

V00104-3  
3/31/98

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the  
Implementation of an  
Investigation of  
Carmel ShopRite Plaza by

AGREEMENT  
(INDEX NUMBER: D3-0001-97-04)

MIF Realty LP,  
Volunteer.

CONSIDERING,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of the Environmental Conservation Law of the State of New York ("ECL"). This Agreement is entered into pursuant to the Department's authority under that law.

2. A. MIF Realty LP ("Volunteer") has offices located at 16479 Dallas Parkway, Suite 400, Dallas, Texas 75248.

B. The property subject to this Agreement is the Carmel ShopRite Plaza, located at 180 Gleneida Avenue, Carmel, Putnam County, New York (hereinafter referred to as the "Site"). A map of the Site showing its general location is attached to this Agreement as Exhibit "A."

C. Volunteer represents, and for the purposes of this Agreement, the Department relies on those representations, that Volunteer's involvement with the Site and with the facility on that Site is limited to that of a former owner and prior thereto, mortgagee, of the Site. Volunteer further represents that the existence of hazardous waste on the Site was not the result of any action by it.

D. Volunteer's investigation of the Site revealed a potential problem at the drycleaners (Laurens Cleaners) at the Site. Volunteer performed a limited soil removal action and installed a single well. Volunteer intends to conduct a further investigation of the Site to determine the nature and extent of any hazardous waste on Site.

3. The Department has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

4. A. Volunteer wishes to enter into this Agreement in order to resolve its potential liability as an operator under ECL Article 27, Title 13 based solely upon Volunteer's investigation of the Site. The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest.

B. Volunteer, desirous of implementing an investigation program acceptable to the Department, consents to the terms and conditions of this Agreement.

5. The Department and Volunteer agree that the goals of this Agreement are for Volunteer to, (i) implement a Department-approved investigation program for the Site ("Investigation Program"); and (ii) reimburse the State's administrative costs as provided in this Agreement.

6. Volunteer agrees to be bound by the terms of this Agreement. Volunteer consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Agreement, and agrees not to contest the validity of this Agreement or its terms.

IN CONSIDERATION OF AND IN EXCHANGE FOR THE DEPARTMENT'S NOT CONSIDERING VOLUNTEER TO BE THE SITE'S OPERATOR MERELY FOR HAVING INVESTIGATED THE SITE UNDER THE CIRCUMSTANCES SET FORTH IN THIS AGREEMENT, VOLUNTEER AGREES TO THE FOLLOWING:

I. Performance and Reporting of the Investigation Program

A. Within 30 days after the effective date of this Agreement, Volunteer shall commence implementation of the Investigation Program work plan (the "Work Plan") attached to this Agreement and made part of it as Exhibit "B." Because Volunteer does not currently own or control the Site, if Volunteer cannot commence within 30 days implementation of the Work Plan due to delays related to the Site owner or operator, Volunteer shall notify the Department of the delay and provide an estimated date when the implementation of the Work Plan shall begin.

B. Volunteer shall perform the Investigation Program in accordance with the Work Plan. Volunteer shall notify the Department of any significant difficulties that may be encountered in implementing the Work Plan or any Department-approved modification to the Work Plan and shall not modify any obligation unless first approved by the Department.

C. During implementation of all investigation activities identified in the Work Plan, Volunteer shall have on-Site a full-time representative who is qualified to supervise the work done.

D. In accordance with the schedule contained in the Work Plan, Volunteer shall submit to the Department a final investigation report. The final investigation report shall:

1. include all data generated and all other information obtained during the investigation;
2. provide all of the assessments and evaluations identified in the Work Plan;
3. identify any additional data that must be collected; and
4. include a certification by the individual or firm with primary responsibility for the day to day performance of the investigation that all activities that comprised the

investigation were performed in full accordance with the approved Work Plan.

E. The Department shall not consider Volunteer to be the Site's operator merely for having carried out its obligations under this Agreement to the Department's satisfaction.

## II. Progress Reports

A. Volunteer shall submit to the parties identified in Subparagraph IX.A.1 in the numbers specified therein copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous month;

2. include all results of sampling and tests and all other data received or generated by Volunteer or Volunteer's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by Volunteer;

3. identify all reports and other deliverables required by this Agreement that were completed and submitted during the previous month;

4. describe all actions, including, but not limited to, data collection and implementation of the Work Plan, that are scheduled for the next month and provide other information relating to the progress at the Site;

5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Volunteer's obligations under the Agreement, and efforts made to mitigate those delays or anticipated delays; and

6. include any modifications to the Work Plan that Volunteer has proposed to the Department and any that the Department has approved.

B. Volunteer shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Agreement.

C. Volunteer also shall allow the Department to attend, and shall provide the Department at least five days advance notice of, any of any meeting relating to the Work Plan's implementation.

## III. Review of Submittals

A. The Department shall review each of the submittals Volunteer makes pursuant to

this Agreement to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Agreement and generally accepted technical and scientific principles. The Department shall notify Volunteer in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

B. 1. If the Department disapproves a submittal, it shall so notify Volunteer in writing and shall specify the reasons for its disapproval within 30 days after its receipt of the submittal and may request Volunteer to modify or expand the submittal; provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work as described in the Work Plan. Within 30 days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall make a revised submittal to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal, the Department shall notify Volunteer in writing within 30 days of its approval or disapproval. If the Department disapproves the revised submittal, the Department and the Volunteer may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to either's right to contest the same. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

#### IV. Enforcement

A. This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York.

B. Volunteer shall not suffer any penalty under this Agreement or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement because of fire, lightning, earthquake, flood, adverse weather conditions, strike, shortages of labor and materials, war, riot, obstruction or interference by adjoining landowners or by the present or any future operator, owner, or occupant of all or any part of the Site, or any other fact or circumstance beyond Volunteer's reasonable control ("force majeure event"). Volunteer shall, within five working days of when it obtains knowledge of any such force majeure event, notify the Department in writing. Volunteer shall include in such notice the measures taken and to be taken by Volunteer to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance of the evidence that an event is a defense to compliance with this Agreement pursuant to this Subparagraph IV.B of this Agreement.

#### V. Entry upon Site

Subject to the rights of any current or future owner, occupant, and/or operator of the Site,

Volunteer hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer by any duly designated employee, consultant, contractor, or agent of the Department or any State agency having jurisdiction with respect to the Investigation Program for purposes of inspection, sampling, and testing and to ensure Volunteer's compliance with this Agreement. The Department shall abide by the health and safety rules in effect for work performed at the Site under the terms of this Agreement. Upon request, Volunteer shall provide the Department with access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Agreement (other than attorney-client communications and attorney workproduct, provided, however, that the Department shall have access to data relating to Site conditions that may be associated with such communications or workproduct) and to job meetings.

#### VI. Payment of State Costs

Within thirty days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money which shall represent reimbursement for the State's expenses including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating this Agreement, reviewing and revising submittals made pursuant to this Agreement, overseeing activities conducted pursuant to this Agreement, collecting and analyzing samples, and administrative costs associated with this Agreement. Each such payment shall be made by certified check payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
50 Wolf Road  
Albany, NY 12233-7010

Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports.

#### VII. Department Reservation of Rights

A. Nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights with respect to any party other than Volunteer.

B. Nothing contained in this Agreement shall prejudice any rights of the Department

to take any investigatory or remedial action it may deem necessary if Volunteer fails to comply with this Agreement.

C. Nothing contained in this Agreement shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

D. Nothing contained in this Agreement shall be construed to affect the Department's right to terminate this Agreement at any time during its implementation if Volunteer fails to comply substantially with this Agreement's terms and conditions.

#### VIII. Indemnification

Volunteer shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement by Volunteer and/or any of Volunteer's directors, officers, employees, servants, agents, successors, and assigns and not caused or contributed to by the gross negligence or intentional misconduct by the Department and/or its employees, representatives, agents, officers, contractors, successors, or assigns.

#### IX. Communications

A. All written communications required by this Agreement shall be transmitted by United States Postal Service, by private courier service, or hand delivered.

1. Communication from Volunteer shall be sent to:

Ramanand Pergadia, P.E.  
New York State Department of Environmental Conservation  
21 South Putt Corners Road  
New Paltz, New York 12561-1696

with copies to:

G. Anders Carlson, Ph.D.  
Director, Bureau of Environmental  
Exposure Investigation  
New York State Department of Health  
2 University Place  
Albany, New York 12203

Charles E. Sullivan, Jr., Esq.  
New York State Department of Environmental Conservation  
50 Wolf Road, Room 410A  
Albany, New York 12233-5550

Copies of work plans and reports shall be submitted as follows:

- Four copies (one unbound) to Mr. Pergadia
- Two copies to Dr. Carlson
- One copy to Mr. Sullivan

2. Communication to be made from the Department to Volunteer shall be sent to:

Dennis P. Harkawik, Esq.  
Jaekle, Fleischmann & Mugel  
Fleet Bank Building  
Twelve Fountain Plaza  
Buffalo, New York 14202-2292

MIF Realty LP  
c/o GE Capital Realty Group, Inc.  
16479 Dallas Parkway, Suite 400  
Dallas, Texas 75248-2661

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other given in accordance with this Paragraph IX.

#### X. Miscellaneous

A. 1. By entering into this Agreement, Volunteer certifies that it has fully and accurately disclosed to the Department all information known to Volunteer and all information in its possession or control. Volunteer also certifies that, to its knowledge, it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at, or from, the Site.

2. If the Department determines that information Volunteer provided and certifications made are not materially accurate and complete, this Agreement, within the sole discretion of the Department, shall be null and void, and the Department shall reserve all rights that it may have. If the Department chooses to exercise this provisions, it shall notify Volunteer in writing and shall provide Volunteer with an explanation for its determination and with a

reasonable period of time to respond to the Department's findings.

B. Volunteer shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Agreement. The responsibility for the performance of the professionals retained by Volunteer shall rest solely with Volunteer.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Volunteer, and the Department also shall have the right to take its own samples. Volunteer shall make available to the Department the results of all sampling and/or tests or other data generated by Volunteer with respect to implementation of this Agreement and shall submit these results in the progress reports required by this Agreement.

D. Volunteer shall notify the Department at least five working days in advance of any field activities to be conducted pursuant to this Agreement.

E. 1. Subject to Subparagraph X.E.2 of this Agreement, the Volunteer shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform the Volunteer's obligations under this Agreement.

2. In carrying out the activities identified in the Work Plan, the Department may exempt Volunteer from the requirement to obtain any Department permit for any activity that is conducted on the Site and that satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

F. Volunteer, Volunteer's partners, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteer), and Volunteer's successors, and assigns shall be bound by this Agreement. Volunteer's partners, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Agreement in the performance of their designated duties on behalf of Volunteer.

G. Volunteer shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and to each person representing Volunteer with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Volunteer or Volunteer's contractors shall provide written notice of this Agreement to all subcontractors hired to perform any portion of the work required by this Agreement. Volunteer shall nonetheless be responsible for ensuring that Volunteer's contractors and subcontractors perform the work in satisfaction of the requirements of this Agreement.

H. All references to "days" in this Agreement are to calendar days unless otherwise specified.



I. The paragraph headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Agreement.

J. 1. No term, condition, understanding, or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application, signed by the Volunteer, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Mr. Pergadia and to Mr. Sullivan.

K. This Agreement is not subject to review under the State Environmental Quality Review Act. 6 NYCRR 617.5(c)(18).

L. The provisions of this Agreement do not constitute and shall not be deemed a waiver of any right Volunteer otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Volunteer's insurers, for payments made previously or in the future for response costs. To the extent authorized by 42 USC 9613 and any other applicable law, Volunteer shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the investigation of the contamination existing on the Site as of the effective date of this Agreement. In any future action brought by Volunteer against a potentially responsible party under the Comprehensive Environmental Response, Compensation & Liability Act of 1980, as amended, the provisions of 42 USC 9613(f)(3) shall apply.

M. Volunteer and Volunteer's partners, officers, employees, servants, agents, lessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site, and further release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever that any of same has or may have as a result of Volunteer's entering into or fulfilling the terms of this Agreement with respect to the Site. However, it is understood by the Department that Volunteer cannot bind the current or future Site owners to this waiver.

N. The effective date of this Agreement shall be the date it is signed by the

Commissioner or his designee.

DATED: MAR 31 1998

JOHN P. CAHILL, COMMISSIONER  
NEW YORK STATE DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION

A handwritten signature in cursive script, reading "John P. Cahill", is written over a horizontal line.

CONSENT BY VOLUNTEER

MIF Realty L.P. hereby consents to the issuing and entering of this Agreement, waives its right to a hearing herein as provided by law, and agrees to be bound by this Agreement.

MIF REALTY, L.P.

By MIF Gen-Par L.P., its general partner

By MIF Sponsor, Inc., its general partner

By: Michael Hudspeth  
Robert S. Riggs, Vice President

Michael Hudspeth

Date: 2nd, October, 1997

STATE OF TEXAS           )  
                                      ) s.s.:  
COUNTY OF DALLAS       )

On this 2nd day of October, 1997, before me personally came Robert S. Riggs, to me known, who being duly sworn, did depose and say that he resides in the State of Texas; that he is Vice President of MIF Sponsor, Inc., the corporation described in and which executed the foregoing instrument; and that he signed his name on behalf of MIF Sponsor, Inc. as general partner of MIF Gen-Par L.P. as general partner of MIF Realty L.P., and was authorized to do so.

Michael Hudspeth

Tonya J. Hovland  
Notary Public

