



City of Fenton

301 South Leroy Street . Fenton Michigan 48430-2196 • (810) 629-2261 • FAX (810) 629-2004

COUNCIL WORK SESSION AGENDA

**Monday, June 6, 2011
City Hall Conference Room
301 South Leroy Street
7:30 PM**

1. Call to Order.
2. Roll Call.
3. Citizen Comments: Request by citizens to speak on specific agenda items.
4. Discussion on how to proceed with Phase II of the Orchard Hills Properties.
5. Discussion on the proposed amendments to the Zoning Ordinance regarding the regulation of Medical Marihuana.
6. Discussion on a vehicle replacement for the Fire Department.
7. Grant Equipment Purchase for Fire Department Equipment.
8. Discussion on the Sidewalk Replacement Program.
9. Discussion on Pedestrian Crosswalk Signs.
10. Discussion on a Tree Planting Policy for City Parks.
11. Discussion on accepting Community Development Block Grant Funds or Opting out of the Program.
12. Council Member Comments
13. Call to the Audience.
14. Adjournment.
- 15.

IF ACCOMMODATIONS ARE NEEDED DUE TO A DISABILITY, PLEASE CONTACT THE CITY CLERK'S OFFICE.

Lansing
313 S. Washington Square
Lansing MI 48933

Marquette
205 S. Front Street - Suite 2D
Marquette MI 49855

Farmington Hills
32300 Northwestern Highway - Suite 230
Farmington Hills MI 48334

Detroit
333 W. Fort Street - 11th Floor
Detroit MI 48226

Grand Rapids
1700 E. Beltline NE - Suite 200
Grand Rapids MI 49525

Holland
151 Central Avenue - Suite 260
Holland MI 49423

Walter S. Foster
1878-1961
Richard B. Foster
1908-1996
Theodore W. Swift
1928-2000
John L. Collins
1926-2001

Webb A. Smith
Allan J. Claypool
Gary J. McRay
Stephen I. Jurmu
Scott A. Storey
Charles A. Janssen
Charles E. Barbieri
James B. Jensen, Jr.
Scott L. Mandel
Michael D. Sanders
Sherry A. Stein

Brent A. Titus
Robert E. McFarland
Stephen J. Lowney
Jean G. Shtokal
Brian G. Goodenough
Matt G. Hrebec
Eric E. Doster
Melissa J. Jackson
Nancy L. Kahn
Deanna Swisher
Thomas R. Meagher
Douglas A. Mielock
Scott A. Chernich
Donald E. Martin
Paul J. Millenbach
Dirk H. Beckwith
Brian J. Renaud
Bruce A. Vande Vusse
Lynwood P. VandenBosch
Lawrence Korolewicz

James B. Doezema
Anne M. Seuryneck
Richard L. Hillman
Steven L. Owen
Jennifer Kildea Dewane
John P. Nicolucci
Francis C. Flood
Michael D. Homier
Keith A. Castora
Randall L. Harbour
David M. Lick
Scott H. Hogan
Richard C. Kraus
Benjamin J. Price
Ronald D. Richards, Jr.
Frank T. Mamat
Michael R. Blum
Norman E. Richards
Jonathan J. David
Nicholas B. Missad

Frank H. Reynolds
Joseph E. Kozely
Pamela C. Dausman
Andrew C. Vredenburg
John M. Kamins
Jack A. Siebers
Julle I. Fershtman
Todd W. Hoppe
Johanna M. Novak
Steven A. Haney, Sr.
Iris K. Linder
Glen A. Schmiege
Michael G. Harrison
Frederick B. Bellamy
Gilbert M. Frimet
Mark J. Colon
Peter R. Tolley
Paul D. Yared
Jennifer B. Van Regenmorter
Thomas R. TerMaat

Ryan E. Lamb
Sheralee S. Hurwitz
John W. Inhulsen
Amanda Garcia-Williams
Zachary W. Behler
Derek A. Walters
Alexander A. Ayar
Joshua K. Richardson
Joel C. Farrar
Samuel J. Frederick
Andrew W. Erlewein
Laura J. Garlinghouse
Anna K. Gibson
Liza C. Moore
Nichole J. Derks
Patricia J. Scott
Lindsey E. Bosch
Nicholas M. Oertel
Erica E.L. Huddas
Nicole E. Stratton

Timothy P. Burkhard
Janene McIntyre
David R. Russell
Mindl M. Johnson
April L. Nelshi
Lauren B. Dunn
Lindsey E. Smith
Alicia W. Blirach
Archana R. Rajendra

Of Counsel
Lawrence B. Lindemer
David VanderHaagen
Allan O. Maki
Dana M. Bennett

Writer's Direct Phone: 517.371.8155

Fax: 517.367.7155

Reply To: Lansing

E-Mail: cbarbieri@fosterswift.com

June 3, 2011

Electronic and First Class Mail

Confidential & Privileged Legal Opinion

Lynn Markland
City Manager
City of Fenton
301 S. Leroy Street
Fenton, MI 48430

Dear Sir:

Re: Orchard Hills Phase II

We are writing to offer you a recommendation on how the City of Fenton (City) may be able to (1) conduct certain "due care" or "response" activities to address arsenic-contaminated soils on the recently acquired Orchard Hills Phase II parcels and (2) at a later time receive reimbursement of the costs for those activities if and when any private development occurs on these parcels. This letter will summarize the relevant site history, current site conditions, legal issues, response options and possible reimbursement opportunities.

A. **Relevant Site History.** Historically, the proposed Orchard Hills subdivision site consisted of agricultural land which included several orchards on the eastern side of the site. One or more of the owners and operators of the orchards reportedly used arsenic as a pesticide during the operation of the orchards. Orchard use discontinued in the 1960s and 1970s. Several subsequent owners have considered residential development for the former orchard site. In the mid 2000s, Orchard Hills Development, LLC proposed to redevelop the property and engaged McDowell & Associates to perform several environmental studies. Although McDowell & Associates suggested that levels of arsenic were consistent with what may be expected from the application of a pesticide according to then generally accepted agricultural standards, which may

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be exempt from the definition of an environmental release, the consulting firm proposed, at the request of the developer, that the arsenic-polluted soils be put under proposed roadways or utility corridors that would be later transferred to and/or maintained by the City. As counsel to the City at that time, we expressed concern about this proposal and suggested that the City may want to avoid acquiring liability through transfer of the roadways and utility corridors and putting its workers in areas where due care may be required. Several meetings occurred to discuss methods for managing the development and minimizing the City's legal exposure and future legal duties for contaminated areas. Unfortunately, the development never occurred, and the property reverted for delinquent taxes to Genesee County (County). When the County later proposed a transfer of the Orchard Hills site to the City, the City studied its options and decided in December 2010 to hire McDowell & Associates to conduct a Phase I environmental assessment before allowing the transfer of the property. The parcels comprising the property transferred on December 28, 2010 to the City after the assessment was completed.

B. **Site Conditions.** As noted above, environmental testing conducted by McDowell & Associates showed arsenic-contaminated soils in areas labeled as Orchard 1 (Area 1) and Orchard 2 (Area 2) as depicted on the attached diagram. (Exhibit 1). Elevated arsenic levels predominantly exist in the upper soils at concentrations above residential criteria for drinking water protection, direct contact, and site calculated background criteria. There is no indication of any arsenic reaching groundwater at the site. The site soil conditions present special challenges to the City as the current owner of the Orchard Hills property, even though the City, as discussed above and further below, conducted due diligence which probably is sufficient to avoid certain types of environmental liabilities.

C. **Legal Issues.** In assessing the City's options several months ago, we indicated that the City needed to assess the risk of acquiring liability and assuming ongoing due care obligations as an owner and operator. Although we believe that the City could make an argument that it should not be liable for arsenic at the site, if the past application of a pesticide by previous owners was done according to generally accepted agricultural practices, we opine that the City will not have liability under Part 201 of Michigan's Natural Resources & Environmental Protection Act (Part 201) as amended, by virtue of a defense afforded in MCL 324.20126(c)(3)(v). That provision exempts local units of government from liability when they acquire ownership from another unit of government which had acquired the property due to tax delinquency. *Id.* On the basis of this defense, we believe that the City also avoids due care responsibilities since the City in acquiring the property from the County should not be charged with the due care responsibilities to avoid exacerbation, prevent unacceptable exposures, take reasonable precautions against acts or omissions of third parties, cooperate with any parties conducting response activities, comply with legal restrictions and not impede or interfere with the integrity of such restrictions. See MCL 324.20107a(5). However, if the City takes steps to invite public use of these parcels, then the City may have these due care duties. *Id.* At this point, we believe that the City would want to

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discourage and even attempt to restrict public use of the parcels given the current condition of the site.

Liability and "due care" issues under the federal Comprehensive Environmental Response, Compensation Liability Act (CERCLA), as amended, are slightly different. First, CERCLA liability as an owner and operator is probably avoided because the due diligence performed prior to the transfer of the deeds from the County to the City arguably provides the City with a bona fide prospective purchaser defense. See 42 USC 9607(r). Continued avoidance of liability under that defense requires that the City as the current owner and operator to take reasonable steps to stop continuing releases, prevent exacerbation and future releases, prevent human, environmental or natural resource exposure, provide cooperation to any person conducting response activities, comply with land use restrictions and not interfere with the effectiveness and integrity of any institutional controls or restrictions. In this case, we believe that the City as a practical matter should be considering "due care" steps under CERCLA that take into account the possibility of potential exposure for the arsenic-contaminated soils.

D. **Response Options.** If the City has concerns about satisfying due care under Part 201 as a precaution or as part of the bona fide prospective purchaser defense under CERCLA, we believe that the City may want to consider certain due care activities to minimize potential exposure and to comply with these requirements. The City, in fact, requested rough estimates from McDowell & Associates, which suggested possible capping of the seven acre area where elevated arsenic exists with a soil fabric and an 18 inch soil cap at a cost in excess of \$200,000. This option also would require a restrictive covenant to limit future disturbances of the cap. McDowell & Associates also suggested an alternative of excavating contaminated soils, placing them under cap and then restricting those areas. This option has an approximate price tag of \$210,000.

Logically, the City requested a second opinion from ECT, which previously had advised the City and this office during the discussion of options that were being presented by the private developer several years ago. After conducting a conceptual evaluation, ECT has estimated a cost of about \$181,000 to cap the soils in their current place in Areas 1 (Orchard 1) and 2 (Orchard 2) and about \$176,000 to relocate and cap contaminated soils. (Exhibit 2). ECT has suggested an approximate six inch cap cover. ECT agrees that these options will require periodic review and maintenance of the cap and future land use restrictions. ECT in its discussions with the City has left open the possibility that capping costs could be reduced if suitable soils for fill or top soil were located by the City for free to use as part of the cap. On that score, the City has explored the use of soils from a recent excavation that was made in advance of construction of a new Fairfield Inn. Testing of the soil from this excavation has shown that some top soils may be suitable for capping, although some deeper soils from this excavation may have arsenic levels that resemble elevated arsenic levels at the Orchard Hills site. ECT is currently examining different relocation and capping options that will allow more area to be developed in the future without restriction.

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In sizing up the options, the City believes that the relocation and capping option may be the best solution since it would not only minimize potential risk to citizens which may have contact with the site but also enhance future development opportunities and, as indicated below, increase the possibility of gaining cost reimbursement.

E. Funding Opportunity. We believe that the City and its Brownfield Redevelopment Authority may want to explore a brownfield grant or loan through the MDEQ to cover the cost of relocating and capping the arsenic-contaminated soils. We would be happy to assist in that regard. Grants or loans for local units of government and their brownfield authorities depend on being able to show likely economic redevelopment and safe future use of contaminated areas. In the absence of an independent source of funding, however, the City may have to consider use of its own funds. Regardless of the source of funding, we believe that the City's Brownfield Redevelopment Authority may be used by the City to recoup expenditures in the future. The City should be able to use its Brownfield Authority to adopt a Brownfield Plan. Under this plan, the City, or its Brownfield Redevelopment Authority, through funds borrowed or loaned by the City, would pay for the relocation and capping remedy. In the future, any future developer whose development would increase the parcels' incremental value would agree as part of the plan that incremental taxes realized by the property's increased value would be recaptured to reimburse the Brownfield Redevelopment Authority or an original lending source (the MDEQ or City) for the low cost environmental expenditures. A similar option was considered historically several years ago when the City acquired the Tipsico Lake Road landfill site and considered possible redevelopment of the Oak Street dump site. Financial and other considerations have not allowed those sites to benefit from the Brownfield financing options as of yet. Nevertheless, the same concept may have application now for the Orchard Hills Phase II parcels.

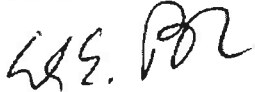
F. Conclusion. In summary, the City faces the challenge of managing and minimizing an environmental contamination risk at the Orchard Hills Phase II parcels which resulted from past pesticide applications. Although the City may have no current liability, its reliance on the bona fide prospective purchaser defense under CERCLA and fulfillment of possible due care duties under Part 201 may depend on managing the arsenic-contaminated soils. The City and/or its Brownfield Redevelopment Authority can address this issue by (1) capping soils in place or (2) excavating, relocating, consolidating and capping the soils in a smaller area. In assessing these options, we agree with the City's preference to relocate and cap these contaminated soils. This option minimizes potential environmental exposures that threaten human health and safety, maximizes the potential for future development and offers a means for reimbursement of City funds. We believe that the City's Brownfield Redevelopment Authority can adopt a Brownfield Plan that should allow recapture of incremental taxes realized by the increased value of the property after the relocation and capping of soils and subsequent Brownfield redevelopment. Any recaptured taxes can reimburse the City for funding the excavation, consolidation and capping of the soils.

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We would be happy to confer with the City on the above approach and, if so chosen, assist the City and its consultant in adopting a suitable Brownfield plan, discussing the best means of using City funds under the Brownfield plan and securing future reimbursement. Please advise if you have questions or comments.

Very truly yours,

FOSTER SWIFT COLLINS & SMITH PC



Charles E. Barbieri

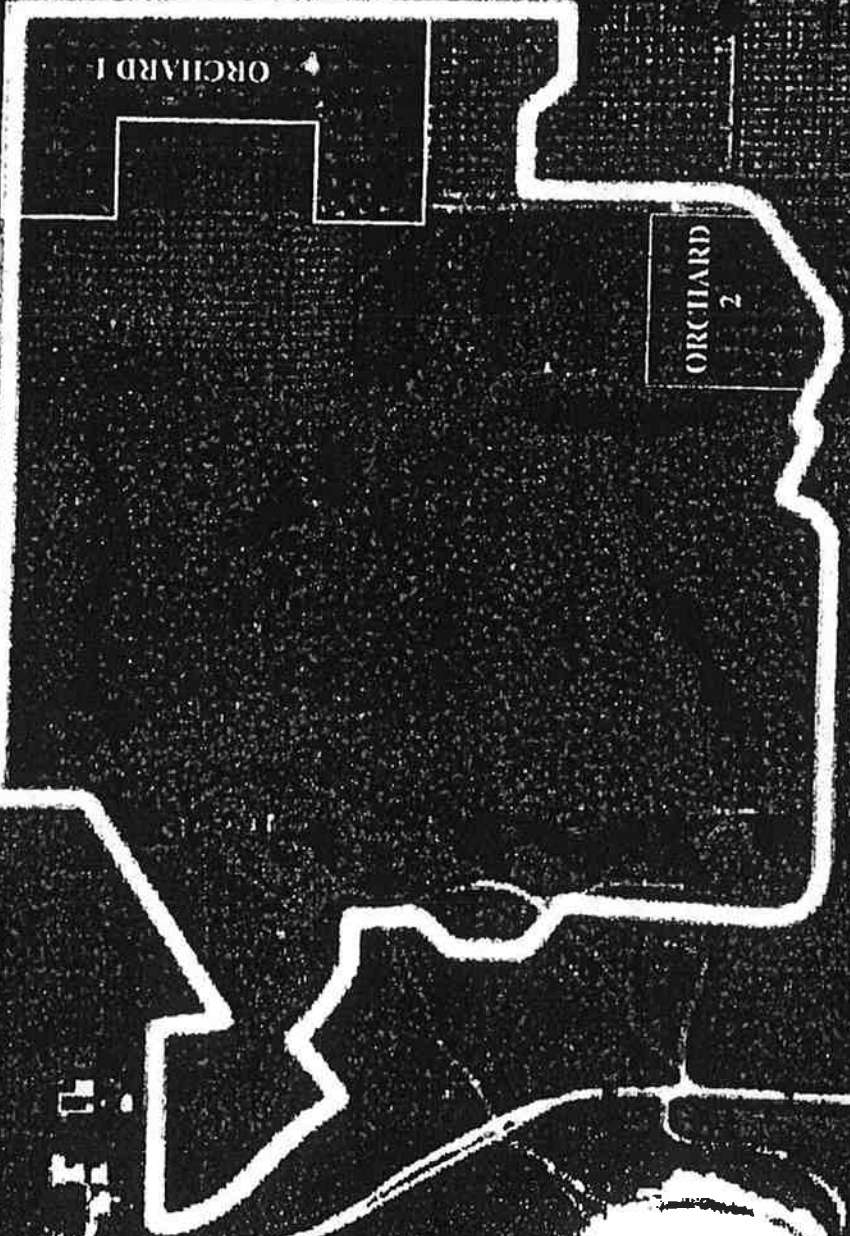
CEB:ldh

cc: Brad Hissong
Jennifer Naismith

EXHIBIT 1



SITE MAP
04-13461
1" ~ 300'



ORCHARD 1

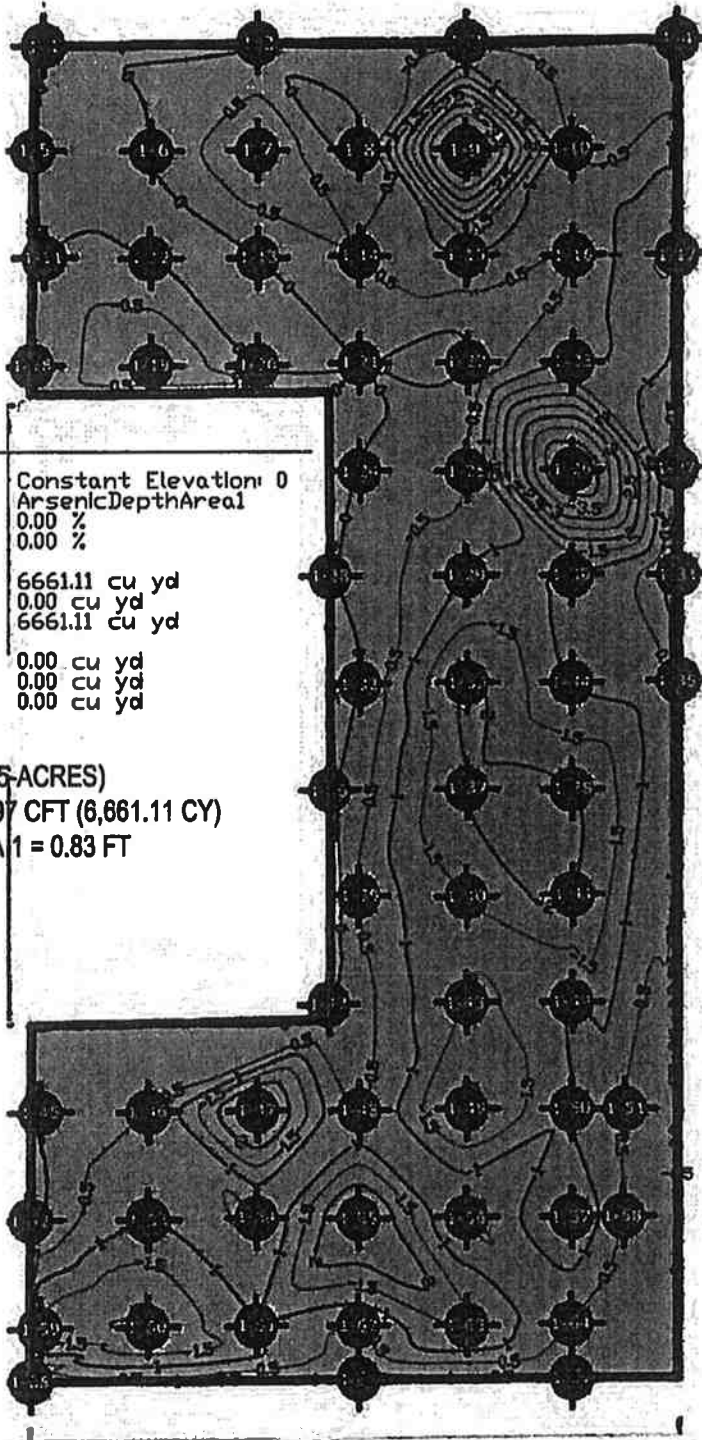
ORCHARD
2



EXHIBIT 2

CONFIDENTIAL AND PRIVILEGED

SAMPLE LOCATION MAP - AREA 1 (APPROXIMATELY 5 ACRES)



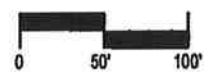
Prismoidal Volume Results

Original Surface Model:	Constant Elevation: 0
Final Surface Model:	Arsenic Depth Area:
Cut Compaction Factor:	0.00 %
Fill Compaction Factor:	0.00 %
Raw Cut Volume:	6661.11 cu yd
Compacted Cut Volume:	0.00 cu yd
Total Cut Volume:	6661.11 cu yd
Raw Fill Volume:	0.00 cu yd
Compacted Fill Volume:	0.00 cu yd
Total Fill Volume:	0.00 cu yd

SITE AREA = 217,800 SQ. FT. (5-ACRES)
RAW CUT VOLUME = 179,849.97 CFT (6,661.11 CY)
AVERAGE CUT ACROSS AREA 1 = 0.83 FT



SCALE: 1" = 100' @ 8.5"x11"



BASE MAP SOURCE: McDOWELL & ASSOCIATES, JOB NO. 04-13461, SAMPLE LOCATION MAP - AREA 1.

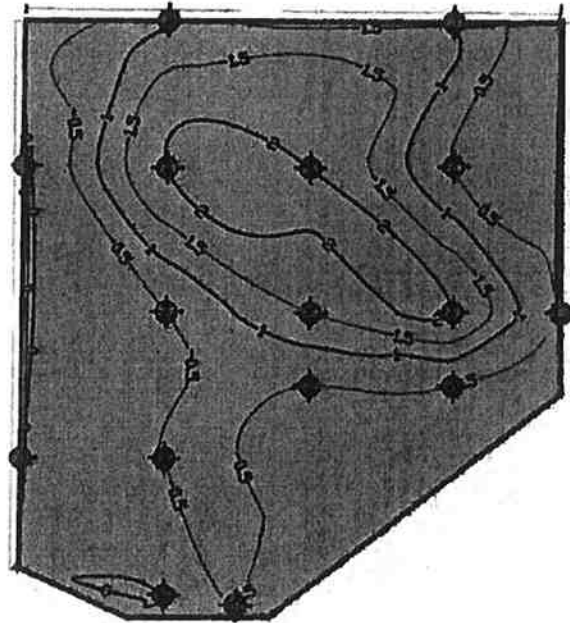


ORCHARD HILLS SUBDIVISION - PHASE II
SHIAWASSEE RD. FENTON TWP., MI
PROPOSED EXCAVATION AREA 1

CONFIDENTIAL
AND
PRIVILEGED

CONFIDENTIAL AND PRIVILEGED

SAMPLE LOCATION MAP - AREA 2 (APPROXIMATELY 2 ACRES)



Prismoidal Volume Results

Original Surface Model:	Constant Elevation:	0.00
Final Surface Model:	AresenicDepthArea2	
Cut Compaction Factor:	0.00 %	
Fill Compaction Factor:	0.00 %	
Raw Cut Volume:	2632.70 cu yd	
Compacted Cut Volume:	0.00 cu yd	
Total Cut Volume:	2632.70 cu yd	
Raw Fill Volume:	0.00 cu yd	
Compacted Fill Volume:	0.00 cu yd	
Total Fill Volume:	0.00 cu yd	

SITE AREA = 87,120 SQ. FT. (2-ACRES)
RAW CUT VOLUME = 71,082.90 CFT (2,632.70 CY)
AVERAGE CUT ACROSS AREA 2 = 0.82 FT



SCALE: 1" = 100' @ 8.5"x11"



BASE MAP SOURCE: McDOWELL & ASSOCIATES, JOB NO. 04-13461, SAMPLE LOCATION MAP - AREA 2.

ECT
Environmental Consulting & Technology, Inc.

ORCHARD HILLS SUBDIVISION - PHASE II
SHIAWASSEE RD. FENTON TWP., MI
PROPOSED EXCAVATION AREA 2

CONFIDENTIAL
AND
PRIVILEGED

CONFIDENTIAL AND PRIVILEGED

SAMPLE LOCATION MAP - AREA 1 (APPROXIMATELY 5 ACRES)

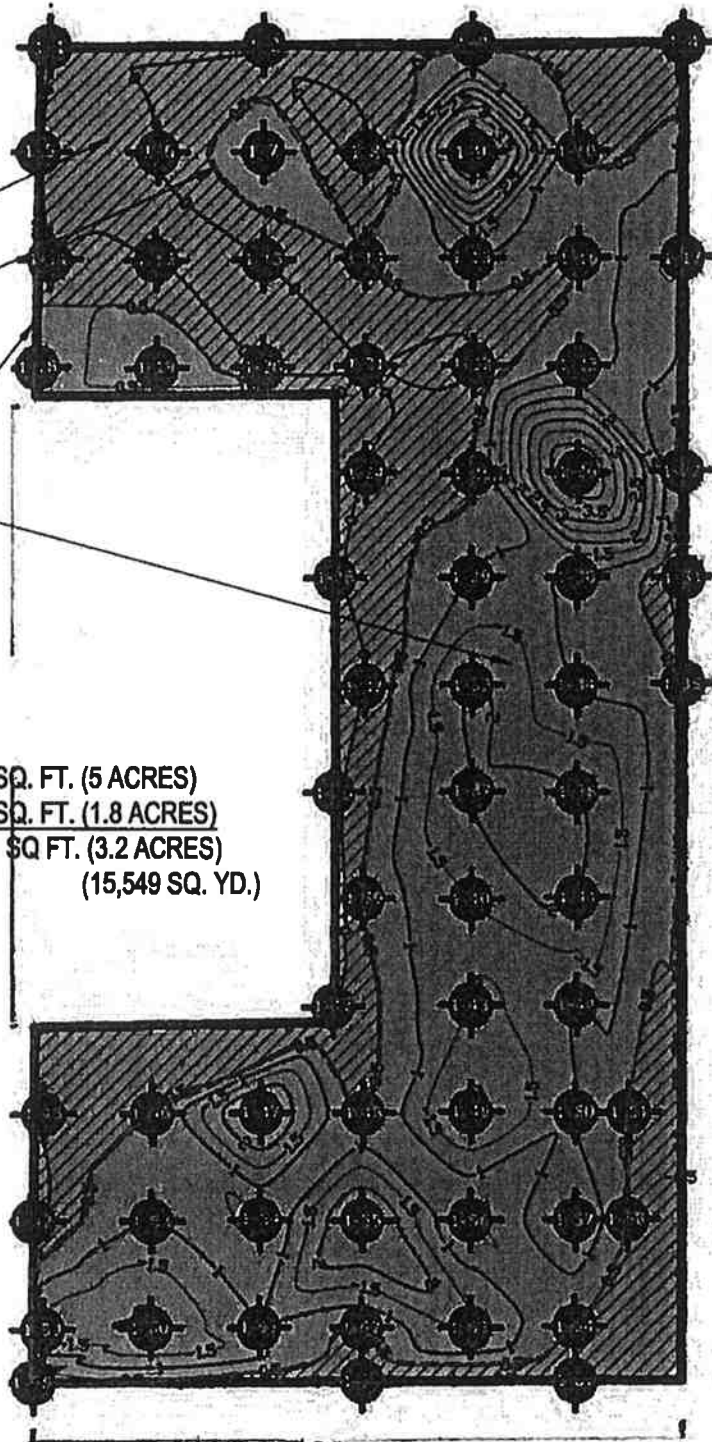
NO TREAT AREA

PROPOSED
SILT FENCE

AREA 1 BOUNDARY

DISTURBED AREA/
EXCAVATION

TOTAL SITE AREA = 217,800 SQ. FT. (5 ACRES)
NO TREAT AREA = 77,857 SQ. FT. (1.8 ACRES)
DISTURBED AREA = 139,943 SQ. FT. (3.2 ACRES)
(15,549 SQ. YD.)



NORTH



SCALE: 1" = 100' @ 8.5"x11"



BASE MAP SOURCE: McDOWELL & ASSOCIATES, JOB NO. 04-13481, SAMPLE LOCATION MAP - AREA 1.

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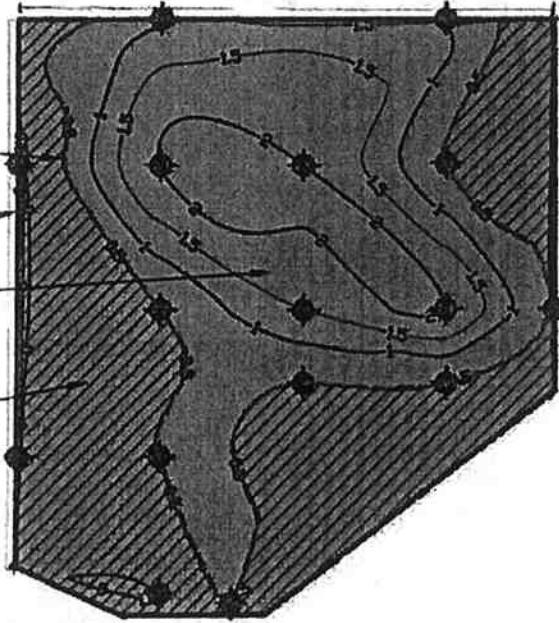
ORCHARD HILLS SUBDIVISION - PHASE II
SHIAWASSEE RD. FENTON TWP., MI
PROPOSED EXCAVATION PLAN

CONFIDENTIAL
AND
PRIVILEGED

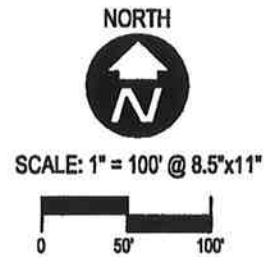
CONFIDENTIAL AND PRIVILEGED

SAMPLE LOCATION MAP - AREA 2 (APPROXIMATELY 2 ACRES)

- PROPOSED SILT FENCE
- AREA 2 BOUNDARY
- DISTURBED AREA/
EXCAVATION
- NO TREAT AREA



TOTAL SITE AREA = 87,120 SQ. FT. (2 ACRES)
NO TREAT AREA = 41,793 SQ. FT. (0.96-ACRE)
DISTURBED AREA = 45,327 SQ. FT. (1.04 ACRES)
(5,036 SQ. YD.)



BASE MAP SOURCE: McDOWELL & ASSOCIATES, JOB NO. 04-13461, SAMPLE LOCATION MAP - AREA 2.

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Environmental Consulting & Technology, Inc.

ORCHARD HILLS SUBDIVISION - PHASE II
SHIAWASSEE RD. FENTON TWP., MI
PROPOSED EXCAVATION PLAN

CONFIDENTIAL
AND
PRIVILEGED

CONFIDENTIAL AND PRIVILEGED

Option #1 - Cap-In-Place

Item	Description	Unit Price	Quantity	Amount
1	Mobilization	\$3,000	1 LS	\$3,000
2	Silt Fence (Area No. 1)	\$3.75	2,684 LF	\$10,065
3	Silt Fence (Area No. 2)	\$3.75	1,139 LF	\$4,271
4	Geotextile/Erosion Control Blanket (Area No. 1)	\$3	15,549 SQY	\$46,647
5	Geotextile/Erosion Control Blanket (Area No. 2)	\$3	5,036 SQY	\$15,108
6	Testing of Clean Fill/Topsoil	\$1,000	1 LS	\$1,000
7	Topsoil - Disturbed Area No. 1	\$12	3,455 CYD	\$41,460
8	Topsoil - Disturbed Area No. 2	\$12	1,119 CYD	\$13,428
9	Spreading & Rough Grading of Topsoil (for 6" Cap) - Disturbed Area No. 1 & No. 2	\$20,000	1 LS	\$20,000
10	Hydroseeding w/ Grass Mix - Disturbed Area No. 1	\$0.45	15,549 SQY	\$6,997
11	Hydroseeding w/ Grass Mix - Disturbed Area No. 2	\$0.45	5,036 SQY	\$2,266

Subtotal = \$164,243
10% Contingency = \$16,424
Total = \$180,667

DESCRIPTION OF WORK

- 1 Mobilization and demobilization of equipment and crews
- 2 Materials, installation, maintenance, & removal of all SESC measures (Area No. 1 Silt Fence)
- 3 Materials, installation, maintenance, & removal of all SESC measures (Area No. 2 Silt Fence)
- 4 Materials and installation of geotextile/erosion control blanket on existing grade (Area No. 1)
- 5 Materials and installation of geotextile/erosion control blanket on existing grade (Area No. 2)
- 6 Testing of clean-fill material (min. 9 samples @ approx. \$110/sample)
- 7 Clean/Screened Topsoil Delivered to the Site (8" Topsoil Over Disturbed Area No. 1; 30% compaction expected).
- 8 Clean/Screened Topsoil Delivered to the Site (8" Topsoil Over Disturbed Area No. 2; 30% compaction expected).
- 9 Spreading and Rough Grading of Topsoil to Obtain 6" Cap (estimated using construction crew operating 1 dozer and 1 loader).
- 10 Installation of hydroseed mix over all disturbed areas/new cap material (Area No. 1)
- 11 Installation of hydroseed mix over all disturbed areas/new cap material (Area No. 2)

Note: Lump sum Spreading & Rough Grading of Topsoil estimate (Item #9) provided by K&D Services, April 1, 2011. This is an estimated cost, as price changes can occur due to actual site conditions.