



State of Ohio Environmental Protection Agency

*Jan Joelker DERR-CDC*

**STREET ADDRESS:**

1800 WaterMark Drive  
Columbus, OH 43215-1099

TELE: (614) 644-3020 FAX: (614) 644-2329

**MAILING ADDRESS:**

P.O. Box 1049  
Columbus, OH 43216-1049



**CERTIFIED MAIL**

October 18, 2001

Mr. Todd Kemmerer  
Capitol Equities, Inc.  
6241 Riverside Drive  
Columbus, OH 43017

**RE: Issuance of Covenant Not To Sue for the former Berry Brothers  
Property 01NFA120**

Dear Mr. Kemmerer:

I am pleased to inform you that on October 18, 2001, the Director of the Ohio Environmental Protection Agency ("Director") issued a Covenant Not To Sue ("Covenant") to 350 East First Avenue, Limited for the former Berry Brothers Property located at 350 East First Avenue, Columbus, Ohio. The Covenant was issued as Final Findings and Orders pursuant to Ohio Revised Code ("ORC") Chapter 3746 and Ohio Administrative Code ("OAC") Chapter 3745-300. You will find the certified copy of the Covenant enclosed.

Upon the issuance of these Findings and Orders, and subject to the conditions outlined in the Covenant, Ohio EPA covenants not to sue and releases 350 East First Avenue, and its agents, employees, shareholders, officers, directors, successors and assigns, and successors and assigns of the property, from all civil liability to the State of Ohio to perform additional investigational and remedial activities at the property for the releases of hazardous substances or petroleum identified in the Phase I Property Assessment and addressed in the Phase II Property Assessment conducted in compliance with ORC Chapter 3746 and OAC Chapter 3745-300.

The issuance of the Covenant is a final action of the Director and will be public noticed in accordance with OAC 3745-47-07. The action may be appealed to the Environmental Review Appeals Commission ("Commission"). The appeal must be in writing and set forth the action complained of and the grounds upon which the appeal is based. The appeal must be filed with the Commission within thirty (30) days after notice or issuance of the action. (See ORC 3745.04 and 3745.07.) A copy of the appeal must be served on the Director within three (3) days after the appeal is filed with the Commission. The appeal may be filed with the Commission at 236 East Town Street, Room 300, Columbus, Ohio 43215.

George V. Voinovich, Governor  
Nancy P. Hollister, Lt. Governor  
Donald R. Schregardus, Director

350 East First Avenue, Limited  
Former Berry Brothers Property  
Page 2

Many parties within Smalley & Associates, Inc. and the agency worked hard to remove the environmental barriers associated with redeveloping this property. Congratulations on the issuance of this Covenant. If you have any questions or concerns, please feel free to contact me at (614) 644-2285.

Sincerely,

Handwritten signature of Amy Yersavich in cursive script.

Amy Yersavich, Manager  
Division of Emergency and Remedial Response  
Voluntary Action Program

Enclosure

cc: Atul Pandey, CP, Smalley & Associates, Inc.  
Dan Tjoelker, DERR, CDO  
Luann Hoover, Legal Office  
CO DERR-VAP Files

TO BE RECORDED IN DEED RECORDS,  
PURSUANT TO R.C. 317.08(A)

AFFIDAVIT

STATE OF OHIO )  
 )  
COUNTY OF FRANKLIN ) ss:

Before me, the subscriber, a Notary Public in and for the State of Ohio, personally appeared Zona L. Clements or Tonya R. Jackson, who, being duly sworn according to law, deposes and says that: (i) she is employed as a records management officer in the Legal Office of the Ohio Environmental Protection Agency ("Ohio EPA") and, as such, is authorized to sign this Affidavit on behalf of Ohio EPA; and (ii) the attached document is a true and correct copy of the Covenant Not to Sue/Director's Final Findings and Orders issued by the Director and entered in the Ohio EPA Director's Journal on Oct 18, 2001 regarding the property known as the former Berry Brothers Property, located at 350 East First Avenue, Columbus, Franklin County, Ohio, and further described in Exhibit 1 of the attached Covenant Not to Sue.

Zona L. Clements  
Zona L. Clements or Tonya R. Jackson  
Records Management Officer  
Ohio EPA Legal Office

Sworn to and subscribed before me, a Notary Public in and for the State of Ohio, this 18<sup>th</sup> day of October, 2001.

S. Kroeger  
Notary Public  
State of Ohio

Permanent Commission  
No expiration, R.C. 147.03

This instrument prepared by:  
Luann Hoover, Attorney  
Ohio EPA Legal Office  
P.O. Box 1049  
Columbus, Ohio 43216-1049



**SUSAN C. KROEGER**  
Attorney at Law  
Notary Public  
State of Ohio  
Lifetime Commission

BEFORE THE  
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the matter of: :  
: :  
350 East First Avenue, Limited : Covenant Not to Sue  
c/o Capitol Equities, Inc. : :  
6241 Riverside Drive : Director's Final Findings  
Columbus, OH 43017 : and Orders  
: :  
Regarding property known as: : :  
: :  
Former Berry Brothers Property : :  
aka Former Berry Bolt Property : :  
350 East First Avenue : :  
Columbus, OH 43201 : :

Pursuant to Ohio Revised Code ("ORC") Chapter 3746 and Ohio Administrative Code ("OAC") Chapter 3745-300, the Director of the Ohio Environmental Protection Agency (the "Director") hereby makes the following Findings and issues the following Orders.

FINDINGS

1. A No Further Action Letter, No. 01NFA120 (the "NFA Letter"), was submitted on July 20, 2001 to the Director under the Voluntary Action Program on behalf of 350 East First Avenue, Limited (the "Volunteer"), by Atul Pandey, a certified professional, No. CP224, as defined in ORC 3746.01(E) and OAC 3745-300-01(A)(8) (the "Certified Professional").
2. The NFA Letter describes investigation and remedial activities undertaken at the approximately 1.322 acre property, formerly known as the Berry Brothers Property, located at 350 East First Avenue, Columbus, Franklin County, Ohio (the "Property"). An exact legal description of the Property is attached hereto as Exhibit 1. A Property location map is attached hereto as Exhibit 2. The NFA Letter includes an Executive Summary, which is attached hereto as Exhibit 3.

I certify this to be a true and accurate copy of the  
official document as filed in the records of the Ohio  
Environmental Protection Agency.  
By:  Date: 10/18/01

3. Based upon the information contained in the NFA Letter, the following investigation and remedial activities were undertaken and completed regarding the Property:
  - a. a Phase I Property Assessment, in accordance with OAC 3745-300-06, to determine whether there is any reason to believe that a release of hazardous substances or petroleum has or may have occurred on, underlying or is emanating from the Property;
  - b. a Phase II Property Assessment, in accordance with OAC 3745-300-07, including but not limited to investigations of identified areas of concern and affected media, to assess environmental conditions related to any release of hazardous substances and petroleum;
  - c. institutional controls contained in the Declaration of Use Restrictions (the "Declaration"), which restricts the Property to commercial and/or industrial uses only; and
  - d. a Property-specific risk assessment, in accordance with OAC 3745-300-09, to develop soil standards based on potential exposures to construction workers.
4. The Certified Professional has verified by affidavit that the investigational and remedial activities undertaken at the Property comply with the applicable standards established in ORC Chapter 3746 and OAC Chapter 3745-300, that the Property is eligible to receive a covenant not to sue ("Covenant") under the Voluntary Action Program, and that the voluntary action was conducted in compliance with all applicable federal, state and local laws and regulations.
5. At the time that analyses were performed, EA Group Labs and Blackhand Laboratory were each a certified laboratory, Nos. CL0015 and CL0064 respectively, as defined in ORC 3746.01(D) and OAC 3745-300-01(A)(7), whose services were used in support of the NFA Letter for the Property (the "Certified Laboratories").
6. According to information provided by the each of the Certified Laboratories in affidavits contained in the NFA Letter, each of the Certified Laboratories performed analyses for which it was certified, pursuant to ORC Chapter 3746 and OAC Chapter 3745-300, that formed the basis for the issuance of the NFA Letter by the Certified Professional.
7. The Declaration was recorded on May 31, 2001 in the Franklin County Recorder's

Office, Instrument Number 200105310120009, in accordance with ORC 3746.14 and OAC 3745-300-13(E)(13). A copy of the Declaration is attached hereto as Exhibit 4. The Declaration restricts the use of the Property to commercial and/or industrial land uses only.

8. Based on the information contained in the NFA Letter and all conditions set forth in these Findings and Orders, the Property meets the applicable standards contained in ORC Chapter 3746 and OAC Chapter 3745-300 for commercial and industrial land use and for unrestricted potable ground water use, including but not limited to:
  - a. commercial and industrial land use category direct contact soil standards for hazardous substances, in accordance with Tables III, IV, V and VI of OAC 3745-300-08 for generic numerical standards, at a point of compliance from the surface to a depth of 2 feet;
  - b. commercial land use category direct contact soil standards for petroleum, in accordance with OAC 3745-300-08(B)(3)(a)(i) for generic numerical standards, and industrial land use category direct contact soil standards for petroleum in accordance with OAC 3745-300-08(B)(3)(a)(ii) for generic numerical standards, at a point of compliance from the surface to a depth of 2 feet;
  - c. unrestricted potable use ground water standards, in accordance with Table VII of OAC 3745-300-08, in the uppermost silty sand ground water zone found at depths of 20 feet to 35 feet below ground surface, at all points underlying the property;
  - d. soil standards, derived through Property-specific risk assessment procedures in accordance with OAC 3745-300-09(D), to satisfy the requirements in OAC 3745-300-10(E) to ensure the protection of ground water meeting unrestricted potable use standards in the uppermost silty sand ground water zone at all points underlying the Property, for all identified source areas on the Property; and
  - e. soil standards based on construction worker exposures, derived through Property-specific risk assessment procedures in accordance with OAC 3745-300-09 for human receptor exposures not related to direct contact with soils, at a point of compliance from the surface to a depth of 10 feet.
9. Based on the NFA Letter and subject to all conditions set forth in these Findings

and Orders, a Covenant may be issued for the Property in accordance with ORC 3746.12(A), and the voluntary action for the Property is protective of public health and safety and the environment.

## **ORDERS**

### **Covenant**

1. Upon the issuance of these Findings and Orders, and subject to the conditions set forth herein, Ohio EPA hereby covenants not to sue and releases 350 East First Avenue, Limited, and its agents, employees, shareholders, officers, directors, successors and assigns, and successors and assigns of the Property, from all civil liability to the State of Ohio (the "State") to perform additional investigational and remedial activities at the Property for the releases of hazardous substances or petroleum identified in the Phase I Property Assessment and addressed in the Phase II Property Assessment conducted in compliance with ORC Chapter 3746 and OAC Chapter 3745-300.

### **Conditions and Limitations**

2. The Covenant provided in Order No. 1 shall only apply to the approximately 1.322 acre Property described in these Findings and Orders, the NFA Letter and the Exhibits attached hereto, upon which the investigational and remedial activities specified in the NFA Letter were conducted.
3. Pursuant to ORC 3746.12(B), the Covenant shall remain in effect for as long as the Property continues to comply with the applicable standards upon which the Covenant is based, as referenced in these Findings and Orders.
4. Pursuant to ORC 3746.05, any use of the Property that does not comply with the institutional controls identified herein (i.e., the use restrictions contained in the Declaration), voids the Covenant on and after the date of the commencement of the noncomplying use.
5. Pursuant to ORC 3746.21 and 3746.171, authorized representatives of the Director shall be granted access to the Property for inspection or investigation purposes, including but not limited to determining whether the Property is being used in compliance with the use restrictions contained in the Declaration.

6. The Covenant shall not apply to releases of hazardous substances or petroleum:
  - a. that occur after the issuance of the NFA Letter to the Volunteer;
  - b. on or emanating from the Property, that are not identified in the Phase I Property Assessment or not addressed in the Phase II Property Assessment of the NFA Letter; or
  - c. for which investigational or remedial activities were conducted that were not in compliance with ORC Chapter 3746 or OAC Chapter 3745-300.
  
7. The Covenant shall not apply:
  - a. to claims for natural resource damages the State may have pursuant to Sections 107 or 113 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9607 and 9613, as amended;
  - b. to claims the State may have pursuant to Section 107 of CERCLA, 42 U.S.C. 9607, as amended, for costs other than those for damages to natural resources, provided that the State incurs those other costs as a result of an action by the United States Environmental Protection Agency; or
  - c. as otherwise specifically provided in ORC Chapter 3746.
  
8. Nothing in ORC Chapter 3746 limits the authority of the Director to act under ORC 3734.13 and 3734.20 to 3734.23, or to request that a civil action be brought pursuant to the ORC or common law of the State to recover the costs incurred by Ohio EPA for investigating or remediating a release or threatened release of hazardous substances or petroleum at or from the Property, when the Director determines that the release or threatened release poses an imminent and substantial threat to public health or safety or the environment.
  
9. Nothing in the Covenant shall be construed to limit or waive the Director's authority to revoke the Covenant in response to any of the circumstances for revocation of a covenant, as provided in ORC Chapter 3746 and OAC Chapter 3745-300.

### Recordation in Deed Records

10. Pursuant to ORC 3746.14(A), a copy of these Findings and Orders, including Exhibits 1 (Legal Description), 2 (Property Location Map), and 3 (Executive Summary) shall be recorded in the Franklin County Recorder's Office, in the same manner as a deed to the Property, within sixty (60) days after the issuance of these Findings and Orders.

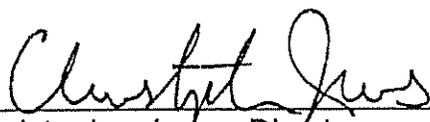
### Transfer

11. Pursuant to ORC 3746.14 and OAC 3745-300-13(K), the NFA Letter and the Covenant Not to Sue/Findings and Orders may be transferred to any person by assignment or in conjunction with the acquisition of title to the Property.

### Notice of Use Restrictions upon Property Conveyance

12. In each instrument the Volunteer uses to convey the Property or any portion of the Property, the Volunteer shall include a notice of the Declaration on the Property in accordance with paragraph 6 of the Declaration attached hereto as Exhibit 4. The Volunteer shall submit to the Director a copy of each instrument containing the notice of the Declaration whenever such conveyance occurs.

IT IS SO ORDERED:



\_\_\_\_\_  
Christopher Jones, Director  
Ohio Environmental Protection Agency

OCT 18 2001

\_\_\_\_\_  
Date

Former Berry Brothers Property  
Director's Final Findings and Orders/Covenant Not to Sue

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**Exhibit 1**  
**Legal Description**

2740 East Main Street  
Hexley, Ohio 43208-2577  
(614) 235-8677  
Telefax 235-4559

August 9, 2000

EXHIBIT "A"

1.122 Acres

Situated in the State of Ohio, County of Franklin, City of Columbus, in Half Section 4, Township 5, Range 12, Refugee Lands, and being the tract intended to be conveyed to Robert W. Lee, Trustee of the Edward A. Berry Trust by Instrument Number 1998022J0019709, all records being of the Recorder's Office, Franklin County, Ohio, and being more particularly bounded and described as follows:

Beginning at a set iron pin at the northeast corner of First Avenue as shown on the Plat of the Description of First Avenue as recorded in Plat Book 5, Page 446, and being in the west line of a 10.488 Acre tract conveyed to Pennsylvania Railroad Holding Company in Official Record Volume J3954, Page D-19;

Thence, along part of the north line of First Avenue, North 36 degrees 34 minutes 53 seconds West, 205.03 feet to a found iron pin at the southeast corner of a 12.544 Acre tract conveyed to Colpark Associates, L.P. in Instrument Number 199910110257964;

Thence, along part of the east line of said 12.544 Acre tract, North 03 degrees 25 minutes 07 seconds East, 390.00 feet to a set iron pin;

Thence, continuing along part of the east line of said 12.544 Acre tract, South 36 degrees 34 minutes 53 seconds, 192.19 feet to a found iron pin in the west line of said 10.488 Acre tract;

Thence, along part of the west line of said 10.488 Acre tract, South 00 degrees 52 minutes 58 seconds West, 390.28 feet to the Point of Beginning, CONTAINING 1.122 ACRES, subject however to all legal easements, restrictions and rights of way of record and of records in the respective utility offices.

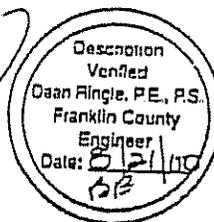
Iron pins set are 30" X 1" O.D. with an orange plastic cap inscribed "P S. 6579". Basis of bearings is North 36 degrees 34 minutes 53 seconds West on the north line of First Avenue per Instrument Number 199910130257964. This description is based on a field survey by Myers Surveying Company, Inc. in August, 2000.

MYERS SURVEYING COMPANY, INC.

*Paul T. Dinan*  
Paul T. Dinan, P.S. #7312  
PTD/kmh (310803002)



C57  
All of  
(010)  
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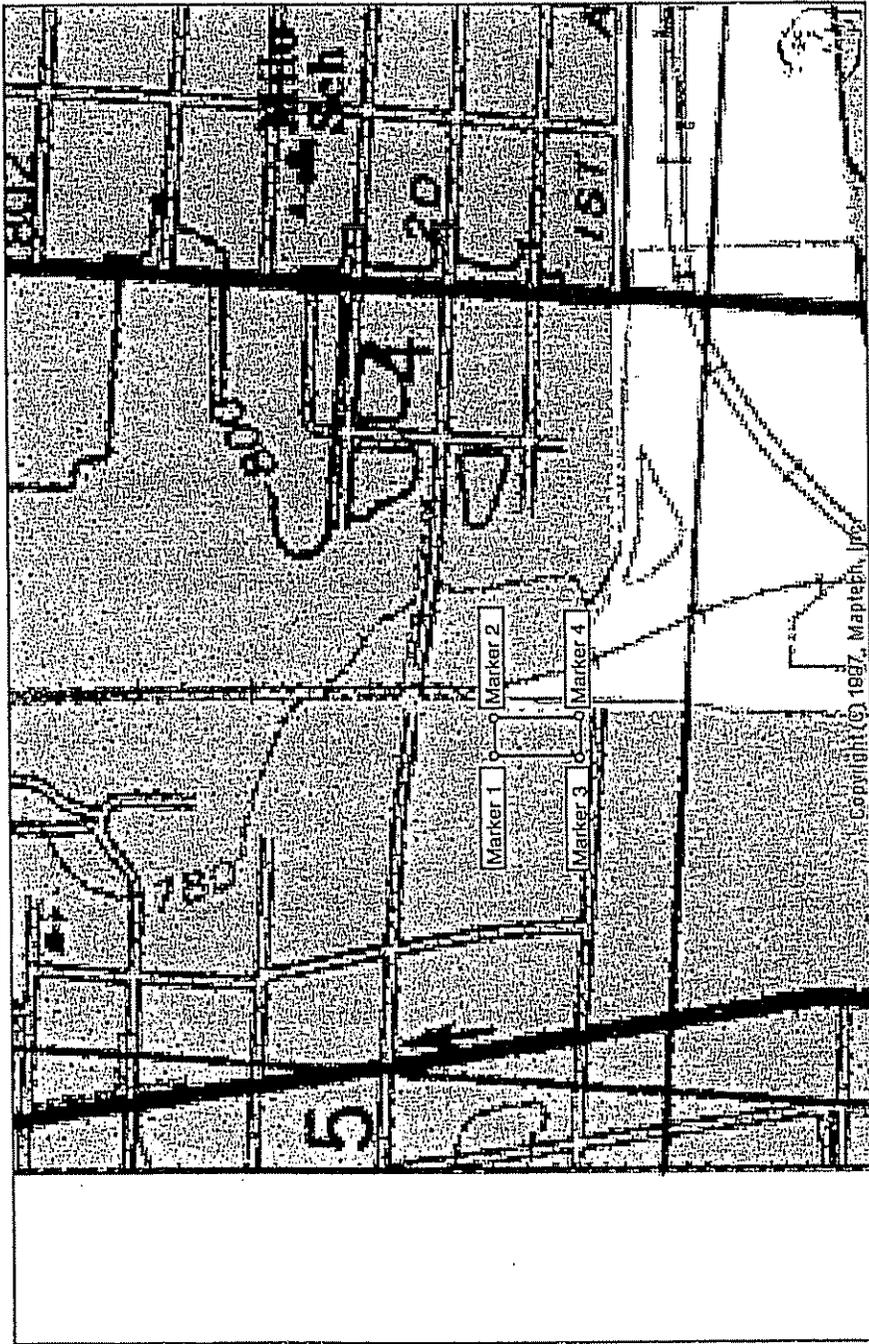


*8-5-2000*

Former Berry Brothers Property  
Director's Final Findings and Orders/Covenant Not to Sue

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**Exhibit 2**  
**Property Location Map**

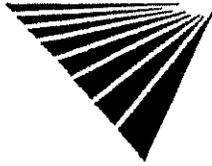


Marker	Latitude Coordinate	Longitude Coordinate
1	039° 58' 53.12" N	082° 59' 42.99" W
2	039° 58' 53.12" N	082° 59' 41.38" W
3	039° 58' 50.26" N	082° 59' 42.99" W
4	039° 58' 50.26" N	082° 59' 41.38" W

**Figure 1**  
 Property Location Map  
 Southeast Columbus, OH  
 1994 (Photorevised)



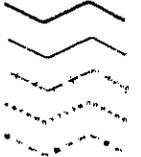
The above map and coordinates were obtained from a computer program (MapTech TopoScout Version 2.01) which uses digitized images of USGS 7.5 min. quads. The above map is of the 1994 Southeast Columbus, OH quadrangle. Smalley & Associates, Inc. makes no warranty as to the accuracy to this program or to the precision of the markers that Smalley & Associates, Inc placed on this map.



# SITE ASSESSMENT PLUS REPORT (PROPERTY BOUNDARY EXTENDED 1/8 MILE)

## Street Map



<p>Subject Site</p> 	 <ul style="list-style-type: none"><li>Highways and Major Roads</li><li>Roads</li><li>Railroads</li><li>Rivers or Water Bodies</li><li>Utilities</li></ul>
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Former Berry Brothers Property  
Director's Final Findings and Orders/Covenant Not to Sue

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**Exhibit 3**  
**Executive Summary**

## **EXECUTIVE SUMMARY - FORMER BERRY BROS. PROPERTY**

### **1.0 Introduction**

A No Further Action (NFA) Letter was submitted to the Ohio Environmental Protection Agency (Ohio EPA), Division of Emergency and Remedial Response (DERR) Voluntary Action Program (VAP) on behalf of 350 East First Avenue, Ltd. on July 13, 2001, by Atul Pandey, P.E. of Smalley & Associates, Inc., CP #224. The NFA letter is dated July 13, 2001.

The NFA describes the Phase I Property Assessment and Phase II Property Assessment for 1.322 acres of land located at 350 East First Avenue in Columbus, Ohio 43201. The subject property is referred to as the "Former Berry Brothers Bolt Works or the Former Berry Brothers Property".

This executive summary of the NFA has been prepared to meet the requirements of Ohio Revised Code (ORC Chapter 3746). A complete copy of the NFA Letter is on file and will be available from the Ohio EPA, Division of Emergency and Remedial Response, Voluntary Action Program in accordance with the filing requirements of OAC 3745-300-13(J).

The legal description of the 1.322 acres of land is provided in Exhibit A to this executive summary.

### **2.0 Summary of No Further Action Letter**

The Certified Professional (Atul Pandey, P.E.) issued an NFA Letter based upon Phase I and Phase II property assessments for the subject property.

A summary of the assessments is provided below. Complete copies of the Phase I Property Assessment and Phase II Property Assessment are contained in the NFA Letter.

### **2.1 Phase I Property Assessment**

A Phase I Property Assessment was conducted in December 2000. A final Phase I Assessment Report was completed on December 22, 2000.

The Phase I Assessment included a determination of eligibility for entry into the Ohio VAP, a review of historic and current uses of the property and surrounding properties, an environmental history review, a review of the history of hazardous substances or petroleum releases, a property inspection and identification of "identified areas" as defined in OAC 3745-300-06(F). A summary of the Phase I Property Assessment is as follows.

The property is located in the City of Columbus, County of Franklin, State of Ohio within the city corporation line. The subject property encompasses 1.322 acres of land located at the northwest corner of the intersection of East First Avenue and the Baltimore & Ohio Railroad. The property is situated in a historically, industrial urban area of east Columbus. The main structure on the property is the manufacturing building. This L-shaped, two-story brick building is approximately 300 feet long and 80 feet wide. It occupies the eastern portion of the property and extends from the southern property line to the northern property line. A four-story tower and a one-story addition are part of this structure. An 80 X 60 foot newer metal storage building is located in the northwestern corner of the property. A small metal lawn implement shed is situated near the southern property line. A gravel driveway loop is located on the western portion of the property. Remaining areas of the property are grassed. An enclosed fenced in area is situated immediately east of the building. An old railway spur is situated just east of the fence.

The property was occupied by Berry Brothers Bolt Works from 1888 until 1997. The main structure at the site is the former Berry Brothers Bolt Works manufacturing building, built in 1888. This facility manufactured bolts, nuts and wire. The property is listed on the National Register of Historic Places. The property was owned by members of the Berry family since the site was first developed. Recently the property was acquired by 350 East First Avenue, Limited, a development corporation. Prior to this transaction, the property was held by the Edward A. Berry Trust. The site is currently leased by Columbus Waterjet, a material cutting service, which occupies warehouse space and portions of the first floor of the Berry manufacturing building. A computer controlled machine cuts materials, such as, aluminum, stainless steel, ceramic tile and glass by use of a high powered, precision sand/water jet.

The site is drained by a drainage ditch on the west side of the property. Drainage from the site is toward E. First Avenue where water enters the city storm water system via catch basins in the street. The property has municipal water and sewer service provided by the City of Columbus. Electric service is supplied by American Electric Power (AEP) via overhead power lines. Natural gas to the building is provided by Columbia Gas of Ohio via underground lines.

To the north, west, and south of the site was the former Jeffrey Manufacturing Company facility, manufacturers of elevators, conveyors, generators, coal handling and mining machinery. Jeffrey buildings south of the target property, across First Avenue, have been razed to their foundations. Buildings north and west of the target property are currently undergoing renovations. East First Avenue is blocked by the railroad to the east. East First Avenue continues on the other side of the railroad tracks. A box manufacturing facility is situated east of the target property across the tracks.

The Berry Brothers Bolt Works was in continuous operation for over 100 years. During that time, machine oil was routinely used in the bolt cutting machines as a coolant and lubricant. Occasionally acids were used during the pickling process of wire. For the majority of the time when the facility was in operation, no regulatory agency or industry wide standards dictated the disposal process for these materials.

The information used to establish a continuous history of the subject property and its surroundings included deed and tax records, city directories, topographic maps, aerial photographs, and interviews.

The Phase I Property Assessment concluded that a Phase II Property Assessment should be conducted to determine potential adverse impacts to soil and/or groundwater from historical operations associated with the nut and bolt manufacturing process.

The routine practice of dumping used machine oil and incidental practice of dumping spent pickling liquor (acid) on the ground at the subject property may have impacted shallow soil and/or groundwater at the site. In addition, disposal of furnace slag on the ground may have impacted the shallow soil at the property. Petroleum hydrocarbons are present in machine oil. In the past, machine oils also commonly contained Polychlorinated Biphenyls (PCBs) and heavy metals. Besides being corrosive, the spent acid may have also contained heavy metals. Chemicals of concern include volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), heavy metals (RCRA 8: lead, arsenic, cadmium, barium, mercury, selenium and silver), total petroleum hydrocarbons (TPH) and Polychlorinated Biphenyl's (PCBs). Based on results of the site inspection, an interview with a former employee and Berry family member, and findings of previous environmental investigations, seven distinct areas were identified as areas which may have been impacted by past practices at the Berry Brothers property.

The Certified Professional determined that the property was eligible for entry into the Ohio VAP on December 6, 2000. The subject property or any portion thereof is not described by paragraphs (C)(1) through (C)(10) of OAC 3745-300-02. The Certified Professional inspected the subject property on December 6, 2000, to verify the Phase I findings.

## **2.2 Phase II Property Assessment**

A Phase II Property Assessment was conducted from December 2000 through February 2001. The Phase II Assessment Report was issued on March 9, 2001. The purpose of the Phase II Assessment was to determine if soil and/or groundwater underneath the subject property was impacted in the identified areas.

The Phase II Assessment included sampling and analysis of soil and groundwater at the subject property, a pathway completeness determination, determination of applicable standards, and an assessment of the risks from direct contact to the soils at the property, construction worker exposure and leaching to groundwater. The complete Phase II Assessment Report is contained in the NFA on file with the Ohio EPA. A summary of the Phase II findings is provided below.

### **2.2.1 Soil Investigation and Findings**

Soil was investigated by the placement of 46 soil bores. A total of 30 different potential chemicals of concern were detected at the property. These presence of these chemicals of concern were attributed to the past disposal for machine oil and coal furnace slag.

### **2.2.2 Groundwater Investigation and Findings**

A silty sand aquifer was discovered beneath the subject property at depths ranging from 18 to 28 feet below surface grade. The unsaturated zone was found to be comprised primarily of silty clay and/or glacial till material. A total of four monitoring wells were advanced into this aquifer.

Groundwater samples were collected in the manner prescribed by Ohio VAP and analyzed for relevant chemicals of concern. Groundwater was not found to be impacted above federal or state action levels.

### **2.2.3 Exposure Pathway Assessment**

An exposure pathway assessment was prepared to evaluate potentially exposed human receptors, current and future, and identify potential exposure pathways associated with the property. This assessment was developed in accordance with guidance in the Ohio VAP (OAC 3745-300-09). The preferred land use designation for the property is unrestricted or residential, as defined by OAC 3745-300-08(2)(C)(i). The following pathways were determined to be complete, and may or may not pose a risk to human health and/or the environment:

- Direct contact soils - on property
- Construction worker exposure scenario - on property
- Leaching of soil contaminants to groundwater

The results of groundwater sampling indicate that groundwater is not impacted in excess of VAP unrestricted potable use standards. The exposure pathway assessment demonstrated that the complete pathways of exposure from soil or groundwater under present or future land use scenarios would not pose

an adverse risk to human health, safety, or the environment.

#### **2.2.4 Determination of all Applicable Standards**

A review of chemical concentrations detected in the soil indicated that the concentrations met generic direct contact standards for commercial/industrial land use, cumulatively adjusted for presence of multiple chemicals, as found in OAC 3745-300-08.

Preliminary analysis of soil data indicated that soils in the residential or unrestricted land use, 0-10 foot zone of compliance do not meet applicable direct contact standards. Due to this fact, it was decided that a deed restriction would be placed on the subject property restricting it to commercial and/or industrial uses only. The recorded copy of the deed restriction is attached to this executive summary.

Because these standards were met, implementation of a remedy was not considered necessary. To be conservative, the aquifer was assumed to be a "critical resource aquifer," per the definition of such an aquifer as found in OAC 3745-300-10.

#### **2.2.5 Determination of Spurious Concentrations**

Six chemicals, namely Acenaphthene, Carbon Disulfide, Naphthalene, Toluene, Fluorene, and Xylenes were screened out from consideration during risk assessment analysis. This was performed in accordance with Ohio EPA VAP Rule OAC 3745-300-09.

#### **2.3 Determination of Risk from Soil Exposure Pathways**

Risk from direct contact to soil was performed for soils in the 0 - 2 foot horizon, in accordance with commercial/industrial land use guidelines. A cumulative adjustment was performed as outlined in OAC 3745-300-08. This analysis concluded that the subject property satisfies the direct contact to soils exposure pathway.

A cumulative adjustment was performed for the construction worker exposure scenario, as well. This analysis concluded that the subject property satisfies the direct contact to deeper soils (0-10 foot) by a future construction worker.

#### **2.4 Determination of Risk from Ground Water Exposure Pathways**

No chemicals of concern were detected in groundwater at the subject property. The property satisfies an unrestricted potable groundwater use pathway. The concentration of chemicals of concern in groundwater were found to be below state or federal action levels.

#### **2.5 Protection of Groundwater Meeting Unrestricted Potable Use Standards (POGWMUPUS) - Leaching to Groundwater from Soils Pathway**

Chemicals of concern detected on-site in the unsaturated zone are not predicted to have an impact to the underlying groundwater in the shallow aquifer in excess of VAP unrestricted potable use standards. This was demonstrated in two stages. In the first stage, generic leach-based soil standards were computed for the subject property using the same approach as that utilized for generic inorganic leach-based soil standards by Ohio EPA VAP and presented in "Ohio EPA Derived Leach-Based Soil Values; Appendix Technical Support Document", OEPA:DERR:VAP, July 1996. This approach consisted of back calculating an acceptable soil concentration based on an acceptable ground water concentration,

conservative (low)  $K_d$ , and an acceptable dilution factor.

The chemicals that failed stage 1 of the leaching analysis were addressed in the second stage of the leaching demonstration, which involved modeling the leaching of contaminants through the soil column at the subject property using the SESOL<sup>®</sup> model.

Through these leaching analyses, it was demonstrated that chemicals of concern in the unsaturated zone will not have a future impact on underlying groundwater in the shallow aquifer in excess of VAP unrestricted potable use standards, and the pathway is satisfied.

### **3.0 Conclusion**

The foregoing is a summary of the NFA Letter submitted for Mr. Todd Kemmerer, Managing Partner for 350 East First Avenue, Ltd. by Atul Pandey, P.E. of Smalley & Associates, Inc., as Certified Professional (CP#224).

Mr. Pandey is the contact at Smalley & Associates, Inc. regarding questions of this NFA Letter. Mr. Pandey can be contacted at 740-654-0112.

A complete copy of the NFA Letter is on file with the Ohio EPA, Division of Emergency and Remedial Response, Voluntary Action Program. The NFA Letter will be made available by the Agency upon request. The number for the Ohio EPA, Division of Emergency and Remedial Response, Voluntary Action Program is 614-644-2924.

Former Berry Brothers Property  
Director's Final Findings and Orders/Covenant Not to Sue

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**Exhibit 4**  
**Declaration of Use Restrictions**

### Declaration of Use Restrictions

This Declaration of Use Restrictions is made by 350 East First Avenue, Ltd.

Whereas, 350 East First Avenue, Ltd. is the owner of a tract of real property consisting of approximately 1.322 acres located in Franklin County, Ohio, and such real property is more particularly described in Exhibit A attached and incorporated by reference into this Declaration of Use Restrictions ("the Property").

Now therefore, in consideration of the foregoing statements, 350 East First Avenue, Ltd., for itself, and its successors and assigns in ownership of the Property, hereby declares that the Property is and shall hereafter be owned, used, held, transferred, sold, conveyed, encumbered, leased, improved and occupied subject to the restrictions hereinafter set forth in this Declaration of Use Restrictions.

I. **Land Use Restrictions.** As a portion of the remedy under the Ohio Environmental Protection Agency ("Ohio EPA") Voluntary Action Program ("VAP"), to protect against exposure to hazardous substances and/or petroleum on the Property, the Property shall be made subject to the following restriction and covenant (collectively, the "Restriction"): the Property shall be restricted to commercial and/or industrial uses only, as set forth in Ohio Administrative Code ("OAC") 3745-300-08(B)(2)(c)(ii) and 3745-300-08(B)(2)(c)(iii), as effective December 16, 1996. The commercial and industrial land uses are defined in this rule as follows:

(i) Commercial land use category

Commercial land use is land use with potential exposure of adult workers during a business day and potential exposures of adults and children who are customers, patrons, or visitors to such facilities. Commercial land use includes potential exposures of adults to dermal contact with soil, inhalation of vapors and particles from soil, and ingestion of soil. Exposures to soil on the property must be short and infrequent. The current or intended use of the property includes, but is not limited to, facilities which supply goods or services and are open to the public. Examples of commercial land uses include, but are not limited to: warehouses, building supply facilities, retail gasoline stations, automobile service stations, automobile dealerships, retail warehouses, repair and service establishments for appliances and other goods, professional offices, banks and credit unions, office buildings, retail businesses selling food or merchandise, hospitals and clinics, religious institutions, hotels, motels, personal service establishments, and parking facilities.

(ii) Industrial land use category

Industrial land use is land use with exposure of adult workers during a business day. Industrial land use must reliably exclude general public and children from access to the facility. Industrial land use involves potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil, and ingestion of soil. The current or intended use for the property includes, but is not limited to, transportation or the manufacture and assembly of goods such as parts, machines or chemicals. Examples of industrial land uses include, but are not limited to: lumber yards, power plants, manufacturing facilities such as metal working shops, plating shops, blast furnaces, coke plants, oil refineries, brick factories, chemical plants, and plastic plants, assembly plants, non-public airport areas, limited access highways, railroad switching yards, and marine port facilities.

File First - 10-21-2001

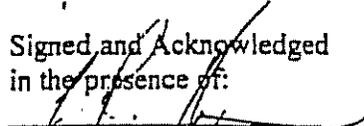
CONVEYANCE TAX  
EXEMPT  
JOSEPH W. TESTA  
FRANKLIN COUNTY AUDITOR

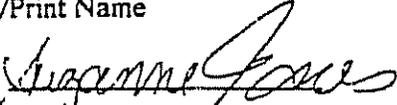
TRANSFERRED  
NOT NECESSARY  
MAY 31 2001  
JOSEPH W. TESTA  
AUDITOR  
FRANKLIN COUNTY, OHIO

2. **Use Restrictions to be Binding and Run With The Land.** This Declaration of Use Restrictions shall run with the land and shall be binding upon all current owners of the Property, and all successors and assigns, of the Property, or any portion of the Property, including any leasehold interests on the Property.
3. **Enforcement.** Compliance with this Declaration of Use Restrictions may be enforced by a legal or equitable action brought in a court of competent jurisdiction by one or more of the following parties: (i) any party referenced in Paragraph One (1) and Two (2) of this Declaration of Use Restrictions, (ii) Ohio EPA or its representatives, or (iii) any party with legal standing under applicable law. Any delay or failure on the part of any such party to take any action to enforce compliance with this Declaration of Use Restrictions shall not bar any subsequent enforcement with respect to the noncompliance in question, and shall not be deemed a waiver of the right of any party to take action to enforce any noncompliance.
4. **Noncomplying Use:** Pursuant to Ohio Revised Code ("ORC") 3746.05, if the Property or any portion of the Property is put to a use that does not comply with this Declaration of Use Restrictions, any Covenant Not to Sue issued for the Property by Ohio EPA under ORC 3746.12 is void on and after the date of the commencement of the noncomplying use.
5. **Recording:** This Declaration of Use Restrictions shall be recorded in the same manner as a deed in the Office of the Recorder of <sup>Franklin</sup> ~~Licking~~ County, pursuant to ORC 3746.10(C) and 317.08(A), and shall be deemed incorporated by reference in any instrument hereafter conveying any interests in the Property or any portion of the Property.  
*10/19/01*
6. **Notice of Use Restrictions Upon Conveyance:** Any instrument hereafter conveying any interest in the Property or any portion of the Property shall contain a recital acknowledging the Declaration of Use Restrictions and providing the recording location of the Declaration of Use Restrictions upon such conveyance substantially in the following form: "The real property described herein is subject to the 'Declaration of Use Restrictions' made by 350 East First Avenue, Ltd., dated 5/13, 2001, and filed for record with the Office of the Recorder of Franklin County, Ohio on 5/31, 2001 in the Franklin County Deed Records, Volume \_\_\_\_\_, Page \_\_\_\_\_", as if the same were fully set forth herein."
7. **Miscellaneous.** If any one or more provisions of this Declaration of Use Restrictions is found unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired. This Declaration of Use Restrictions shall be governed by and interpreted in accordance with the laws of the State of Ohio,, including ORC Chapter 3746. and OAC Chapter 3745-300. All headings used herein are for convenience and shall not be used to interpret or qualify the terms of this Declaration of Use Restrictions.

350 East First Avenue, Ltd., has executed this Declaration of Use Restrictions, by its duly authorized representative, TODD KEMMERER, Managing Partner on 5/18, 2001.

Signed and Acknowledged  
in the presence of:

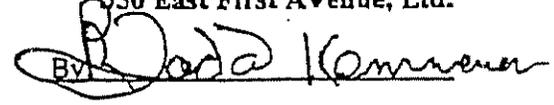
  
A.R. Kern  
Print Name

  
Suzanne Jones  
Print Name

State of Ohio  
County of Franklin

The foregoing instrument was acknowledged before me on May 18, 2001, by TODD KEMMERER,  
MANAGING PARTNER, for and on behalf of the said corporation.

350 East First Avenue, Ltd.

By 

TODD KEMMERER, MANAGING PARTNER

  
NOTARY PUBLIC

SARAH J. ELLIOTT  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES 11-28-04

2740 East Main Street  
Bexley, Ohio 43209-2577  
(614) 235-8677  
Telefax 235-4559

August 9, 2000

EXHIBIT "A"

1.322 Acres

Situated in the State of Ohio, County of Franklin, City of Columbus, in Half Section 4, Township 5, Range 22, Refugee Lands, and being the tract intended to be conveyed to Robert W. Lee, Trustee of the Edward A. Berry Trust by Instrument Number 199802230039709, all records being of the Recorder's Office, Franklin County, Ohio, and being more particularly bounded and described as follows:

Beginning at a set iron pin at the northeast corner of First Avenue as shown on the Plat of the Description of First Avenue as recorded in Plat Book 5, Page 446, and being in the west line of a 10.488 Acre tract conveyed to Pennsylvania Railroad Holding Company in Official Record Volume 33954, Page D-19;

Thence, along part of the north line of First Avenue, North 36 degrees 34 minutes 53 seconds West, 205.03 feet to a found iron pin at the southeast corner of a 12.544 Acre tract conveyed to Colpark Associates, L.P. in Instrument Number 199910130257964;

Thence, along part of the east line of said 12.544 Acre tract, North 03 degrees 25 minutes 07 seconds East, 290.00 feet to a set iron pin;

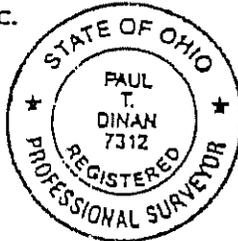
Thence, continuing along part of the east line of said 12.544 Acre tract, South 36 degrees 34 minutes 53 seconds, 192.19 feet to a found iron pin in the west line of said 10.488 Acre tract;

Thence, along part of the west line of said 10.488 Acre tract, South 00 degrees 52 minutes 58 seconds West, 290.28 feet to the Point of Beginning, CONTAINING 1.322 ACRES, subject however to all legal easements, restrictions and rights of way of record and of records in the respective utility offices

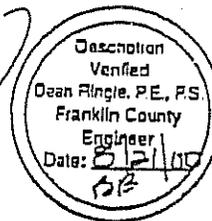
Iron pins set are 30" X 1" O.D. with an orange plastic cap inscribed "P 5.6579". Basis of bearings is North 36 degrees 34 minutes 53 seconds West on the north line of First Avenue per Instrument Number 199910130257964. This description is based on a field survey by Myers Surveying Company, Inc. in August, 2000.

MYERS SURVEYING COMPANY, INC.

*Paul T. Dinan*  
Paul T. Dinan, P.S. #7312  
PTD/kmh (310803002)



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