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May 8, 2020

Governor Jared Polis
200 East Colfax Avenue
Denver, CO 80203

RE: Thornton Shopping Center
Northeast Corner of 88th & Washington
Thornton, Colorado

CDPHE site

Dear Governor Polis,

I am respectfully asking for your help. At this point, I have few places to turn. In short, I need your help in dealing with the Colorado Department of Public Health and Environment ("CDPHE").

CDPHE expects my environmental contractor to begin the first phase remediation of a dry cleaning contamination site on July 1, 2020. This phase is estimated to cost just over \$1 million. I have enclosed a copy of the most recent letter, dated April 24, 2020, from CDPHE, which sets forth its requirements.

The letter from CDPHE implies that I have done little to address the contamination on the property. To the contrary, I have always done my best to comply with CDPHE's requests. To the extent that I have been and am now unable to meet CDPHE demands, it is for lack of resources, not for lack of willingness to cooperate.

When July 1 arrives, I will be unable to perform. At that point I do not know if CDPHE will pursue court or jail... I just don't know. You may be my last chance. The sad thing is, there are alternatives to court or jail, if only CDPHE works with me to accomplish their goals.

Again, I would appreciate any assistance that you can provide.

BACKGROUND (I'll do my best to be brief.)

Thornton LLC (of which I am the sole member) purchased Thornton Shopping Center on May 9, 2005. At that time, the property consisted of an approximately 160,000 square foot multi-

building shopping center on a 20 acre parcel, anchored by Albertsons, Family Dollar and US Post Office. The purpose of the purchase was to take this old (1955 buildings), tired property which had plenty of deferred maintenance, give it a new facelift, new landscaping, new parking lot, new signage, and then lease it to better quality retailers and service businesses.

The shopping center was represented by the Seller as being about 85% leased (I found out later that the Seller had fraudulently “injected” three of the tenants, totaling about 30,000 square feet, just before the Seller put it up for sale). These three tenants ultimately paid almost no rent, and were gone less than six months after I closed on the purchase.

I was also preparing to obtain a Phase I environmental study when the Seller asked if I wanted to use his. The Seller had just recently refinanced the shopping center, and his new lender, Sun Life Insurance Company, had obtained a Phase I. Since it was just a few months old, I decided to use that Phase I, not to save the \$3,000 - \$5,000 a new one would have cost, but to save about 30 – 45 days. The attorney representing me on the purchase didn't advise me to obtain my own Phase I, or to obtain a letter from the environmental consultant that would allow me to rely on the Sun Life Phase I. He should have.

Because I did not obtain my own Phase I study, or get a reliance letter for the Sun Life Phase I, that mistake changed my life. It turns out that the environmental law in Colorado is very strict. Having purchased the property without obtaining my own Phase I, even using a limited liability company, resulted in me being personally liable for any contamination on the site. Again, my attorney at the time, from the large law firm Rothgerber Johnson, did not advise me of this.

Three months after closing, in August of 2005, I received a letter from CDPHE indicating that there was groundwater contamination in the property across 88th Avenue to the south of my property, and that the contamination came from a dry cleaner on my site that had been closed since 1982 – more than 20 years previous.

I contacted my attorney at Rothgerber, and he put me in touch with an environmental attorney at Rothgerber. Their negotiations with CDPHE were fruitless. We hired an environmental consultant who did further Phase I and Phase II studies, and determined that the environmental consultant who had prepared the Sun Life Phase I totally missed the dry cleaner that had caused the chemical spill, and the Sun Life Phase I made no mention of it.

CDPHE required me to implement a remediation plan, which I did for a few years. The plan included injections of a carbon-based chemical (Boss100) that “eats” the dry-cleaning solution, “Perc” for short. The periodic injections into strategic areas of the property, along with quarterly reports required by CDPHE, drained the funds I had available for the improvement of the shopping center.

That, and two other unfortunate occurrences happened at almost the same time. The loss of our anchor, Albertsons, which closed most of their Colorado stores in 2007 & 2008, and the recession of 2007 – 2009. Those two things, coupled with the newly-discovered environmental problems, changed the direction of the property.

In 2010, my case leader at CDPHE decided that the chemical insertions and monitoring were not progressing at the level she would like, so she modified the plan to include a requirement for a roughly \$1 million cleanup plan. At that time, I had lost my rehab line of credit due to the recession and resulting lower value of the property, and with the priority of my funds and my personal focus to keep the property afloat during those trying times, I was unable to find quality tenants for an old, tired property that I was unable to improve.

Thus, my cash flow was stagnant, my legal fees and environmental costs turned what may have been a break-even to a six figure annual loss, and I had to start borrowing from family.

I was unable to commit to the \$1 million modified plan that CDPHE required, so CDPHE took me to court. I showed them that I did not have the financial capability to commit to the \$1 million modification that CDPHE required. The case leader apparently felt that I had much more capabilities than I was letting on. After all, I had purchased this shopping center for \$8,020,000 in 2005. Why wouldn't I have extra cash or equity sitting in an account somewhere?

The judge during that trial confirmed that, while I was the responsible party and thus did have personal liability, he wanted to see the two parties work together as much as possible.

It is my understanding that the trial caused the site to become a "Mandatory cleanup" instead of a "Voluntary cleanup." The difference between the two is huge. With a Voluntary cleanup, a new property owner could negotiate with CDPHE to accomplish a cleanup; with a Mandatory cleanup order, CDPHE prohibits a new property owner from conducting a VCUP, thus severely limiting my ability to find a buyer.

In 2013, I began the attempt to sell the shopping center (by then, I had sold the Albertsons building to New American School to pay for ongoing environmental costs). I had a number of lookers, but of course the environmental condition and liability concerned most purchasers. From 2013 until about 2016, I had one contract from an experienced environmental group, but that one fell apart when the buyer decided to walk from the deal. Apparently, the buyer was concerned, not just about the ground contamination, but also the roughly \$1mm the demolition would cost, which included the additional cost of removing the asbestos. The buyer also mentioned the fact that the Mandatory order cleanup designation of the site made the cleanup much more difficult and costly.

Roughly four years ago, John Cody, head of the City of Thornton's Economic Development Department called me in for a meeting. Thornton City Council had directed Mr. Cody to offer an incentive to a developer who would demolish the existing buildings and build a new complex. That incentive to a developer was a City fund that would, in effect, cover the cost of remediation of the on-site and off-site contamination.

The fund, which the City of Thornton would set aside for a developer of the property, was purportedly \$6 - \$7 million, which is the range of cost for the cleanup that I've seen from

multiple environmental consultants who are familiar with the contamination. Based upon a recent discussion with the City of Thornton, that fund is still set aside for this project, although for how long, I don't know.

At the same time, CDPHE had been actively monitoring the site and they were losing patience. They wanted a plan of action, and apparently it didn't matter to them if I had the funds to pay for it. It turns out that they (and the City of Thornton and EPA) were less concerned about the contamination that is under the parking lot of the shopping center. The larger concern is the contamination that is moving in the groundwater off the property, to the southeast, where there are multifamily apartment buildings. My environmental consultant, Tom Harp, put together a plan in 2018 that CDPHE approved, which involved taking care of the off-site contamination first in order to alleviate the concern of any impact to residents of the apartment complex.

However, in light of the fact that these were residential buildings, CDPHE required that indoor air samples be taken inside those apartment buildings in 2012 and in 2019. Fortunately, the air samples came back negative; there was no noxious fumes emanating from the 'Perc' in the ground that were penetrating into those apartments, and no need for indoor air treatment.

2018 MODIFIED CORRECTIVE ACTION PLAN

When the state approved the Modified CAP in 2018, I was negotiating with several prospective developers looking to purchase the site. One important factor was the ability of a purchaser/developer to take advantage of the "cleanup fund" the City of Thornton had committed to put aside.

I tried to make it clear at the outset (in 2018) with CDPHE and the City of Thornton that the property, with its high vacancy and the extraordinary environmental and legal costs, had drained my financial resources. The only way the Modified CAP, or any other aggressive cleanup, would be possible was with the City of Thornton involvement, which meant I needed to find a purchaser/developer.

Understandably, the City of Thornton is not interested in paying for a cleanup that in any way would enrich the current ownership (i.e. me). I am aware of that, and my intent has never been to be enriched by the cleanup funds. My only interest has been, and is, in the sale of the property to a qualified developer who can transform the property into a development that the neighbors and the City of Thornton will take pride in.

With knowledge of such a fund being available, I received more activity from prospective purchasers, all of whom have had experience with developing contaminated property. The latest contract, from a development company named Flywheel Development, was signed in early 2019. After a few contract extensions on the part of Flywheel, a closing was scheduled for on or about January 31, 2020.

In the course of developing their plan for the shopping center, Flywheel engaged their own environmental consultant, whose concept for how to remediate the contamination was drastically different from the 2018 Modified Cap. To their credit, CDPHE worked in

conjunction with the City of Thornton and Flywheel and took no action to enforce the implementation of the 2018 Modified Cap plan while Flywheel was under contract.

Unfortunately, however, the Flywheel deal fell apart. After a meeting with their team the first week of January, they sent me a "counteroffer" to the original contract price of \$6 million. That price would have covered the amount I needed to pay off my bank loan and the loans from my family members. Their counteroffer, three weeks before the scheduled closing date, was \$1 million. That deal was dead.

WHAT NEXT?

With the Flywheel transaction dead, toward the end of January, 2020, I reached out to a number of prospective purchaser/developers who had been interested in 2018, before Flywheel went under contract. Within 30 days, three of those prospects had either phone or personal meetings with Chad Howell at the City of Thornton Economic Development. Chad was brought on a few years ago by John Cody because of his vast experience with environmentally-challenged properties.

Over the last 60 days, with the extraordinary effects of the COVID-19 virus and resulting shutdown of much of the economy, those negotiations have come to a screeching halt. I've been told by at least two of the developers that there is still interest, but understandably they just want to wait a bit to see what happens as the economy begins to open up again.

The reason I focused on earlier developer prospects is because the City of Thornton and I have very strong motivations to see a new development on this site, rather than to sell off different parcels to different purchasers. The New America School is currently surrounded by older 1955 buildings; and a new development could only improve the outlook of the school.

PERSONAL EFFECT

Governor Polis, this property has drained me financially. I've not only refinanced this property a couple times to find enough money to keep it going, but I've financed the one other asset I have and drained its equity twice in order to help sustain this Thornton property.

Additionally, I've borrowed a great deal of money from family, expecting over the years that I would get them paid back. The fact that some of these loans have gone for over five years instead of two or three, has strained my relationships with all three of my younger brothers.

The bank loan on the property is from a local (Chicago) bank. They typically do not do out-of-state mortgages, but on the strength of my friendship with one of their good customers, they lent me the money six years ago. So far, they've had to extend the loan on three separate occasions, which they are not happy about, but they are stuck. They don't want to foreclose on a property with such contamination.

Physically and emotionally this has been a disaster to my life. I have not been able to sleep at night without a very strong dose of sleeping aids; and even then I typically wake up after four hours of sleep (I really need 5 ½ - 6).

This has also affected my family life, my relationships with my wife, my two children and my three brothers, who I still owe a lot of money to. I've also lost some friends as well.

As mentioned earlier, I received a letter (by email) from CDPHE's Lindsay Masters on April 30, 2020. In part, it states:

"The Division approves the proposed date of May 1, 2020 for submission of a CAP addendum. However, the Division disapproves the proposed September 1, 2020 date as the final date for starting approved CAP remediation field. Thornton has long been aware additional remediation work is required, both on and off-site."

Governor Polis, CDPHE "stood down" while Flywheel had the property tied up under a purchase contract. During that period, I was unable to tap into the equity of the property by selling off smaller parcels – it was under contract.

CDPHE did not, as stated here, give Thornton LLC a "grace period". It was given to the contract purchaser. Our hands were tied.

"Thornton was required to begin implementing the CAP by August 31, 2019. Thornton has enjoyed a grace period after that date, which the Division granted as a courtesy given the anticipated pending sale of the property. In the event the property did not sell and a new third-party CAP was not approved, these remediation costs should have been anticipated by Thornton. Moreover, it is the Division's understanding that Thornton rejected a recent offer to buy the Thornton Shopping Center site, and has rejected previous offers in past years."

Ms. Masters may not be aware that the Purchaser tried to renegotiate the contract from a \$6 million purchase price down to \$1 million. To insinuate that Thornton "rejected a recent offer" is a mischaracterization.

Additionally, I never gave CDPHE the impression, either expressed or otherwise, that I had the wherewithal to effect a million dollar cleanup at the property. This is why I've worked so hard to find a purchaser/developer who will deal in good faith and not string me along, like Flywheel did for over a year.

"In addition, Thornton did not immediately begin to implement the as-approved CAP when the anticipated property sale fell through in January 2020 – before coronavirus was widespread."

When the deal fell through, my plan was to contact the other purchasers I had been discussing the development with, which is what I did.

Again, the common goal of the City of Thornton and mine is to find a developer who will purchase the property, demolish the 65-year old buildings, and replace it with a mixed-use development.

The goal of CDPHE is a clean site. The best way to accomplish the clean site is to work with

me – not against me. Unfortunately, while CDPHE has been cooperative on some fronts, it has been an obstacle for some of the prospective purchasers, including Flywheel.

Flywheel (and others) and the City of Thornton have asked CDPHE for a consideration that would help get a transaction done without losing anything on their end.

Since our 2012 litigation, I've been under a Mandatory clean-up, instead of a "Voluntary clean-up" or 'V-Cup'. Flywheel, as well as others, have requested that CDPHE reclassify the property as a 'V-Cup' for them, and, if the deal falls through, it would still be Mandatory cleanup for Thornton LLC/Jay Brown. The City of Thornton has asked CDPHE for the same consideration, as even the City have heard from developers that a Mandatory cleanup is a stumbling block.

"Nor did Thornton contact the Division to discuss CAP implementation immediately after the sale fell through. This suggests Thornton had and has no plans of performing its cleanup obligations."

That is not true and it seems that CDPHE is imputing bad faith on my part. First, I was under contract with Flywheel, and every time Flywheel asked for an extension, and at the prodding of the City of Thornton who felt rather confident that Flywheel would indeed close, I agreed to those extensions. Those extensions pushed back the date in the eyes of CDPHE, and I was depending on a closing.

Please keep in mind, and the City of Thornton is aware of this, that my ability to perform any of the expensive clean-up phases that CDPHE requires would necessitate me selling off parcels of the shopping center, rather than selling the property as a whole.

I could not sell parcels while under contract with Flywheel, and today's COVID19 marketplace is certainly not a good time to begin parceling off the site, although I am prepared to do so.

But CDPHE needs to give me more time to gather the funds necessary to perform these tasks.

Again – I don't have money in the bank. Furthermore, today I am collecting approximately half the rents I was collecting pre-COVID19.

"The sole reason the Division is not enforcing the approved CAP at this very moment is that the Division believes the additional information gathered over the course of last year should inform and update the CAP. Therefore, CDPHE requires Thornton to submit a CAP addendum by May 1, 2020."

Flywheel's environmental consultant found additional contamination at the off-site area south of 88th Avenue. So my consultant, Tom Harp, needed to change the design of the remediation for the additional known contaminated areas. This added hundreds of thousands of dollars to the 2018 Modified CAP plan, which CDPHE wants me to begin shortly.

"Thornton must commence implementation of the approved CAP as instructed by the Division upon its review of the May 1, 2020 CAP addendum. The CAP addendum

should only include relatively minor changes based on the additional information collected during on and off-site 2019 investigations; the data collected does not change the overall understanding of site contamination. The Division does not anticipate major changes to the approved remediation method and plan. However, the Division will consider CAP addendum proposals for additional offsite injections and broader groundwater sampling to monitor the larger-than-previously delineated groundwater plume and remediation's impacts. The Division will require a start work date of July 1, 2020 unless Thornton submits information documenting a sincere need for a later work date.

As indicated above, my need for a later work date is clear.

'In addition, the Division expressly disagrees with a number of statements in the April 1, 2020 memorandum. First, Thornton cannot unilaterally decide to suspend regulatory or legal requirements. CAP implementation is required whether or not Thornton obtains funding from other sources.'

My April 1, 2020 memorandum stated only that the remediation plan may be delayed until I am able to sell parcels so I can pay for the work. I never attempted to unilaterally suspend regulatory or legal requirements.

If I am not able to obtain funding from other sources, by selling off parcels of the shopping center, then I am unable to sign a contract for roughly \$1 million to begin the work. Doing so would not only damage the contractor, but the resulting legal fees and liens on the property will only tie it up even more.

In summary, Governor Polis, I will be able to perform the cleanup CDPHE is looking for upon the following:

- 1) Selling the property to one of the other developers that the City of Thornton has spoken to since the Flywheel deal fell through in January.
- 2) Selling individual parcels. I would need to sell approximately three of the 1 to 2-acre parcels in order to pay off my bank loan. I cannot sell part of the bank's collateral as the bank is in first position.

This will take some time because, according to the City of Thornton, in order to be able to sell off separate parcels, I will need to apply for a formal subdivision. I'm willing to do that, if that is what CDPHE and the City of Thornton want me to do.

Governor, this is my dilemma. CDPHE feels that I am not dealing in good faith because I didn't implement the 2018 Modified CAP plan as soon as Flywheel walked from the deal. However, I was dealing in good faith by contacting the other prospective purchasers to get an idea of their timing on a contract as well as a closing.

While I was a victim of some bad lawyering 15 years ago, which has changed my life in so many ways, my goal now is to accomplish as much as I can for CDPHE as well as the City of Thornton.

Have the circumstances with respect to this contamination changed so much that it is now urgent that I start to implement the 2018 Modified Cap immediately? Doing so would force me to move ahead to subdivide the property and sell off parcels, which would forever preclude something that the City of Thornton wants - a complete redevelopment of the site. My hope is that, instead, I be given some time to sell the entire property to a developer, so that all parties' goals can be achieved.

Thank you once again, Governor Polis, for taking the time to review this. I would welcome the chance to speak with you about this, and would be willing to come to Denver to meet with you in person when it's safe to do that.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay Brown", with a long horizontal flourish extending to the right.

Jay Brown
Member, Thornton LLC



COLORADO
Department of Public
Health & Environment

Mr. Jay Brown
Thornton, LLC
2503 Crawford Avenue, #102
Evanston, Illinois 60201

Sent via email to jaylon7@gmail.com

April 24, 2020

RE: **Thornton Shopping Center Site**
File - EPA ID # COR000212639, M&E3.2

Mr. Brown:

The Colorado Department of Public Health and Environment's Hazardous Materials and Waste Management Division (Division) received Thornton, LLC's (Thornton) April 1, 2020 site update memorandum from Remediation Risk Reduction, LLC on your behalf. The Division thanks you for providing a proposed timeline per the Division's March 23, 2020 letter to you, which stated:

"An approved CAP [corrective action plan] constitutes a special permit issued under the Colorado Hazardous Waste Regulations, 6 CCR 1007-3, Section 100.26 (the Regulations). Compliance with an approved CAP is a requirement of Part 3 of the Colorado Hazardous Waste Act, C.R.S. § 25-15-101 *et seq.* (the Act). See § 100.26(g). While the monitoring and sampling activities conducted by the third party generated additional, valuable environmental information - e.g. more recent indoor air data and further delineation of the extent of offsite groundwater contamination - as the current property owner and holder, your responsibility to conduct groundwater monitoring and carry out remediation activities, as required by the approved CAP, remains. Therefore, you are required to:

- Submit a Corrective Action Plan addendum, submitting any modified planned off-site remediation based on the additional on and off-site environment data collected by Rettew in 2019 (e.g. indoor air sampling data, groundwater data identifying a larger-than-previously-delineated off-site plume).
- Begin off-site BOSS injections and implement the approved Thornton, LLC *Second Corrective Action Plan* (CAP), as may be modified by the Division following the submittal of a CAP addendum.

If Thornton does not start implementing the CAP in an aggressive and prompt manner, the Division will take action to ensure compliance with the Act and Regulations. You are required by law to implement the approved CAP without further delay."

The Division approves the proposed date of May 1, 2020 for submission of a CAP addendum. However, the Division disapproves the proposed September 1, 2020 date as the final date for starting approved CAP remediation field. Thornton has long been aware additional remediation work is required, both on



and off-site. Thornton was required to begin implementing the CAP by August 31, 2019. Thornton has enjoyed a grace period after that date, which the Division granted as a courtesy given the anticipated pending sale of the property. In the event the property did not sell and a new third-party CAP was not approved, these remediation costs should have been anticipated by Thornton. Moreover, it is the Division's understanding that Thornton rejected a recent offer to buy the Thornton Shopping Center site, and has rejected previous offers in past years.

In addition, Thornton did not immediately begin to implement the as-approved CAP when the anticipated property sale fell through in January 2020 - before coronavirus was widespread. Nor did Thornton contact the Division to discuss CAP implementation immediately after the sale fell through. This suggests Thornton had and has no plans of performing its cleanup obligations. The sole reason the Division is not enforcing the approved CAP at this very moment is that the Division believes the additional information gathered over the course of last year should inform and update the CAP. Therefore, CDPHE requires Thornton to submit a CAP addendum by May 1, 2020.

Thornton must commence implementation of the approved CAP as instructed by the Division upon its review of the May 1, 2020 CAP addendum. The CAP addendum should only include relatively minor changes based on the additional information collected during on and off-site 2019 investigations; the data collected does not change the overall understanding of site contamination. The Division does not anticipate major changes to the approved remediation method and plan. However, the Division will consider CAP addendum proposals for additional off-site injections and broader groundwater sampling to monitor the larger-than-previously delineated groundwater plume and remediation's impacts. The Division will require a start work date of July 1, 2020 unless Thornton submits information documenting a sincere need for a later work date.

In addition, the Division expressly disagrees with a number of statements in the April 1, 2020 memorandum. First, Thornton cannot unilaterally decide to suspend regulatory or legal requirements. CAP implementation is required whether or not Thornton obtains funding from other sources.

Second, the Division's corrective action enforcement authority follows any contaminated site parcels that are sold off. As the Division has repeatedly discussed with Thornton and potential third-party buyers any subdivided parcels would continue to be subject to the Division's corrective action authority.

Finally, while the Division acknowledges that it has given permission for work at other corrective action sites to be delayed as part of a larger effort to help mitigate the public health threat of coronavirus, the Division is considering such requests on a case-by-case basis. Here, such a delay would be inappropriate. Contaminated groundwater flowing off the site is not under control. Furthermore, Thornton, has not performed recent remediation work or complied with its existing obligations. Nor is the site so well-controlled that corrective actions may be delayed. Also, this site is also located within a community with a downgradient residential area. While indoor air tests conducted last year did not show an unacceptable indoor air risk to downgradient residents, data collected in 2019 shows a larger-than-previously-documented offsite groundwater plume. The Division observes that other sites, knowing remediation is critical, have asked for express permission from CDPHE to continue certain types of work in order to help protect the community and meet critical corrective action obligations. Other environmental consultants and regulated entities are also utilizing social distancing measures, while managing to conduct crucial field work. For these reasons, CDPHE adjudges the need for action at this



site outweighs the risks currently posed by coronavirus. It is critical that corrective action on and off-site progress to minimize the spread of contamination and remediate the environment.

Sincerely,

Lindsay Masters

Lindsay Masters
Environmental Protection Specialist
Hazardous Waste Corrective Action Unit
Hazardous Materials and Waste Management Division
Colorado Department of Public Health and Environment

ecc: Tom Harp, R3
Chad Howell, City of Thornton
Tom Butts, Tri-County Health Department
Robert Beierle, CDPHE
Emily Splitek, Colorado AGO
HMWMD Records

