

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

Vernon 4540 Realty LLC,

Petitioner,

v.

THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, Basil Seggos, in
his capacity as Commissioner of the New York State
Department of Environmental Conservation, and ROBERT
W. SCHICK, P.E., in his capacity as the Director of the
Division of Environmental Remediation of the New York
State Department of Environmental Conservation,

Respondents.

To amend a Certificate of Completion issued by the
Respondents under the NYSDEC Brownfield Cleanup
Program to conform to Respondents' written determination
with respect to Petitioner's brownfield site and to set forth
Petitioner's correct name on such Certificate.

Pursuant to N.Y. Civ. Prac. L. & R. Article 78.

VERIFIED PETITION

Index No.: 902658-17

Petitioner Vernon 4540 Realty LLC ("Petitioner"), as and for its Verified Petition by and
through its attorneys Bousquet Holstein PLLC, respectfully alleges as follows:

PRELIMINARY STATEMENT

1. This proceeding is brought pursuant to Article 78 of the Civil Practice Law and
Rules ("CPLR") for, among other things, an order amending the Certificate of Completion
("COC") for DEC Site No. C241108 (the "Site") *nunc pro tunc* as of December 15, 2016: (1) to
set forth applicable percentages for the site preparation and on-site groundwater remediation
credit components of 28% as provided for under Section 27-1419 of the Environmental

Conservation Law ("ECL"); and (2) to correct Petitioner's name on the COC to reflect its true name as set forth on **Exhibit A** hereto. Petitioner further seeks an order directing Respondent to issue a corrected COC to Petitioner reflecting the amendments described in the preceding sentence. The foregoing relief is requested on the basis that the DEC's actions were and are affected by an error of law and are arbitrary and capricious, in violation of lawful procedure, and not supported by substantial evidence.

2. Venue is proper pursuant to Section 506(b) of the CPLR because the principal office of Respondent is located in County of Albany and, upon information and belief, the determination complained of took place in the County of Albany, the COC was executed by Respondents in the County of Albany, and the material events herein took place in the County of Albany.

3. Less than four months has elapsed since the final determination that underlies this Verified Petition.

4. No prior application for the relief sought herein has been made to any court or judge with respect to said determination.

THE PARTIES

5. Petitioner is a New York limited liability company duly organized and, upon information and belief, is in good standing under the laws of New York. Petitioner's true name is "Vernon 4540 Realty LLC" as evidenced by the New York State Department of State entity information sheet which is attached hereto as **Exhibit A**.

6. Upon information and belief, DEC is a department of the State of New York with its principal office located at 625 Broadway, Albany, New York, 12233.
7. Upon information and belief, the office of the Commissioner of Environmental Conservation (hereinafter "Commissioner") is maintained at 625 Broadway, Albany, New York, 12233.
8. Upon information and belief, Basil Seggos is the current Commissioner.
9. Upon information and belief, Robert W. Schick, P.E., is the Director of DEC's Division of Environmental Remediation ("DER Director"), whose office is maintained at 625 Broadway, Albany, New York, 12233.
10. Each reference made in this Petition with respect to the Commissioner or the DER Director is hereby also made with respect to DEC, and each reference made in this Petition with respect to DEC is hereby also made with respect to the Commissioner and the DER Director, and all such references shall be deemed realleged as if set forth fully in this Petition.

FACTUAL BACKGROUND

11. The Site, site of the former Paragon Paint and Varnish Corp. and designated under the BCP as DEC. Site No. C241108, is located at 5-49 46th Avenue in Long Island City, New York.
12. Upon information and belief, DEC executed a Brownfield Cleanup Agreement ("BCA") with respect to the Site on September 4, 2008.
13. On March 24, 2008, DEC sent a letter to Gail Suchman, Esq., including copies of the BCA for signature, and advising that "any work conducted at the Site prior to full execution of the Agreement, and/or absent an approved work plan, will not be considered work done

pursuant to the [Brownfield Cleanup P]rogram." A copy of this letter is attached hereto as **Exhibit B**.

14. On August 1, 2008, in response to an inquiry by counsel, DEC Counsel Deborah Christian stated in writing via email that the Site would be "subject to the new legislation once the BCA is fully executed." A copy of the relevant email is set forth in the email chain attached hereto as **Exhibit C**.

15. Upon information and belief, Ms. Christian was referring to amendments enacted in 2008 to the law regarding New York's Brownfield Cleanup Program ("BCP"). *See generally* Ch 390 of the Laws of 2008 ("2008 Amendments").

16. Among other things, the 2008 Amendments amended the applicable percentages used to calculate the site preparation and on-site groundwater remediation credit components of the Brownfield Redevelopment Tax Credit by mandating the inclusion of such percentages on the COC for each site issued pursuant to subdivision 3 of Section 27-1419 of the ECL.

17. The applicable percentages are a function of the Site's cleanup track under subdivision 4 of Section 27-1415 of the ECL and Section 375.3.8 of Part 375 of Title 6 of the New York Compilation of Codes, Rules & Regulations ("NYCRR").

18. For sites, such as the Site, which attain a "Track 4: residential" cleanup, the applicable percentage for the site preparation and on-site groundwater remediation credit components under is 28% under subdivision 3(b) of section 27-1419 of the ECL.

19. The Site successfully completed its remediation under the BCP, and DEC issued a COC for the Site on December 15, 2016 reflecting that the Site was remediated to "Track 4: residential" standards. A copy of the COC is attached hereto as **Exhibit D**.

20. Upon information and belief, the listing of "4540 Vernon Realty LLC" on the COC was a clerical error that was intended to refer to Petitioner. Petitioner's true name is "Vernon 4540 Realty LLC".

21. The COC erroneously states that the applicable percentage for the Site is either 12% or 10%, depending upon which article of the Tax Law the taxpayer is subject to. The correct applicable percentage under Section 27-1419 of the ECL is 28%, irrespective of the article of the Tax Law to which the taxpayer is subject.

22. DEC's action in erroneously listing an incorrect applicable percentage on the COC was affected by an error of law and is arbitrary and capricious.

23. Petitioner has exhausted its administrative remedies.

24. Petitioner therefore seeks an order amending the Certificate of Completion ("COC") for DEC Site No. C241108 (the "Site") *nunc pro tunc* as of December 15, 2016: (1) to provide for applicable percentages of 28% for the site preparation and on-site groundwater remediation credit components as provided for under Section 27-1419 of the Environmental Conservation Law ("ECL"); and (2) to correct Petitioner's name on the COC to reflect its true name as set forth on **Exhibit A** hereto. Petitioner further seeks an order directing Respondent to issue a corrected COC to Petitioner reflecting the amendments described in the preceding sentence.

AS AND FOR ITS FIRST CAUSE OF ACTION

Under CPLR 7803(3)

25. Petitioner repeats and realleges each and every allegation set forth in paragraphs 1 through 23 above, as if fully set forth herein.

26. DEC Counsel Deborah Christian stated in writing that the Site would be subject to the rules for BCP Sites accepted into the BCP after June 23, 2008.

27. DEC subsequently issued a COC for the Site that included an incorrect applicable percentage for the site preparation and on-site groundwater remediation credit components.

28. Upon information and belief, DEC's issuance of a COC stating incorrect applicable percentages for the site preparation and on-site groundwater remediation credit components of 10%-12% was arbitrary and capricious because it was made contrary to the determination by DEC counsel that the 2008 Amendments were applicable to the Site.

29. DEC's issuance of an incorrect COC was affected by an error of law.

WHEREFORE, Petitioner respectfully requests an order amending the COC for the Site *nunc pro tunc* as of December 15, 2016: (1) to set forth applicable percentages for the site preparation and on-site groundwater remediation credit components of 28% as provided for under Section 27-1419 of the ECL; and (2) to correct Petitioner's name on the COC to reflect its true name as set forth on **Exhibit A** hereto. Petitioner further seeks an order directing Respondent to issue a corrected COC to Petitioner reflecting the amendments described in the preceding sentence and granting such other, further, or different relief, including attorney's fees, as the Court finds just and proper.

Dated: April 17, 2017

BOUSQUET HOLSTEIN PLLC

By: 

Philip S. Bousquet, Esq.
Cecelia R. Cannon, Esq.
Michael W. Tysko, Esq.
Attorneys for Petitioners
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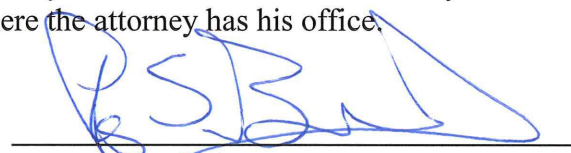
TO: New York State Department of Environmental Conservation
Basil Seggos, Commissioner
Robert W. Schick, P.E., Director of the Division of Environmental Remediation
625 Broadway
Albany, NY 12333-1011

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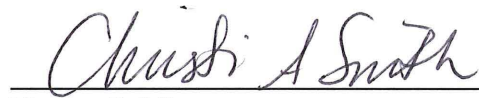
VERIFICATION

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

Philip S. Bousquet Esq., being duly sworn, states that he is the attorney for Petitioner in this action and that the foregoing Verified Petition is true to his own knowledge, except as to those matters stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writing furnished to him by Petitioner and interviews with officers and employees of Petitioner; and that the reason why the verification is not make by Petitioner is that Petitioner's principal is not in the county where the attorney has his office.


Philip S. Bousquet, Esq.

Sworn and subscribed to before me this
17th day of April, 2010 2017


Notary Public

CHRISTIA A. SMITH
Notary Public, State of New York
No. 01SM6067704
Qualified in Onondaga County
Commission Expires December 17, 2017

Exhibit A

NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through February 21, 2017.

Selected Entity Name: VERNON 4540 REALTY LLC

Selected Entity Status Information

Current Entity Name: VERNON 4540 REALTY LLC

DOS ID #: 4121867

Initial DOS Filing Date: JULY 25, 2011

County: WESTCHESTER

Jurisdiction: DELAWARE

Entity Type: FOREIGN LIMITED LIABILITY COMPANY

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

C/O NATIONAL REGISTERED AGENTS, INC.

111 EIGHTH AVENUE

NEW YORK, NEW YORK, 10011

Registered Agent

NATIONAL REGISTERED AGENTS, INC.

111 EIGHTH AVENUE

NEW YORK, NEW YORK, 10011

This office does not require or maintain information regarding the names and addresses of members or managers of nonprofessional limited liability companies. Professional limited liability companies must include the name(s) and address(es) of the original members, however this information is not recorded and only available by [viewing the certificate](#).

***Stock Information**

Entity Information

of Shares Type of Stock \$ Value per Share

No Information Available

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
JUL 25, 2011	Actual	VERNON 4540 REALTY LLC

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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Exhibit B

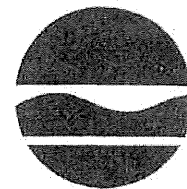
**New York State Department of Environmental Conservation
Office of General Counsel**

Eastern Field Unit

100 Hillside Avenue Suite 1W, White Plains, New York 10603-2860

Phone: (914) 428-2505 Ext. 316 • **FAX:** (914) 428-0792

Website: www.dec.state.ny.us



Alexander B. Grannis
Commissioner

March 24, 2008
via regular mail

Gail Suchman, Esq.
Stroock, Stroock & Lavan LLP
180 Maiden Lane
New York, New York 10038

Re: Brownfield Cleanup Program
Applicant: 549 46th Avenue LLC
Site Name: Paragon Paint and Varnish Corp., Site No. C241108

Dear Ms. Suchman:

This letter serves to formally advise you on behalf of your client, 549 46th Avenue, LLC, that upon subsequent review and in reliance upon the representations made in connection with 549 46th Avenue, LLC's Brownfield Cleanup Program ("BCP") Application dated June 29, 2007 (the "Application"), the New York State Department of Environmental Conservation (the "Department") has reconsidered the position communicated in its November 20, 2007 BCP eligibility determination letter regarding the Application.

Based on the representations in the Application, and additional information and/or communications submitted on behalf of 549 46th Avenue, LLC including by letter dated December 28, 2007, the Department has reconsidered its determination that 549 46th Avenue, LLC is a "Participant" as that term is defined in ECL 27-1405(1)(a).

Accordingly, find enclosed three original copies of the Brownfield Cleanup Agreement (the "Agreement") for a Volunteer. If 549 46th Avenue, LLC is interested in participating in the BCP, the enclosed Agreement must be executed in triplicate and returned to my attention at the above address. Upon receipt of the duly signed and notarized Agreements, I will forward same to the Department's central office for further review and/or consideration. The Brownfield Cleanup Agreement provides a framework for the submission, review, approval and implementation of work plans under the program. Please be reminded that any work conducted at the Site prior to full execution of the Agreement, and/or absent an approved work plan, will not be considered work done pursuant to the program.

If you have any questions or comments, do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alali M. Tamuno".

Alali M. Tamuno

Senior Attorney

cc: w/o encl.
J. O'Connell
M. Ajoku
M. Barrie
L. Zeppetelli
D. Christian
M. Lesser

Exhibit C

Bousquet, Phil S. PSB

From: Brent L. Carrier <BCarrier@credevelopment.com>
Sent: Thursday, April 6, 2017 3:49 PM
To: Bousquet, Phil S. PSB
Cc: [REDACTED]
Subject: Paragon BCP New "2.0" Program

Phil,

I need to ask for your assistance in requesting the NYS DEC correct my Certificate of Completion to reflect the new programs 28% credit on remediation expenditures rather than the old programs 10% credit.

Please see confirmation from the DEC below.

Thank you in advance for your assistance in this matter.

Sincerely, Brent

-----Original Message-----

From: Deborah Christian [mailto:dwchrist@gw.dec.state.ny.us]
Sent: Friday, August 01, 2008 2:09 PM
To: Suchman, Gail
Cc: Alison Crocker; Philip Lodico; Val Washington
Subject: Re: brownfields

Hi Gail,
Your client will be subject to the new legislation once the BCA is fully executed. I expect that to happen in the very near future.
Deb

>>> "Suchman, Gail" <gsuchman@stroock.com> 7/29/2008 6:18 PM >>>
Hi Deb,

Now that the Governor has signed the brownfields legislation, I thought I would check in again about DEC's plans to implement the new legislation. Specifically, we would like to know if there has been any determination as to whether my client, 549 46 Avenue LLC (Paragon site), may be included in the program under the new legislation (as discussed previously) and when the BCA might be executed.

Thank you for your ongoing consideration.

Best, Gail

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IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS in Circular 230, we inform you that any tax advice contained in this communication (including any attachment that does not explicitly state otherwise) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

=====
=====

BRENT CARRIER

Principal

CRE Development, Inc.
733 Third Ave., 16th Floor
New York, NY 10017

T [718.383.4540](tel:718.383.4540)F [718.349.0001](tel:718.349.0001)M [917.847.9876](tel:917.847.9876)bcarrier@credevelopment.com

Exhibit D

NYSDEC BROWNFIELD CLEANUP PROGRAM (BCP)
CERTIFICATE OF COMPLETION

CERTIFICATE HOLDER(S):**Name**

549 46TH AVENUE LLC

Anable Beach, Inc.

4540 Vernon Realty LLC

Address

11 Ferncliff Road, Cos Cob, CT 06807

375 South End Avenue, New York, NY 10280

45 Carleon Avenue, Larchmont, NY 10538

BROWNFIELD CLEANUP AGREEMENT:**Application Approval:** 3/24/08 **Agreement Execution:** 9/4/08 **Agreement Index No.:** W2-1119-08-03**Application Approval Amendment:** 8/17/10**Agreement Execution Amendment:** 8/17/10**Application Approval Amendment:** 7/21/11**Agreement Execution Amendment:** 8/2/11**SITE INFORMATION:****Site No.:** C241108 **Site Name:** Paragon Paint and Varnish Corp**Site Owner:** CSC 4540 Property Co, LLC**Street Address:** 5-49 46th Avenue**Municipality:** Long Island City **County:** Queens **DEC Region:** 2**Site Size:** 0.759 Acres**Tax Map Identification Number(s):** 26-4**Percentage of site located in an EnZone:** 0 - 49 %

A description of the property subject to this Certificate is attached as Exhibit A and a site survey is attached as Exhibit B.

CERTIFICATE ISSUANCE

This Certificate of Completion, hereinafter referred to as the "Certificate," is issued pursuant to Article 27, Title 14 of the New York State Environmental Conservation Law ("ECL").

This Certificate has been issued upon satisfaction of the Commissioner, following review by the Department of the final engineering report and data submitted pursuant to the Brownfield Site Cleanup Agreement, as well as any other relevant information regarding the Site, that the applicable remediation requirements set forth in the ECL have been or will be achieved in accordance with the time frames, if any, established in the remedial work plan.

The remedial program for the Site has achieved a cleanup level that would be consistent with the following categories of uses (actual site use is subject to local zoning requirements):

Allowable Uses under the BCP: Restricted-Residential, Commercial, and Industrial**Cleanup Track:** Track 4: Restricted use with site-specific soil cleanup objectives**Tax Credit Provisions for Entities Taxable Under Article 9, 9-A, 32, and 33:**

Site Preparation and On-Site Groundwater Remediation Credit Component Rate is 12 %.

Tangible Property Credit Component Rate is 12 %.

Tax Credit Provisions for Entities Taxable Under Article 22 & S Corporations:

Site Preparation and On-Site Groundwater Remediation Credit Component Rate is 10 %.

Tangible Property Credit Component Rate is 10 %.

The Remedial Program includes use restrictions or reliance on the long term employment of institutional or engineering controls which are contained in the approved Site Management Plan and an Environmental Easement granted pursuant to ECL Article 71, Title 36 which has been duly recorded in the Recording Office for Queens County as 2015000400038.

LIABILITY LIMITATION

Upon issuance of this Certificate of Completion, and subject to the terms and conditions set forth herein, the Certificate holder(s) shall be entitled to the liability limitation provided in ECL Section 27-1421. The liability limitation shall run with the land, extending to the Certificate holder's successors or assigns through acquisition of title to the Site and to a person who develops or otherwise occupies the Site, subject to certain limitations as set forth in ECL Section 27-1421. The liability limitation shall be subject to all rights reserved to the State by ECL Section 27-1421.2 and any other applicable provision of law.

CERTIFICATE TRANSFERABILITY

This Certificate may be transferred to the Certificate holder's successors or assigns upon transfer or sale of the Site as provided by ECL Section 27-1419.5 and 6NYCRR Part 375-1.9.

CERTIFICATE MODIFICATION/REVOCATION

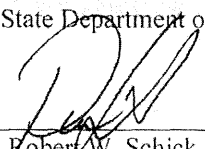
This Certificate of Completion may be modified or revoked by the Commissioner following notice and an opportunity for a hearing in accordance with ECL Section 27-1419 and 6NYCRR Part 375-1.9(e) upon a finding that:

- (1) either the Applicant or the Applicant's successors or assigns have failed to comply with the terms and conditions of the Brownfield Site Cleanup Agreement;
- (2) the Applicant made a misrepresentation of a material fact tending to demonstrate that it was qualified as a Volunteer;
- (3) either the Applicant or the Applicant's successors or assigns made a misrepresentation of a material fact tending to demonstrate that the cleanup levels identified in the Brownfield Site Cleanup Agreement were reached;
- (4) there is good cause for such modification or revocation;
- (5) either the Applicant or the Applicant's successors or assigns failed to manage the controls or monitoring in full compliance with the terms of the remedial program;
- (6) the terms and conditions of the environmental easement have been intentionally violated or found to be not protective or enforceable.

The Certificate holder(s) (including its successors or assigns) shall have thirty (30) days within which to cure any deficiency or to seek a hearing. If the deficiency is not cured or a request for a hearing is not received within such 30-day period, the Certificate shall be deemed modified or vacated on the 31st day after the Department's notice.

Basil Seggos
Commissioner
New York State Department of Environmental Conservation

By:


Robert W. Schick, P.E., Director
Division of Environmental Remediation

Date:

December 15, 2016