011.000-074) ("Affected Area") depicted on Exhibit "F" of the ERC during any construction without first submitting a work plan for approval by the IDEM at least sixty (60) days prior to beginning work. Any removal, excavation or disturbance of soil from the Affected Area of the Site during any construction must be conducted in accordance with IDEM-approved work plan, including all applicable requirements of IOSHA/OSHA.
 - i. Soil in any area on the Site on which standalone single-family or duplex residential housing will be constructed must be sampled down to 10 feet bgs. Any soil determined through such sampling to be contaminated above applicable RCG residential screening levels must be excavated, leaving only soil that meets RCG RDCSLs in place.

- ii. Shall restore soil disturbed as a result of excavation and construction activities during any construction on the Site in such a manner that any remaining contaminant concentrations do not present a threat to human health or the environment (as determined under the RCG using residential screening levels). Upon IDEM's request, the Owner shall provide the IDEM with documentation showing the excavated and restored area, and any other area affected by excavation or construction activities, does not represent such a threat.
 - iii. Any soil that is removed, excavated or disturbed on the Site during any construction must be managed and disposed of in accordance with all applicable federal and state laws and regulations.
- (b) Shall install a two-foot clean (constituents not exceeding RCG residential direct contact screening levels) soil and vegetative barrier in any areas of the Site not covered by buildings, parking lots, or sidewalks, and maintain their integrity. Buildings, parking lots, sidewalks, and soil capped areas will serve as engineered barriers to prevent direct contact with the underlying soils and must not be excavated, removed, disturbed, demolished, or allowed to fall into disrepair without replacement by a barrier that will provide equal or better protection, unless it can be demonstrated to IDEM that the underlying contaminated soil has been remediated to RCG RDCSLs and/or IDC SLs, depending on then-current land use(s).
- (c) Shall install, operate, and maintain a ventilation system designed to mitigate potential exposure to contaminants in ground water detected above Indus VE GWSLs in any subsurface parking garage constructed on the Site after the effective date of this Covenant.
- (d) Shall not use or allow the use or extraction of ground water at the Site for any purpose, including, but not limited to, human or animal consumption, gardening, industrial processes, or agriculture, without prior IDEM approval, except that ground water may be extracted in conjunction with environmental investigation and/or remediation activities.
- (e) Shall prohibit any activity at the Site that interferes with any ongoing response activities, long-term ground water monitoring, or measures necessary to assure the effectiveness and integrity of any response action or engineering control, or component thereof, implemented at the Site.

Conclusion

IDEM encourages the redevelopment of the Site. Should additional information gathered in conjunction with future Site investigations and/or remediation demonstrate that a particular restriction is no longer necessary to protect human health and the environment or that Site conditions are appropriate for unrestricted use, IDEM will, upon request, consider modification or termination of the ERC recorded on the deed for the Site pursuant to its terms

and conditions. Conversely, it is also possible that new land use restrictions may be necessary in the future due to new information or changed circumstances at the Site.

Pursuant to the Comfort and Site Status Letter Policy, the determinations in this letter are based on the nature and extent of contamination known to IDEM as of the date of this letter, as a result of review of information submitted to or otherwise reviewed by IDEM. If additional information regarding the nature and extent of contamination at the Site later becomes available, additional measures may be necessary to satisfy the reasonable steps requirements of BFPP status. In particular, if new areas of contamination or new contaminants are identified, the Prospective Purchaser must communicate this information to IDEM upon becoming aware of it and should ensure that reasonable steps are undertaken with respect to such contamination in order to qualify as and maintain BFPP status. This requirement does not apply to information developed by a third party that should be separately communicated to IDEM by the third party.

This letter shall not be construed as limiting the Prospective Purchaser's ability to rely upon any other defenses and/or exemptions available to it under any common or environmental law, nor shall it limit any ongoing obligations of the Prospective Purchaser that are required to maintain the status of BFPP. Furthermore, the terms and conditions of this letter shall be limited in application to this letter recipient and this Site, and shall not be binding on IDEM at any other Site.

If at any time IDEM discovers that the above-mentioned reports, any representations made to IDEM, or any other information submitted to or reviewed by IDEM was inaccurate, which inaccuracy can be attributed to the Prospective Purchaser, then IDEM reserves the right to revoke this letter and pursue any responsible parties. Furthermore, if any activities undertaken by the Prospective Purchaser result in a new release or if Site conditions are later determined by IDEM to constitute an imminent and substantial threat to human health or the environment, IDEM reserves the right to revoke this decision and pursue any responsible parties. Additionally, this decision does not apply to past or present contamination that is not described in this Comfort Letter, future releases, or applicable requirements under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 or CERCLA. In addition, if any acts or omission by the Prospective Purchaser exacerbates the contamination at the Site, or if the Prospective Purchaser does not implement and maintain the reasonable steps and other statutory requirements outlined in this letter, then the Prospective Purchaser would not be considered a BFPP and may be potentially liable under IC §§ 13-25-4-8(a), 13-23-13 and/or 13-24-1. Furthermore, activities conducted at the Site subsequent to purchase that result in a new release can give rise to full liability.

In order for IDEM to consider this letter effective, upon acquisition, the enclosed ERC, which includes a copy of the Comfort Letter, must be recorded by the Prospective Purchaser on the new deed for the Site in the Allen County Recorder's Office. Additionally, the enclosed Modification of ERC must be recorded by the owner of the remainder of parcel 02-12-02-276-

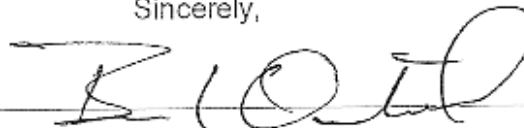
Club Soda Parking Lot, Fort Wayne – BFPP Comfort Letter
BFD #4181211
August 30, 2019
Page 23 of 23

005.000-074 on the deed for that property in the Allen County Recorder's Office. Please return certified copies of the filed documents to the address listed below:

Indiana Brownfields Program
100 North Senate Avenue, Room 1275
Indianapolis, Indiana 46204
ATTN: Dawn Andershock

IDEM is pleased to assist The Lofts at Headwater Park, LLC and Fort Wayne Garage Associates, One, LLC with this redevelopment project. Should you have any questions or comments, please contact Dawn Andershock at (317) 234-4861. She can also be reached via email at: dandershock@ifa.in.gov.

Sincerely,

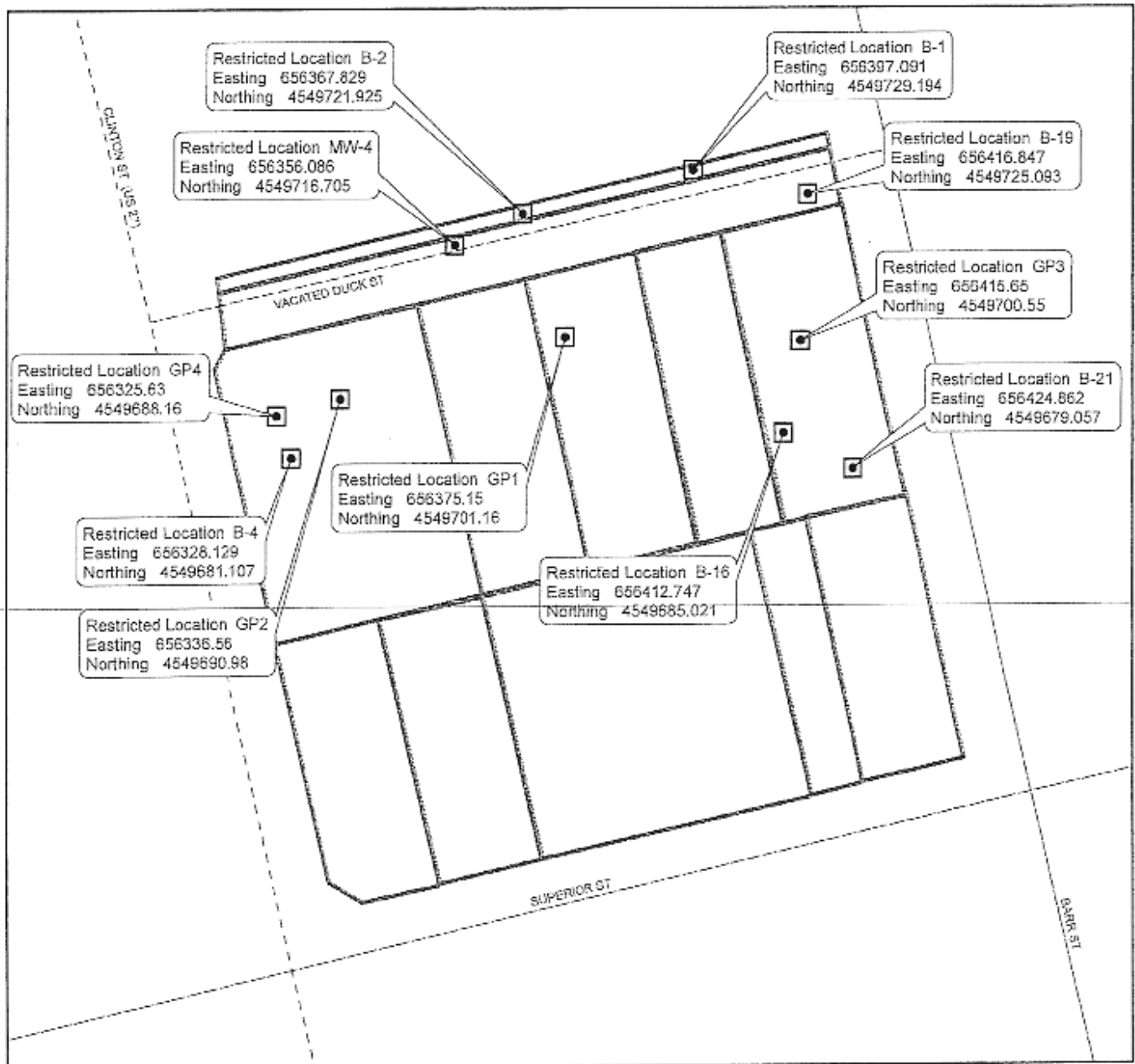


for Peggy Dorsey
Assistant Commissioner
Office of Land Quality

Attachment (Map)
Enclosure (ERCs)

cc: Patricia Polston, U.S. EPA Region 5 (*electronic copy*)
Meredith Gramelspacher, Indiana Brownfields Program (*electronic copy*)
Dawn Andershock, Indiana Brownfields Program (*electronic copy*)
Mark Nance, VRP (*electronic copy*)
Timothy Veatch, LUST (*electronic copy*)
Glen Howard, SES Environmental (*electronic copy*)
Allison Wells Gritton, Wooden McLaughlin LLP (*electronic copy*)
Lindsey Maksim, City of Fort Wayne (*electronic copy*)

Indiana Brownfields Program 4181211 - Restricted Locations

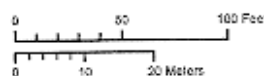
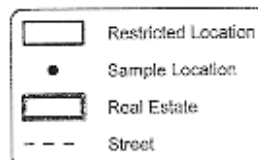


Mapped By: Mike Hill, IDEM, Office of Land Quality, Science Services Branch, Engineering & GIS Services, August 22, 2019

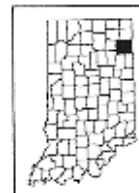
Restricted Location Info:
 Restricted Location coordinate parameters:
 Projection: UTM, Zone 16N
 Datum: NAD83
 Units: meters
 All Restricted Locations are centered on a sample location and are defined by a 15' by 10' polygon.

PLSS Info: Section 2, T30N, R12E
 Wayne Township
 Allen County, Indiana

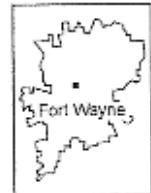
Disclaimer: This map is intended to serve as an aid in graphic representation only. This information is not warranted for accuracy or other purposes.



Allen County



Project Area



Environmental Restrictive Covenant

THIS ENVIRONMENTAL RESTRICTIVE COVENANT is made this ____ day of _____, 201__, by The Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates, One, LLC (collectively, "Owner").

WHEREAS: Owner is the fee owner of certain real estate in the County of Allen, Indiana, which is located at 235 East Superior Street in Fort Wayne and more particularly described in the attached **Exhibit "A"** ("Real Estate"), which is hereby incorporated and made a part hereof. The Real Estate was acquired by deed on _____, and recorded on _____, as Deed Record _____, in the Office of the Recorder of Allen County, Indiana and consists of approximately 2.919 acres that are identified by the State by parcel identification numbers 02-12-02-276-005.000-074, 02-12-02-276-006.000-074, 02-12-02-276-007.000-074, 02-12-02-276-008.000-074, 02-12-02-276-009.000-074, 02-12-02-276-010.000-074, 02-12-02-276-011.000-074, 02-12-02-276-012.000-074, 02-12-02-276-013.000-074, 02-12-02-276-014.000-074, 02-12-02-276-015.000-074, and 02-12-02-276-016.000-074. The Real Estate to which this Covenant applies is depicted on a map attached hereto as **Exhibit "B"**.

WHEREAS: A Comfort Letter, a copy of which is attached hereto as **Exhibit "C"**, was prepared and issued by the Indiana Department of Environmental Management ("the Department" or "IDEM") pursuant to the Indiana Brownfields Program's ("Program") recommendation at the request of Owner to address the redevelopment potential of the Real Estate which is a brownfield site resulting from a release of hazardous substances and petroleum products relating to historical operations on or in the vicinity of the Real Estate, Program site number BFD #4181211.

WHEREAS: The Comfort Letter, as approved by the Department, provides that certain contaminants of concern ("COCs") have been detected in soil and ground water on the Real Estate but will not pose an unacceptable risk to human health at the detected concentrations provided that the land use restrictions contained herein are implemented and maintained to ensure the protection of public health, safety, or welfare, and the environment. The COCs are arsenic, hexavalent chromium, lead, mercury, benzene, 1,2,4-trichlorobenbenzene, benz(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, dibenzo(a,h)anthracene, indeno(1,2,3-cd)pyrene, 1-methylnaphthalene, 2-methylnaphthalene, and naphthalene.

WHEREAS: Soil, ground water, and exterior soil gas on the Real Estate were sampled for volatile organic compounds ("VOCs"), polycyclic aromatic hydrocarbons ("PAHs"), polychlorinated biphenyls ("PCBs"), Resource Conservation and Recovery Act ("RCRA") 8 metals, hexavalent chromium, and lead. Investigations detected levels of arsenic, chromium, lead, mercury, benz(a)anthracene, benzo(b)fluoranthene, and indeno(1,2,3-cd)pyrene in soil above their respective residential direct contact screening levels

("RDCSLs") established by IDEM in the *Remediation Closure Guide* (March 22, 2012 and applicable revisions). Benzo(a)pyrene was detected in soil above industrial direct contact screening level ("IDCSL"). Lead and mercury were also detected in soil above their respective excavation worker direct contact screening levels ("EX DCSLs"). Investigations detected levels of arsenic, hexavalent chromium, benzene, 1,2,4-trichlorobenzene, benz(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, dibenzo(a,h)anthracene, 1-methylnaphthalene, 2-methylnaphthalene, and naphthalene above their respective residential tap ground water screening levels ("Res TAP GWSLs"). Benzene and naphthalene in ground water were also detected above their respective industrial vapor exposure ground water screening levels ("Indus VE GWSLs"). Soil and ground water analytical results above applicable RCG screening levels are summarized on Tables 1, 2, 3, 4, and 5 attached hereto as **Exhibit "D"**. A site map, attached hereto as **"Exhibit E"**, depicts sample locations on the Real Estate at which the COCs were detected in soil and ground water above applicable RCG screening levels.

WHEREAS: Site investigation and remediation activities on the off-site property to the east of the Real Estate that is the source of some of the ground water contamination detected on the Real Estate are ongoing under the oversight of the Department's State Cleanup Program and/or Voluntary Remediation Program (Incident #6040704).

WHEREAS: The Department has not approved closure of environmental conditions on the Real Estate under the *Remediation Closure Guide*. However, the Department has determined that the land use restrictions contained in this Covenant will enable the Real Estate to be used safely for conditional residential use.

WHEREAS: Environmental reports and other documents related to the Real Estate are hereby incorporated by reference and may be examined at the Public File Room of the Department, which is located in the Indiana Government Center North at 100 N. Senate Avenue, 12th Floor East, Indianapolis, Indiana. The documents may also be viewed electronically by searching the Department's Virtual File Cabinet on the Web at: <http://www.in.gov/idem/4101.htm>.

NOW THEREFORE, The Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates, One, LLC subject the Real Estate to the following restrictions and provisions, which shall be binding on The Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates, One, LLC and all future owners:

I. RESTRICTIONS

1. Restrictions. The Owner and all future owners:

- (a) Shall neither engage in nor allow drilling or excavation of soil on the northern seven parcels of the Real Estate (parcels 02-12-02-276-006.000-074, 02-12-02-276-005.000-074, 02-12-02-276-007.000-074, 02-12-02-276-008.000-074, 02-12-02-276-009.000-074, 02-12-02-276-010.000-074, 02-12-02-276-011.000-074) ("Affected Area") depicted on **Exhibit "F"**, attached hereto,

during any construction without first submitting a work plan for approval by the IDEM at least sixty (60) days prior to beginning work. Any removal, excavation or disturbance of soil from the Affected Area of the Real Estate during any construction must be conducted in accordance with IDEM-approved work plan, including all applicable requirements of IOSHA/OSHA.

- i. Soil in any area on the Real Estate on which standalone single-family or duplex residential housing will be constructed must be sampled down to 10 feet bgs. Any soil determined through such sampling to be contaminated above applicable RCG residential screening levels must be excavated, leaving only soil that meets RCG RDCSLs in place.
 - ii. Shall restore soil disturbed as a result of excavation and construction activities during any construction on the Real Estate in such a manner that any remaining contaminant concentrations do not present a threat to human health or the environment (as determined under the RCG using residential screening levels). Upon IDEM's request, the Owner shall provide the IDEM with documentation showing the excavated and restored area, and any other area affected by excavation or construction activities, ~~does not represent such a threat.~~
 - iii. Any soil that is removed, excavated or disturbed on the Real Estate during any construction must be managed and disposed of in accordance with all applicable federal and state laws and regulations.
- (b) Shall install a two-foot clean (constituents not exceeding RCG residential direct contact screening levels) soil and vegetative barrier in any areas of the Real Estate not covered by buildings, parking lots, or sidewalks, and maintain their integrity. Buildings, parking lots, sidewalks, and soil capped areas will serve as engineered barriers to prevent direct contact with the underlying soils and must not be excavated, removed, disturbed, demolished, or allowed to fall into disrepair without replacement by a barrier that will provide equal or better protection, unless it can be demonstrated to IDEM that the underlying contaminated soil has been remediated to RCG RDCSLs and/or IDCSLs, depending on then-current land use(s).
 - (c) Shall install, operate, and maintain a ventilation system designed to mitigate potential exposure to contaminants in ground water detected above Indus VE GWSLs in any subsurface parking garage constructed on the Real Estate after the effective date of this Covenant.
 - (d) Shall not use or allow the use or extraction of ground water at the Real Estate for any purpose, including, but not limited to, human or animal consumption, gardening, industrial processes, or agriculture, without prior Department approval, except that ground water may be extracted in conjunction with environmental investigation and/or remediation activities.

- (e) Shall prohibit any activity at the Real Estate that interferes with any ongoing response activities, long-term ground water monitoring, or measures necessary to assure the effectiveness and integrity of any response action or engineering control, or component thereof, implemented at the Real Estate.

II. GENERAL PROVISIONS

2. Restrictions to Run with the Land. The restrictions and other requirements described in this Covenant shall run with the land and be binding upon, and inure to the benefit of the Owner of the Real Estate and the Owner's successors, assignees, heirs and lessees or their authorized agents, employees, contractors, representatives, agents, lessees, licensees, invitees, guests, or persons acting under their direction or control ("Related Parties") and shall continue as a servitude running in perpetuity with the Real Estate. No transfer, mortgage, lease, license, easement, or other conveyance of any interest in all or any part of the Real Estate by any person shall limit the restrictions set forth herein. This Covenant is imposed upon the entire Real Estate unless expressly stated as applicable only to a specific portion thereof.
- ~~3. Binding upon Future Owners. By taking title to an interest in or occupancy of the Real Estate, any subsequent owner or Related Party agrees to comply with all of the restrictions set forth in paragraph 1 above and with all other terms of this Covenant.~~
4. Access for Department. The Owner shall grant to the Department and its designated representatives the right to enter upon the Real Estate at reasonable times for the purpose of determining whether the land use restrictions set forth in paragraph 1 above are being properly maintained (and operated, if applicable) in a manner that ensures the protection of public health, safety, or welfare and the environment. This right of entry includes the right to take samples, monitor compliance with the remediation work plan (if applicable), and inspect records.
5. Written Notice of the Presence of Contamination. Owner agrees to include in any instrument conveying any interest in any portion of the Real Estate, including but not limited to deeds, leases and subleases (excluding mortgages, liens, similar financing interests, and other non-possessory encumbrances) the following notice provision (with blanks to be filled in):

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTIVE COVENANT, DATED _____ 20__, RECORDED IN THE OFFICE OF THE RECORDER OF ALLEN COUNTY ON _____, 20__, INSTRUMENT NUMBER (or other identifying reference) _____ IN FAVOR OF AND ENFORCEABLE BY THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT.

6. Notice to Department of the Conveyance of Property. Owner agrees to provide notice to the Department of any conveyance (voluntary or involuntary) of any

ownership interest in the Real Estate (excluding mortgages, liens, similar financing interests, and other non-possessory encumbrances). Owner must provide the Department with the notice within thirty (30) days of the conveyance and include (a) a certified copy of the instrument conveying any interest in any portion of the Real Estate, and (b) if the instrument has been recorded, its recording reference(s), and (c) the name and business address of the transferee.

7. Indiana Law. This Covenant shall be governed by, and shall be construed and enforced according to, the laws of the State of Indiana.

III. ENFORCEMENT

8. Enforcement. Pursuant to IC 13-14-2-6 and other applicable law, the Department may proceed in court by appropriate action to enforce this Covenant. Damages alone are insufficient to compensate the Department if any owner of the Real Estate or its Related Parties breach this Covenant or otherwise default hereunder. As a result, if any owner of the Real Estate, or any owner's Related Parties, breach this Covenant or otherwise default hereunder, the Department shall have the right to request specific performance and/or immediate injunctive relief to enforce this Covenant in addition to any other remedies it may have at law or at equity. Owner agrees that the provisions of this Covenant are enforceable and agrees not to challenge the provisions or the appropriate court's jurisdiction.

IV. TERM, MODIFICATION AND TERMINATION

9. Term. The restrictions shall apply until the Department determines that contaminants of concern on the Real Estate no longer present an unacceptable risk to the public health, safety, or welfare, or to the environment.
10. Modification and Termination. This Covenant shall not be amended, modified, or terminated without the Department's prior written approval. Within thirty (30) days of executing an amendment, modification, or termination of the Covenant, Owner shall record such amendment, modification, or termination with the Office of the Recorder of Allen County and within thirty (30) days after recording, provide a true copy of the recorded amendment, modification, or termination to the Department.

V. MISCELLANEOUS

11. Waiver. No failure on the part of the Department at any time to require performance by any person of any term of this Covenant shall be taken or held to be a waiver of such term or in any way affect the Department's right to enforce such term, and no waiver on the part of the Department of any term hereof shall be taken or held to be a waiver of any other term hereof or the breach thereof.
12. Conflict of and Compliance with Laws. If any provision of this Covenant is also the subject of any law or regulation established by any federal, state, or local government, the strictest standard or requirement shall apply. Compliance with

this Covenant does not relieve the Owner from complying with any other applicable laws.

13. Change in Law, Policy or Regulation. In no event shall this Covenant be rendered unenforceable if Indiana's laws, regulations, guidelines, or remediation policies (including those concerning environmental restrictive covenants, or institutional or engineering controls) change as to form or content. All statutory references include any successor provisions.
14. Notices. Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other pursuant to this Covenant shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Owner:

The Lofts at Headwaters Park, LLC
Fort Wayne Garage Associates, One, LLC
3755 East 82nd Street, Suite 300
Indianapolis, Indiana, 46240
ATTN: Rex Barrett

To Department:

Indiana Brownfields Program
100 N. Senate Avenue, Rm. 1275
Indianapolis, Indiana 46204
ATTN: Dawn Andershock

Any party may change its address or the individual to whose attention a notice is to be sent by giving written notice in compliance with this paragraph.

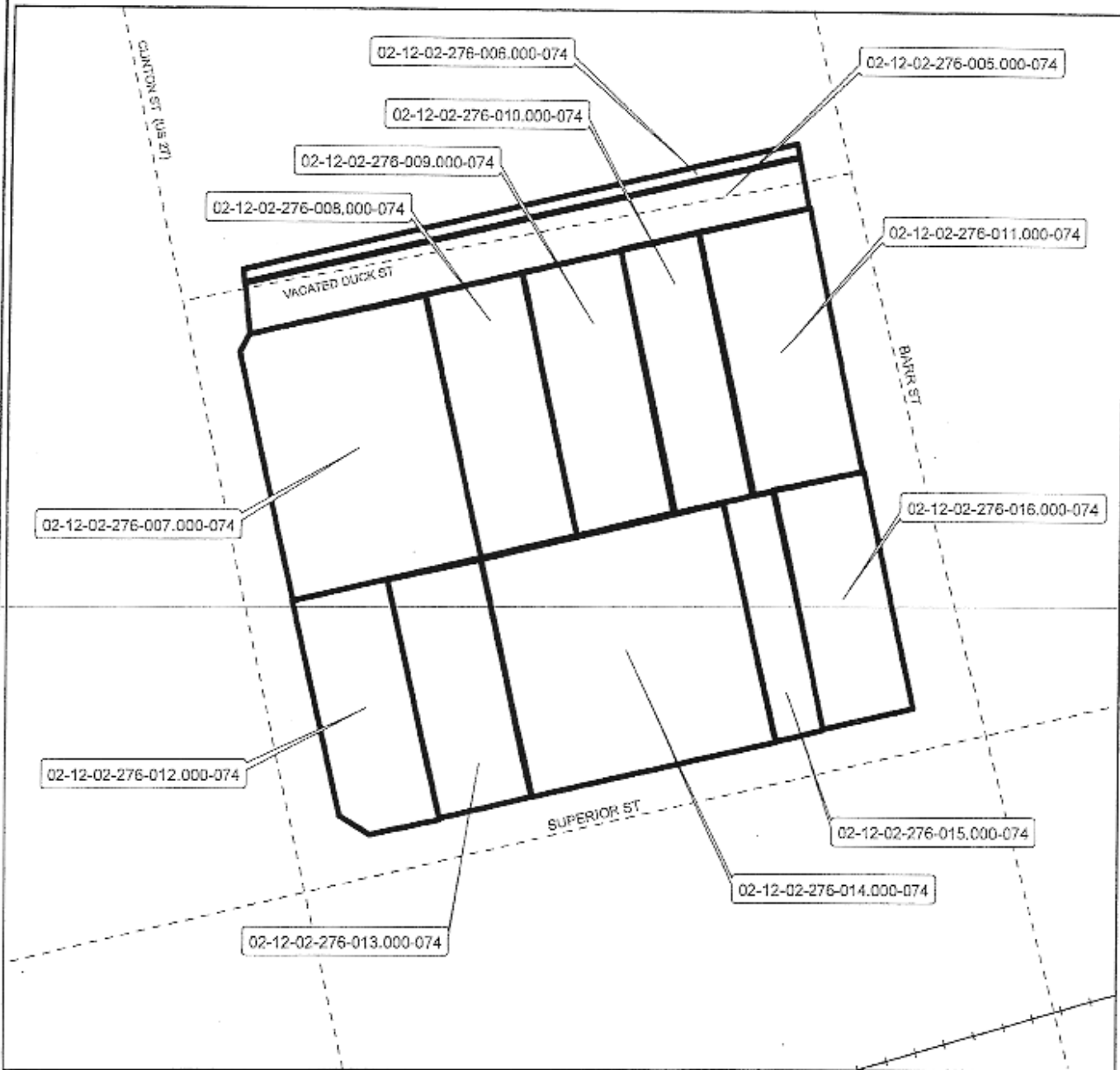
15. Severability. If any portion of this Covenant or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions or terms of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.
16. Authority to Execute and Record. The undersigned person executing this Covenant represents that he or she is the current fee Owner of the Real Estate or is the authorized representative of the Owner, and further represents and certifies that he or she is duly authorized and fully empowered to execute and record, or have recorded, this Covenant.

EXHIBIT A
Deed for the Real Estate

EXHIBIT B

Map of the Real Estate

Indiana Brownfields Program # 4181211 - Real Estate



Mapped By: Mike Hill, IDEM, Office of Land Quality, Science Services Branch, Engineering & GIS Services, August 21, 2019

Deed Info: ALTA Commitment for Title Insurance
Commitment Number 101900299

Parcel ID:

02-12-02-276-011.000-074	02-12-02-276-012.000-074
02-12-02-276-010.000-074	02-12-02-276-015.000-074
02-12-02-276-009.000-074	02-12-02-276-014.000-074
02-12-02-276-008.000-074	02-12-02-276-015.000-074
02-12-02-276-007.000-074	02-12-02-276-016.000-074
02-12-02-276-005.000-074	02-12-02-276-006.000-074

PLSS Info: Section 2, T30N, R12E
Wayne Township
Allen County, Indiana

Disclaimer: This map is intended to serve as an aid in graphic representation only. This information is not warranted for accuracy or other purposes.

Real Estate
 Street
 Railroad

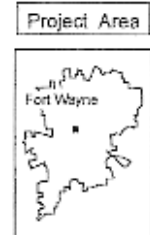
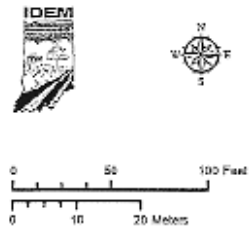


EXHIBIT C

Copy of Comfort Letter

EXHIBIT D

TABLE 1

Club Soda, Fort Wayne – BFD #4181211
September 2017 Soil Concentrations Exceeding
Applicable IDEM RCG Screening Levels

TABLE 2

Club Soda, Fort Wayne – BFD #4181211
May 2019 Soil Concentrations Exceeding Applicable IDEM RCG Screening Levels

TABLE 3

Club Soda, Fort Wayne – BFD #4181211
September 2017 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

TABLE 4

Club Soda, Fort Wayne – BFD #4181211
April 2019 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

TABLE 5

Club Soda, Fort Wayne – BFD #4181211
May 2019 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

TABLE 1
Club Soda, Fort Wayne – BFD #4181211
September 2017 Soil Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Contaminant Detected	Sample Location (Depth bgs) & Results (parts per million (ppm))						RDCSL	IDCSL	EX DCSL
	GP1 (10-12)	DUP (GP1 (10-12))	GP2 (6-8)	GP3 (2-4)	GP4 (6-8)	GP7 (6-8)			
Benz(a) anthracene	<0.49	<0.42	15.2	1.91	7.10	<0.34	15	210	12,000
Benzo(a) pyrene	0.184	0.248	15.0	2.04	6.36	<0.070	1.5	21	500
Benzo(b) fluoranthene	<0.49	<0.42	18.7	2.62	7.96	<0.34	15	210	12,000
Chromium*	21	42	7.9	9.5	14	8.9	4.2	63	2,700
Lead	640	<i>1,380</i>	744	166	247	14	400	800	1,000
Mercury	<u>31</u>	<u>27</u>	<u>21</u>	<u>8.4</u>	<u>10</u>	<1	3.1	3.1	3.1

Notes: **bold** = above RCG Residential Direct Contact Screening Level
italics = above RCG Commercial/Industrial Direct Contact Screening Level
underline = above RCG Excavation Worker Direct Contact Screening Level
bgs = below ground surface
* = Because the chromium was not speciated between chromium III and the more toxic chromium VI, IDEM, in the most conservative approach, compared the analytical results to the chromium VI screening level.

TABLE 2
Club Soda, Fort Wayne – BFD #4181211
May 2019 Soil Concentrations Exceeding Applicable IDEM RCG Screening Levels

Sample Location (Depth bgs)	Contaminant Detected & Results (parts per million (ppm))						
	Arsenic	Lead	Mercury	Benz(a) anthracene	Benzo(a) pyrene	Benzo(b) fluranthene	Indeno (1,2,3-cd) pyrene
B-1(2-4)	7.4	477	<0.26	0.069	0.041	0.038	0.023
B-1(8-10)	13.1	<u>1,730</u>	2.5	1.3	1.0	0.88	0.53
B-2(2-4)	21.4	<u>4,390</u>	0.45	<0.034	<0.034	<0.034	<0.034
B-2(8-10)	14.3	76.1	0.71	0.38	0.027	0.039	0.021
B-3(2-4)	11.3	64.0	<0.23	0.071	0.056	0.052	0.032
B-3(8-10)	17.6	416	2.0	5.0	3.0	2.9	1.5
B-4(2-4)	7.6	329	6.4	0.45	0.39	0.41	0.26
B-4(8-10)	11.3	346	2.8	1.2	1.2	0.92	0.63
B-5(2-4)	10.5	118	<0.23	0.15	0.12	0.13	0.078
B-5(8-10)	12.5	43.2	<0.23	0.052	0.043	0.039	0.025
B-8(8-10)	10.3	16.5	<0.27	<0.0065	<0.0065	<0.0065	<0.0065
B-9(2-4)	6.2	82.2	0.52	3.2	2.7	2.0	1.5
B-9(8-10)	5.5	51.9	0.45	6.2	4.4	3.2	2.2
B-10(2-4)	10.8	7.3	<0.24	<0.0056	<0.0056	<0.0056	<0.0056
B-12(2-4)	13.3	3.8	<0.21	<0.0053	<0.0053	<0.0053	<0.0053
B-13(2-4)	13.3	184	0.32	1.7	1.8	1.5	1.1
B-13(8-10)	11.5	72.1	2.1	0.49	0.37	0.33	0.20
B-14(2-4)	12.6	216	1.2	39.6	19.3	16.0	6.5
B-15(2-4)	12.8	13.1	<0.22	0.11	0.081	0.088	0.054
B-16(2-4)	8.1	156	2.8	73.2	43.1	27.7	18.4
B-18(2-4)	6.4	113	1.6	5.3	3.8	3.2	2.2
B-18(8-10)	6.4	45.8	0.55	5.6	3.4	3.2	1.7
B-19(8-10)	17.6	<u>1,580</u>	5.4	19.1	11.3	7.4	5.3
B-21(2-4)	20.7	<u>1,660</u>	0.63	0.82	0.75	0.73	0.55
RDCSL	9.5	400	3.1	15	1.5	15	15
IDCSL	30	800	3.1	210	21	210	210
EX DCSL	920	1,000	3.1	12,000	500	12,000	12,000

Notes: **bold** = above RCG Residential Direct Contact Screening Level
italics = above RCG Commercial/Industrial Direct Contact Screening Level
underline = above RCG Excavation Worker Direct Contact Screening Level
bgs = below ground surface

TABLE 3
Club Soda, Fort Wayne – BFD #4181211
September 2017 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Contaminant Detected	Sample Location & Results (parts per billion (ppb))			Res TAP GWSL	Res VE GWSL	Indus VE GWSL
	GP5	MW04-06	MW04-08			
Arsenic	NA	<10	100	10	NE	
Benzene	<5	<u>1,350</u>	<5	5	28	120
1-Methylnaphthalene	<1.0	35.5	<1.0	11	NE	
Naphthalene	2.12	192	<1.0	1.7	110	460

Notes: **bold** = above RCG Residential Tap Ground Water Screening Level
italics = above RCG Residential Vapor Exposure Ground Water Screening Level
underline = above RCG Commercial/Industrial Vapor Exposure Ground Water Screening Level
 NE = not established
 NA = not analyzed

TABLE 4
Club Soda, Fort Wayne – BFD #4181211
April 2019 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Contaminant Detected	Sample Location & Results (parts per billion (ppb))	Res TAP GWSL	Res VE GWSL	Indus VE GWSL
	MW94-2			
Hexavalent Chromium	0.39	0.35	NE	

Notes: **bold** = above RCG Residential Tap Ground Water Screening Level
 NE = not established

TABLE 5
Club Soda, Fort Wayne – BFD #4181211
May 2019 Ground Water Concentrations Exceeding
Applicable IDEM RCG Screening Levels

Sample Location	Contaminant Detected & Results (parts per billion (ppb))									
	Arsenic Dissolved	Benzene	1,2,4-Trichlorobenzene	Benz(a)anthracene	Benzo(a)pyrene	Benzo(b)fluoranthene	Dibenzo(a,h)anthracene	1-Methylnaphthalene	2-Methylnaphthalene	Naphthalene
B-5	19.5	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-9	14.9	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	1.7
B-10	<10.0	155	89.6	2.8	1.9	1.5	<0.10	423	510	3,580
B-11	58.3	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	7.4
B-12	<10.0	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	4.6
B-14	11.8	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-15	18.3	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-16	<10.0	52.2	<5.0	<0.10	<0.10	<0.10	<0.10	10.4	1.4	53.2
B-17	<10.0	142	<50.0	<0.10	<0.10	<0.10	<0.10	129	49.0	499
B-18	14.9	<5.0	<5.0	<0.10	<0.10	<0.10	<0.10	<1.0	<1.0	<1.0
B-20	15.0	1,310	<5.0	6.0	5.3	5.5	0.47	58.0	74.2	4.8
B-21	11.2	2,360	<5.0	<0.10	<0.10	<0.10	<0.10	14.4	3.1	501
Res TAP GWSL	10	5	70	0.3	0.2	2.5	0.25	11	36	1.7
Res VE GWSL	NE	28	NE	NE	NE	NE	NE	NE	NE	110
Indus VE GWSL	NE	120	NE	NE	NE	NE	NE	NE	NE	460

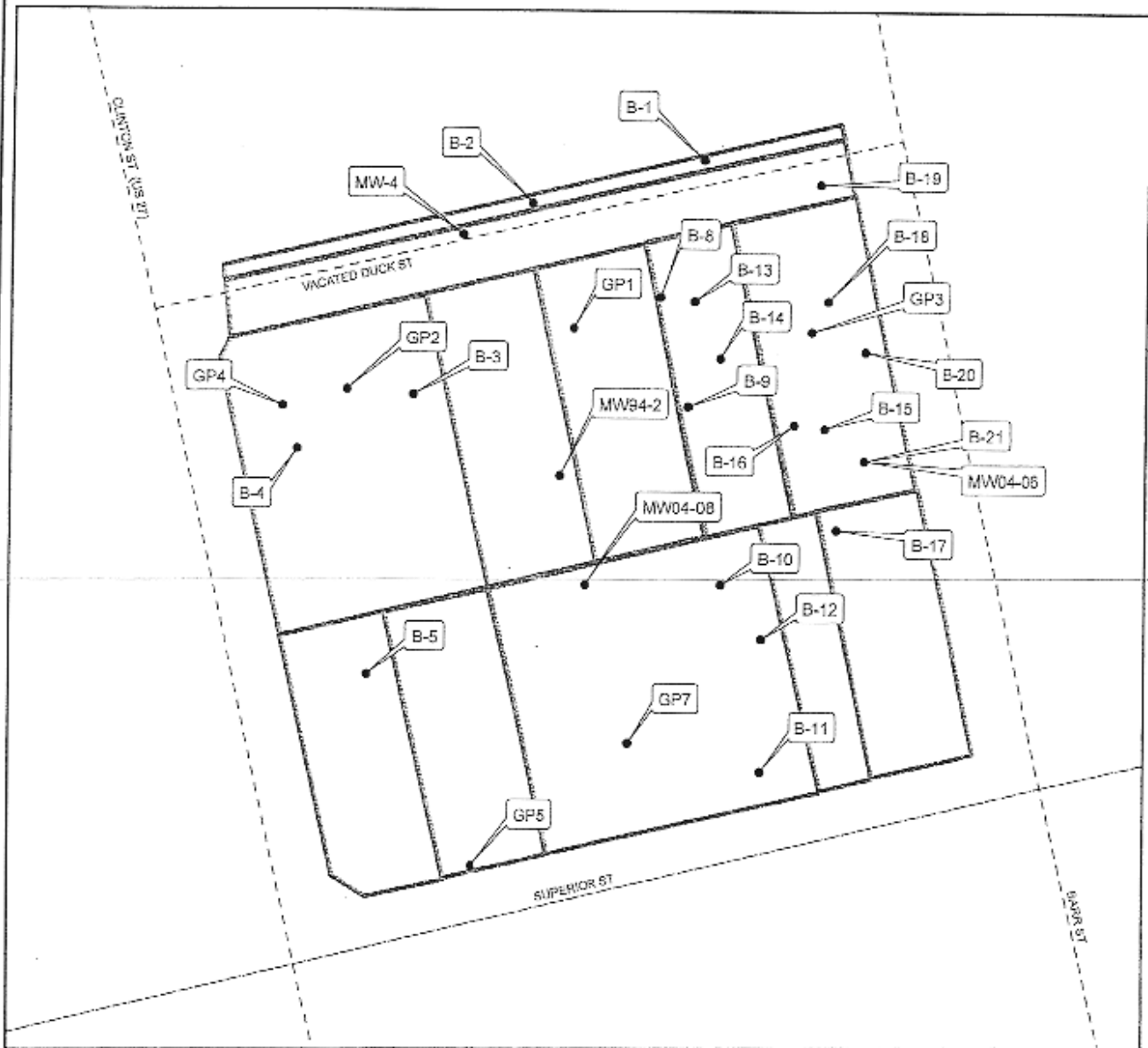
Notes: **bold** = above RCG Residential Tap Ground Water Screening Level
italics = above RCG Residential Vapor Exposure Ground Water Screening Level
underline = above RCG Commercial/Industrial Vapor Exposure Ground Water Screening Level
 NE = not established

EXHIBIT E

Club Soda, Fort Wayne – BFD #4181211
**Site Map Depicting Sampling Locations at Which
COCs Were Detected Above Applicable IDEM RCG Screening Levels**

DISCLAIMER: Information on this map is being provided to depict environmental conditions on the Real Estate that are the subject of the land use restrictions contained in the Covenant to which this map is attached and incorporated. The land use restrictions contained in the Covenant were deemed appropriate by the Department based on information provided to the Department by the Owner or another party investigating and/or remediating the environmental conditions on the Real Estate. This map cannot be relied upon as a depiction of all current environmental conditions on the Real Estate, nor can it be relied upon in the future as depicting environmental conditions on the Real Estate.

BFD 4181211 - Site Map Depicting Sample Location Where COCs Were Detected Above Applicable IDEM RCG Screening Levels



Mapped By: Mike Hill, IDEM, Office of Land Quality, Science Services Branch, Engineering & GIS Services, August 22, 2019

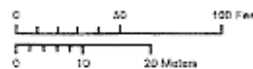
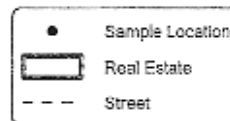
Sample Info: Sample locations based on Figure # 3, "Soil Testing Results" by SES, dated 11/14/17

Sample locations based on Figure # 1, "Site Map" by SES, dated 5/8/19

Sample locations based on Figure # 5, "Soil Boring Locations Map" by Heartland Environmental Associates, Inc, dated 6/10/19

PLSS Info: Section 2, T30N, R12E
Wayne Township
Allen County, Indiana

Disclaimer: This map is intended to serve as an aid in graphic representation only. This information is not warranted for accuracy or other purposes.



Allen County



Project Area

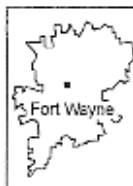
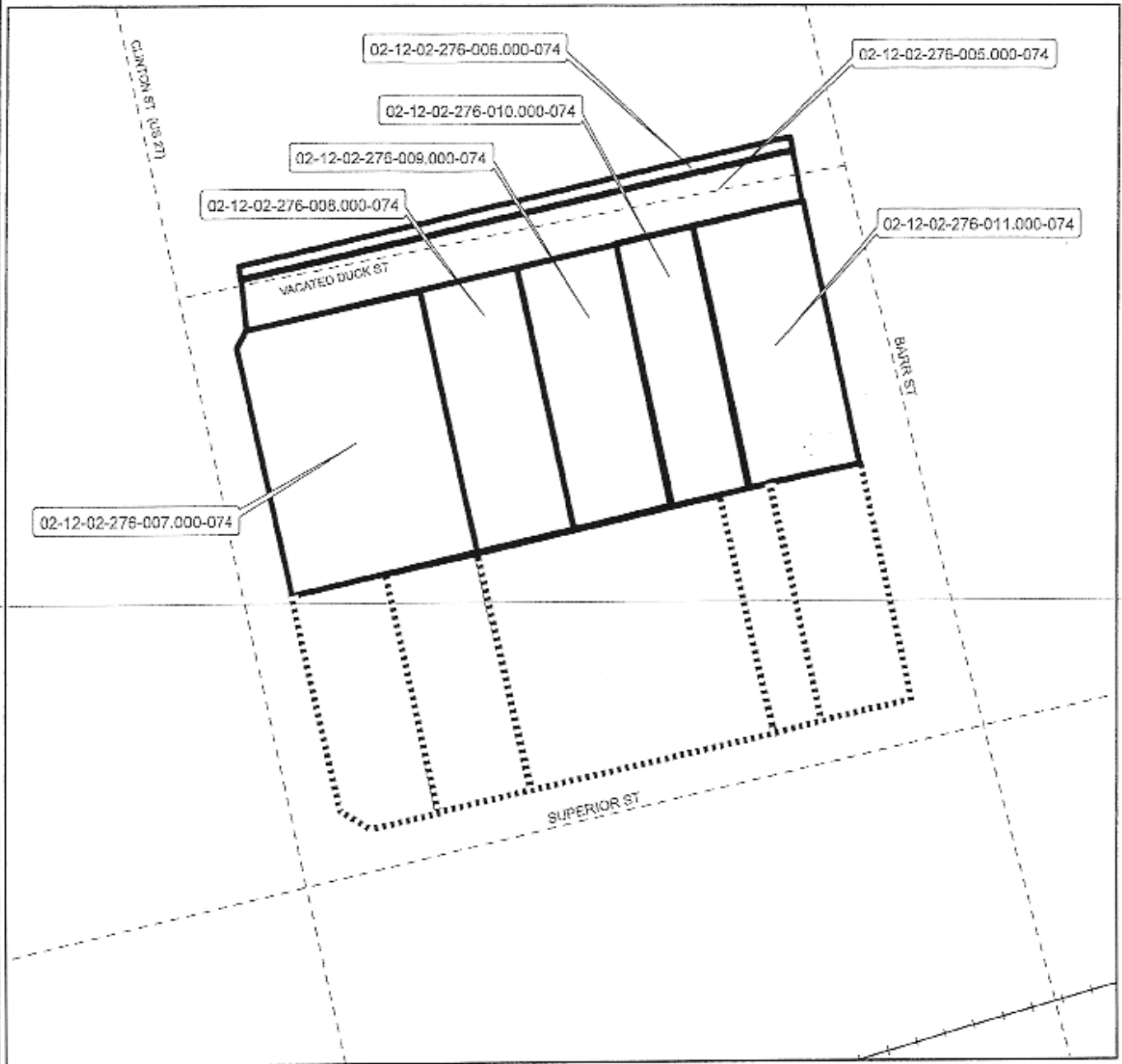


EXHIBIT F

Club Soda, Fort Wayne – BFD #4181211
Affected Area

Indiana Brownfields Program # 4181211 - Affected Area



Mapped By: Mike Hill, IDEM, Office of Land Quality, Science Services Branch, Engineering & GIS Services, August 21, 2019

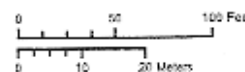
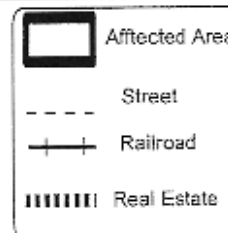
Deed Info: ALTA Commitment for Title Insurance
Commitment Number 101900286

Parcel ID:	02-12-02-276-011.000-074	02-12-02-276-012.000-074
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	02-12-02-276-009.000-074	02-12-02-276-014.000-074
	02-12-02-276-008.000-074	02-12-02-276-015.000-074
	02-12-02-276-007.000-074	02-12-02-276-016.000-074
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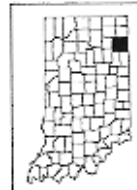
PLSS Info: Section 2, T30N, R12E
Wayne Township
Allen County, Indiana

Disclaimer: This map is intended to serve as an aid in graphic representation only. This information is not warranted for accuracy or other purposes.

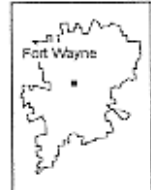
Modified By: Carmen Anderson, Indiana Brownfields Program, August 28, 2019



Allen County



Project Area



DIGEST SHEET

TITLE OF RESOLUTION. A Resolution of the Common Council of the City of Fort Wayne, Indiana, approving and authorizing the execution of a remediation and indemnification agreement with respect to a new economic development project in the city to be undertaken by the Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates, One, LLC (The Lofts at Headwaters Park project)

DEPARTMENT REQUESTING RESOLUTION. Redevelopment Commission.

SYNOPSIS OF RESOLUTION. This resolution approves a remediation and indemnification agreement for the project site, whereby the City agrees to (i) remove and/or remediate certain contamination caused by historical uses, and (ii) indemnify the developer against third party claims arising out of or with respect to the contamination. The resolution sets forth a process to achieve "site closure" from the Indiana Department of Environmental Management ("IDEM"), and contains a provision whereby indemnification sunsets two years after IDEM approves site closure.

EFFECT OF PASSAGE. The project site and the surrounding real estate have a long history of industrial uses that have contaminated the soil in various locations across the site, at depths ranging from the surface to nearly thirty (30) feet. The top twelve (12) feet of soil across virtually the entire site must be excavated in order to remove shallow contaminants and unbuildable soil. Complete removal of contaminants is economically infeasible and would compromise the Club Soda building as well as the surrounding streets and sidewalks. In lieu of complete removal, a remediation and indemnification agreement alleviates environmental risk and gives the development team and their lenders the confidence needed to undertake this significant investment.

Passage of the resolution and construction of the project would put a challenging site to productive use. The project would provide many benefits to the community, including (i) public parking in an area with an urgent need for additional parking spaces, (ii) substantial additions to the downtown housing and commercial market, which is an essential element of resident and business attraction, and (iii) annual property tax revenue generated by a type of development that typically has low per capita public service costs.

EFFECT OF NON-PASSAGE. This \$67.75 million dollar investment will not move forward without passage of the resolution, and the significant economic and community benefits, including much needed public parking, would be lost. The City has owned this site for 30 years and has a deep understanding of its challenges. It is unlikely that the site could be developed in a manner befitting its exceptional location without governmental involvement.

MONEY INVOLVED (DIRECT COSTS, EXPENDITURES, SAVINGS). There are no direct costs associated with the passage of this resolution. However, remediation, soil removal, site preparation, and other protective measures are substantial public expenses associated with the project. The Commission expects to obtain environmental liability insurance to protect against future claims at an average cost of \$8,000 to \$10,000 per year until site closure is achieved. It is the expectation of the Commission that NIPSCO, the entity responsible for the deep contamination, will cover the insurance premiums.

ASSIGNED TO COMMITTEE (PRESIDENT). _____



COMMUNITY DEVELOPMENT REDEVELOPMENT

Thomas C. Henry, Mayor

City of Fort Wayne
Community Development
200 East Berry Street, Suite 320
Fort Wayne, IN 46802

260-427-2150 fwcommunitydevelopment.org

February 20, 2020

MEMO

To: City of Fort Wayne Common Council

Copy: City of Fort Wayne Redevelopment Commission

From: Nancy Townsend, Executive Director, 427-2323

Re: **Resolution approving execution of a remediation and indemnification agreement for an economic development project called the Lofts at Headwaters Park**

This memo requests Common Council approval of one of five resolutions that must be considered to support an economic development project called the Lofts at Headwaters Park to be undertaken in downtown Fort Wayne. The project, located at the northeast corner of Superior Street and Clinton Street, will consist of approximately 232 dwelling units, 12,000 square feet of ground floor commercial space, and 651 parking spaces at an investment of approximately \$67,750,000.

Enclosed herewith, please find a digest sheet, a resolution approving the remediation and indemnification agreement previously approved by the Redevelopment Commission, a project description and a legal description of the project real estate.

As additional background, on February 10, 2020, the Commission approved an economic development agreement, a pledge of project-generated tax increment revenue and net parking revenue, a parking lease, and a remediation and indemnification agreement in furtherance of the project. The Common Council's approvals and appropriations are necessary due to the scope and complex nature of the project and site. The following resolutions encompass all anticipated Common Council actions that will be needed to support the project:

- Approval of a parking structure lease and appropriation of LIT revenues (the appropriation of LIT revenues is needed to cover shortfalls in annual rent)
- Appropriation of LIT revenues for construction of compensatory floodwater storage
- Appropriation of LIT revenues for soil remediation and removal
- Approval of a soil remediation and indemnification agreement
- Approval of an intergovernmental property transfer for Duck Street

With the exception of the resolution attached to this memo, the resolutions above will be delivered to the Council under separate cover.

Vibrant. Prosperous. Growing.



REPORT OF COMMITTEE ON FINANCE

March 3, 2020


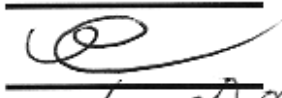

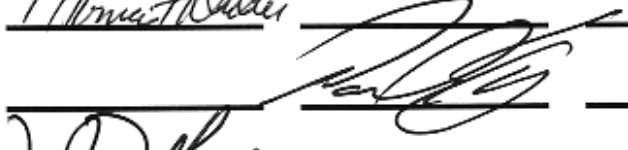
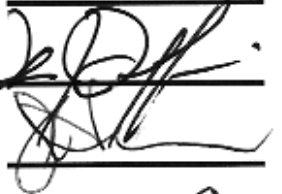

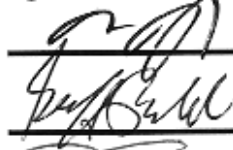


Sharon Tucker Chair

Jason Arp Co-Chair

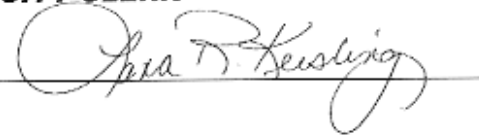
All Council Members

A Resolution of the Common Council of the City of Fort Wayne, Indiana, approving and authorizing the execution of a remediation and indemnification agreement with respect to a new Economic Development Project in the city to be undertaken by The Lofts at Headwaters Park, LLC and Fort Wayne Garage Associates, One, LLC (The Lofts at Headwaters Park Project)

COMMITTEE ON REGULATIONS HAVE HAD SAID Ordinance under consideration and beg leave to report back to the Common Council that said Ordinance

<u>COUNCIL MEMBER</u>	<u>DO PASS</u>	<u>DO NOT PASS</u>	<u>ABSTAIN</u>
ARP			
CHAMBERS			
DIDIER			
ENSLEY			
FREISTROFFER			
HINES			
JEHL			
PADDOCK			
TUCKER			

**LANA R. KEESLING
CITY CLERK**



Public Hearing Date: N/A

Read the first time in full and on motion by Councilperson Tucker.

Read the second time by title and referred to the Finance Committee.

Read the third time in full and on motion by Councilperson Tucker, placed on passage by the following vote:

<u>TOTAL VOTES</u>	<u>AYES</u>	<u>NAYS</u>	<u>ABSTAINED</u>	<u>ABSENT</u>
ARP	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
CHAMBERS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DIDIER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ENSLEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
FREISTROFFER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
HINES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
JEHL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PADDOCK	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
TUCKER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>


DATED: March 10, 2020



 LANA R. KEESLING, CITY CLERK

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as
 Resolution No. R-20-02-24 on the 10th day of March, 2020

ATTEST:



 LANA R. KEESLING
 CITY CLERK



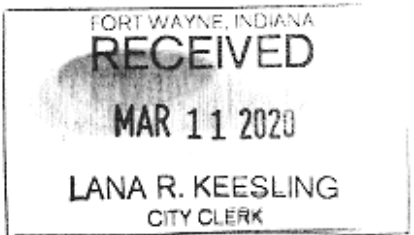
 PRESIDING OFFICER

Presented by me to the Mayor of the City of Fort Wayne, Indiana, on the 11th
 of March 2020, at the hour of 10:00 o'clock A.M. E.S.T.



 LANA R. KEESLING, CITY CLERK

Approved and signed by me this 11th day of MARCH
 2020, at the hour of 10:00 o'clock AM . E.S.T.





 THOMAS C. HENRY, MAYOR