

ORDINANCE NO. 2023-38 FIRST READING July 24, 2023
INTRODUCED BY: ROTH CAVANAGH SECOND READING WAINED
THIRD READING WAINED

ORDINANCE APPROVING THE AGREEMENT WITH HZW ENVIRONMENTAL CONSULTANTS, LLC FOR AN ASBESTOS SURVEY OF ONE COMMERCIAL STRUCTURE AND ONE GARAGE LOCATED AT 1208 BELL ROAD IN AN AMOUNT NOT TO EXCEED \$3,000, AUTHORIZING THE STREET COMMISSIONER TO EXECUTE THE AGREEMENT ON BEHALF OF THE VILLAGE OF SOUTH RUSSELL, AND DECLARING AN EMERGENCY.

WHEREAS, the Village of South Russell desires to enter into an agreement with HZW Environmental Consultants, LLC for an asbestos survey of one commercial structure and one garage located at 1208 Bell Road (the "Agreement"), a copy of which is attached hereto and incorporated herein by reference as Exhibit A, as per the terms of the Agreement outlined therein.

NOW, THEREFORE, BE IT ORDAINED by the Council of the Village of South Russell, Geauga County, Ohio that:

SECTION 1. The Agreement, a copy of which is attached hereto and incorporated herein by reference as Exhibit A, is hereby approved for the asbestos services described therein up to an amount not to exceed \$3,000 and upon the terms and conditions as expressed therein.

SECTION 2. The Street Commissioner of the Village of South Russell is hereby authorized to execute the Agreement on behalf of the Village.

SECTION 3. It is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this Resolution were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees on or after December 2, 1975, that resulted in formal actions, were in meetings open to the public in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 4. This Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety of the Village of South Russell and for the further reason this Ordinance must be immediately effective to allow the asbestos survey to commence as soon as possible as described in the Agreement; wherefore provided it receives the affirmative vote of at least two-thirds (2/3) of all members elected to Council, this Ordinance shall be in full force and effect from and immediately upon its passage by this Council and approval by the Mayor; otherwise, it shall take effect and be in force after the earliest period allowed by law.

Passed this 24TH day of JULY, 2023.


Mayor - President of Council

ATTEST:

Danielle Romanowski
Fiscal Officer

I certify that Ordinance No. 2023-38 was duly enacted on the 24th day of JULY 2023, by the Council of the Village of South Russell, and published in accordance with the Codified Ordinances of the Village.

Danielle Romanowski
Fiscal Officer



HZW
Environmental
Consultants

July 14, 2023

South Russell Village
5205 Chillicothe Road
South Russell, Ohio 44022

Attn: Tim Alder

Subject: *Proposal to Conduct an Asbestos Survey of One Commercial Structure and one Garage Located at 1208 Bell Street, South Russell, Geauga County, Ohio*

Dear Mr. Alder:

HZW Environmental Consultants, LLC (HZW) is pleased to submit for your consideration this proposal to conduct an asbestos survey of one commercial structure and one garage located at 1208 Bell Street, South Russell, Ohio (herein referred to as the “subject property”). We propose to provide these professional services to the Village of South Russell (herein referred to as the “Client”) in accordance with the terms and conditions set forth herein.

SCOPE OF SERVICES

Task 1 – Asbestos Survey

In order to assist the Client in identifying asbestos-containing materials (ACMs) located at the subject property prior to manual demolition activities being performed, HZW will provide an Asbestos Hazard Evaluation Specialist, who is certified by the state of Ohio, in accordance with the Ohio Environmental Protection Agency regulations, to conduct an asbestos survey. This survey will consist of the following elements:

- A. Conducting a physical inspection of the subject property to identify the location, quantities and condition of building materials suspect for containing asbestos. The physical inspection will include all necessary field work, sample collection, etc.

- B. Submitting the bulk samples collected to CA Labs, LLC of Baton Rouge, Louisiana, an independent laboratory accredited under the National Institute of Standard and Technology (NIST) National Voluntary Accredited Laboratory Program (NVLAP) for confirmation of asbestos content. The samples will be analyzed by polarized light microscopy (PLM) using the Environmental Protection Agency (EPA) Method 600-M4-020. In accordance with the United States EPA National Emissions Standard for Hazardous Air Pollutants (NESHAP), building materials identified by PLM as containing three (3) percent asbestos or less will subsequently be analyzed by 400-point count methodology. Drywall system layers when found to contain asbestos will be composited and point counted to determine proper handling and disposal regulations.

- C. Preparing a letter report that presents the findings of the asbestos survey conducted at the subject property and any associated recommendations. Drawings documenting the bulk sampling locations and locations of any ACMs identified will be provided as part of the letter report. The Client will receive one (1) electronic copy (via electronic mail) of the letter report.

INFORMATION/SERVICES PROVIDED BY THE CLIENT

The following information, services and equipment shall be provided to HZW by the Client:

- 1. Access to the subject property during normal working hours to conduct the asbestos survey.

FEE AND BILLING

We will accomplish the work outlined in **Task 1** for the lump sum fee of \$1,400.00, **exclusive** of analytical fees which will be billed as follows:

Analytical Fees

Asbestos Bulk Analysis.....	\$12.00/sample*
400-Point Count.....	\$22.00/sample*

**Based on normal analytical turnaround (5 days)*

It is estimated that from 25 to 35 bulk samples will be collected from the subject property, with 10 percent of these samples being further analyzed by 400 Point Count.

Billing for Task 1 will be submitted on completion of the project. Invoices are due and payable within twenty-five (25) days of receipt.

CLOSURE

In addition to the matters set forth herein, our agreement shall include and be subject to the Standard Provisions attached hereto (**Attachment 1**) and hereby incorporated herein. The term "the Client" as used in the Standard Provisions shall be understood to refer to South Russell Village. The Standard Provisions shall apply to this agreement, regardless of the method of authorization.

If you concur in the foregoing and wish us to proceed with the aforementioned work, please execute this letter agreement, initial the Standard Provisions in the space provided, and return the same to the undersigned. Fees and times stated in this agreement are valid for sixty (60) days from the date of this agreement by HZW.

Please call us should you have any questions regarding this letter agreement. We look forward to working with you on this project.

Sincerely,

HZW ENVIRONMENTAL CONSULTANTS, LLC

Joan A. Sablar

Joan A. Sablar
Group Leader
Industrial Hygiene, IAQ, Asbestos and Lead

MPF:mpf

Attachment: Standard Provisions

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South Russell Village

Agreed to this 24 Day of July, 2023

By: MAYOR WILLIAM G. KOONS
(Please Print Name and Title)

Signature: William G. Koons

Witness: Danielle Romanowski



ATTACHMENT 1

STANDARD PROVISIONS

1. Information Provided by Others. Client shall provide to HZW Environmental Consultants, LLC, ("Consultant") all pertinent background information related to the project. Client recognizes that it is impossible for Consultant to assure the sufficiency or accuracy of such information, either because it is impossible to do so, or because of errors or omissions by others which may have occurred in assembling the information. Accordingly, Consultant may rely on all information provided to it, and Client waives any claim against Consultant, and agrees to defend, and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from errors, omissions, or inaccuracies in documents or other information provided to Consultant by sources which may include, but are not limited to, Client, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of, or otherwise regarding, any such claim.

2. Right of Entry. Client shall provide or assist Consultant in gaining the right to enter property owned by Client and/or other(s) in order for Consultant to fulfill the scope of services included hereunder.

3. Notification of Hazardous Materials. When wastes, materials and/or substances or other materials or substances hazardous and/or toxic to human health or to the environment, whether regulated or unregulated, ("Hazardous Materials") are known, assumed or suspected to exist at a site, Consultant is required to take appropriate precautions to protect the health and safety of its personnel, to comply with applicable laws and regulations, and to follow procedures that Consultant deems prudent to minimize risks to its employees and the public. Should Client know or have any reason to assume or suspect that Hazardous Materials exist at the project site, Client will inform Consultant prior to project initiation, and advise Consultant of such known or suspected Hazardous Materials' type, quantity, and/or location.

4. Hazardous Materials. It is understood and agreed that in seeking the professional services of Consultant under this Agreement, Client may request Consultant to undertake obligations involving or related to Hazardous Materials (including, but not limited to, asbestos). Such services shall be performed in accordance with generally accepted professional practice at the time when and the place where the services are rendered. Client agrees to hold harmless, , and defend Consultant from and against any and all claims, losses, damages, liabilities, and costs arising, or allegedly arising, out of or in any way connected with the presence, discharge, release, or escape of contaminants or Hazardous Materials of any kind, or environmental liability of any nature or in any manner related to services performed by Consultant under this Agreement, including the failure to discover any Hazardous Materials which exist in, on, above, beneath, about, or which have migrated onto, or under, the project site. Such hold harmless shall not apply to claims, damages, losses, or expenses which are finally determined to result from willful or reckless disregard by Consultant of its obligations under this Agreement.

5. Scope of Services.

a. In the event that the Scope of Services for this Agreement was developed by Consultant, Client acknowledges that it was prepared at Client's direction and without input from Client and/or other professionals retained (directly or indirectly) by Client. Client further acknowledges that, as a result, Consultant has been required to make various assumptions about Client's needs and preferences, as well as Client's ability to obtain certain services from other sources. Accordingly, Client waives any claim against Consultant, and agrees to defend, and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from the assumptions made by Consultant in developing the Scope of Services and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such assumption in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

b. In the event that the scope of services for this project was developed by a party other than Consultant, Consultant makes no claims as to its adequacy, since Consultant was not involved in or privy to the information and considerations that it reflects. Accordingly, Client acknowledges that Consultant is forced to assume that the scope of services is fully adequate for Client's purposes. Client also acknowledges and understands that Consultant assumes that Client has an alternative source from which to obtain any needed or desired services not listed. Accordingly, Client waives any claim against Consultant, and agrees to defend, and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from Consultant's failure to perform services limited by or not included in the scope of services, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

6. Disturbance of Property/Adverse Property Conditions. Client understands that use of sampling equipment may cause some disturbance to the property, the correction of which is not part of this Agreement. Client also understands that the discovery of certain conditions and/or taking preventive measures relative to these conditions may affect a property's value. Accordingly, Client waives any claim against Consultant, and agrees to defend, and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from said conditions, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

7. Limiting Conditions: Certain conditions may be encountered in the field which limit the Consultant's ability to complete all or part of the Scope of Services. These may include (but are not limited to) locks on gates, doors, or fences; flooded basements; immovable equipment or machinery; structurally unsound buildings, walkways, "cat walks", etc.; snow cover; debris/fill piles; or active game hunting in the immediate area where the Consultant is to implement the Scope of Services. In the event of a limiting condition, the Consultant will endeavor to contact the Client as soon as practical to advise of the limiting condition, and request direction on how to complete the Scope of Services, given the limiting condition. Should the Client direct the Consultant to return to the site once the limiting condition has been removed or otherwise abated, such a re-inspection of the work site by the Consultant may be considered an Additional Service, and subject to additional compensation above that contemplated in the original agreement. Should the Client direct the Consultant to disregard the limiting condition, the Client will waive any claim against Consultant, and agree to defend, and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from said conditions, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

8. Job Site Safety. Consultant is responsible for its own employee's activities on the job site. Neither this Agreement, nor the professional activities of Consultant, nor the presence of Consultant or its employees and/or subcontractors shall be construed to imply Consultant has responsibility for the methods of work performance, superintendence, sequencing of construction, or safety of others in, on, or about the job site.

9. Opinions of Cost. Since Consultant has no control over the cost of labor, materials, equipment or services furnished by others or over methods of determining prices, or over competitive bidding or market conditions, any and all opinions as to the costs of services, construction or materials shall be made on the basis of its experience and qualifications and represent its best judgment; however, Consultant cannot and does not guarantee that bids or actual costs will not vary from opinions of probable cost.

10. Graphic Presentation of Physical Features. Any graphic presentation of physical features on maps or in reports is based upon field measurement techniques (such as compass or distance triangulation, pace-and-compass traverses, etc.) using available physical landmarks, and will be considered approximate unless indicated otherwise.

11. Reuse and/or Revision of Documents. All documents prepared by Consultant pursuant to this Agreement are related exclusively to the services described herein. They are not intended or represented to be suitable for reuse by Client or others on extensions of this project or on any other project. Any reuse without written verification or adaptation by Consultant for the specific purposes intended will be at Client's sole risk and without liability or legal exposure to Consultant; and Client shall hold Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising, or allegedly arising, out of or resulting therefrom. Any revision, verification or adaptation after Consultant's submission of its final work-product to Client will entitle Consultant to further compensation in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

12. Standard of Care. In performing its professional services hereunder, Consultant will use that degree of care and skill ordinarily exercised, under similar circumstances, by members of its profession practicing at the same time in the same or similar locality. No other warranty, express or implied, is made or intended by Consultant's undertaking herein or its performance of services hereunder.

13. Maintenance of Professional Standards and Ethics. Client acknowledges that Consultant's services in all cases must be rendered in accordance with prevailing professional standards and ethics, as well as certain laws or regulations that apply to Consultant. Client further acknowledges that the responsibility for making reports or disclosures to any governmental agency or third party is solely that of the Client and/or the owner of the property that is the subject of the services, unless otherwise required by prevailing legal or professional standards.

14. Notice of Deficiency. Client, Client's personnel, contractors and subcontractors shall promptly notify Consultant of any deficiency or suspected deficiency in Consultant's work, in order that Consultant may take prompt, effective measures to address any perceived deficiencies.

15. Invoices. Invoices will be submitted by Consultant to Client monthly for services performed and expenses incurred pursuant to this Agreement. Client recognizes that time is of the essence with respect to payment of Consultant's invoices and that timely payment is a material part of the consideration of this Agreement. Payment of each such invoice will be due within twenty-five (25) days. A service charge will be added to delinquent accounts at the maximum rate allowed by law for each month of delinquency.

16. Non-Contingency. Client acknowledges and agrees that the payment for services rendered and expenses incurred by Consultant pursuant to this Agreement is not subject to any contingency unless expressly set forth in writing in this Agreement

17. Failure to Pay. If Client fails to make any payment due Consultant for services and expenses within sixty (60) days after Consultant's transmittal of its invoice therefor, Consultant may, after giving seven (7) days' advance written notice to Client, suspend services under this Agreement until it receives payment in full for all amounts due. Consultant may also initiate legal proceedings to collect. In cases where the Consultant has issued reports and/or letters of reliance, Consultant may also notify the Client and any other party to which these reports and/or letters of reliance were issued of the Consultant's withdrawal of reliance upon the information contained therein, and request return of all written reports, data, and other information as the rightful property of the Consultant, based upon the Client's failure to pay. In the case of such a request, the Client agrees to return of all documents and/or letters of reliance, and provide written notification to any party to which Consultant's reports or data were disseminated, notifying them of the Consultant's withdrawal of reliance. In addition to all amounts due and payable pursuant to Consultant's invoices, Consultant may collect accrued interest and its reasonable attorneys' fees and other expenses related to the collection proceeding. Such expenses shall include, but shall not be limited to, the cost of the time devoted by Consultant's officers, directors, employees, and agents devoted to such proceeding and Consultant's related expenses, determined in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

18. Compensation for Additional Services. The undertaking of Consultant to perform professional services under this Agreement extends only to those services specifically described herein. If Client and Consultant agree that Consultant shall perform additional services ("Additional Services") hereunder, Client shall pay Consultant for the performance of such Additional Services (in addition to all other amounts payable under this Agreement) in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

19. Changed Conditions. In the event of an occurrence or discovery that was not originally contemplated by or known to Consultant in developing the original scope of services and fees, Consultant, in its sole discretion, may request modification of this Agreement. In the event of such a request, Consultant shall identify to Client the change in conditions which, in Consultant's judgment, make such modification necessary. If a modified Agreement or specific Additional Services cannot be agreed to, this Agreement may be terminated.

20. Changed Costs. Consultant shall have the right to increase the compensation payable by Client to Consultant for any non-lump sum project in the event that performance of this Agreement extends beyond January 1 (the date on which Consultant annually revises its fee and reimbursement schedule) of any calendar year and/or in the event that Consultant must modify services, facilities or equipment to comply with laws or regulations that become effective after execution of this Agreement.

21. by Consultant. Consultant is protected by Workmen's Compensation Insurance and other insurance, and will furnish certificates of insurance upon request. Consultant agrees to hold Client harmless from loss, damage, injury, or liability arising, or allegedly arising, directly from the negligent acts or omissions of Consultant, its employees, agents, subcontractors and their employees and agents to the extent that the same is actually covered and paid under the foregoing policies of insurance.

22. Limitation of Liability. To the fullest extent permitted by law, Client will limit any and all liabilities, claims for damages, costs of defense, and/or expenses to be levied against Consultant (whether by Client or by any other person or entity) on account of any and all defects, errors, omissions, negligence and other claims and liabilities to the amount actually paid in compensation to Consultant or paid under said insurance policies, whichever is greater. Client shall defend, and hold Consultant harmless from any claim or liability in excess of this amount. Further, Client agrees to notify any contractor or subcontractor who may perform work in connection with any design, report, or study prepared by Consultant of such limitation on, and for, claims and liabilities, and require as a condition precedent to its performance of such work an identical limitation on, and for, claims and liabilities on its part as against Consultant. In the event Client fails to obtain an identical limitation and provision, Client shall and hold Consultant harmless for any claims and liabilities in such a manner and to such extent that the aggregate liability of Consultant shall not exceed the aforementioned amount.

23. Environmental Indemnity. To the fullest extent permitted by law, Client agrees to , defend and hold harmless Consultant and its subcontractors, consultants, agents, officers, directors and employees of any of them from and against all claims, liabilities, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from any release or threatened release of Hazardous Materials that existed at the project site, prior to or after the commencement of Consultant's work, provided that such release or threatened release is not finally determined to have resulted from the sole negligence of Consultant. Without limiting the generality of the foregoing, the above hold harmless extends to claims resulting from:

a. Client's violation or alleged violation of any federal, state or local statute, regulation or ordinance relating to the disposal of Hazardous Materials;

b. Client's or Consultant's undertaking of or arrangement for the handling, removal, treatment, storage, transportation or disposal of Hazardous Materials found or identified at the site;

c. Hazardous Materials introduced at the site by Client or third persons before or after the completion of services herein;

d. Allegations that Consultant is a generator, operator, treater, storer, transporter, arranger for transport, handler, or disposer under RCRA, the Comprehensive Environmental, Response, Compensation and Liability Act ("CERCLA") or any other federal, state or local law, regulation or ordinance.

24. Consequential Damages. Client shall not be liable to Consultant and Consultant shall not be liable to Client for any consequential damages incurred by either due to the fault of the other, regardless of the nature of this fault, or whether it was committed by Client or Consultant, their employees, agents or subcontractors. Consequential damages include, but are not limited to, loss of use and loss of profit.

25. Delays. Consultant's field or technical work may be interrupted due to causes beyond its control. Client shall not hold Consultant responsible for damages or delays in performance caused by acts of God or other circumstances. For purposes of this Agreement, acts of God and other circumstances beyond the control of Consultant include, but are not limited to, unusual weather; floods; epidemics; war; riots; strikes, lockouts or other industrial disturbances; protest demonstrations; unanticipated site conditions; denial of, or impediment to, site access; insufficient or incomplete delivery of information requested from Client, regulatory agencies, or third parties; or inability, despite reasonable diligence, to obtain personnel, equipment or material for the project.

26. Termination. The obligation to provide further services under this Agreement may be terminated by either party upon seven (7) days' written notice in the event of changed conditions or the substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party. In the event of termination by either party, Consultant will be paid for all services rendered to the date of termination, all expenses subject to reimbursement hereunder, and other reasonable expenses incurred by Consultant as a result of such termination. In the event Consultant's compensation under this Agreement is a fixed fee, upon such termination the amount payable to Consultant for services rendered will be determined using a proportional amount of the total fee based on a ratio of the amount of the work done, as reasonably determined by Consultant, to the total amount of work which was to have been performed, less prior partial payments, if any, which have been made.

27. Confidentiality. Consultant agrees to keep confidential and not to disclose to any person or entity, other than Consultant's employees and subcontractors, without the prior consent of Client, all data and information which are furnished to Consultant by Client and which are marked CONFIDENTIAL; provided, however, that this provision shall not apply to data which are in the public domain, or were generated by or previously known to Consultant, or which were acquired by Consultant independently from third parties which have no obligation to Client to keep said data and information confidential. These provisions shall likewise not apply to information, in whatever form, that comes into the public domain through no fault of Consultant. Nor shall these provisions restrict Consultant from disclosing any information or data when ordered by a court, administrative agency or other authority with apparent jurisdiction. Consultant may use Client's name and a general description of Consultant's services for Client for marketing purposes.

28. Binding Effect. This Agreement shall bind, and the benefits thereof shall inure to, the respective parties hereto, their legal representatives,

executors, administrators, successors, and assigns.

29. Third-Party Exclusion. Nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than Client and Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Client and Consultant and not for the benefit of any other party. Client agrees that Client shall not disclose to any third party any data, reports or other information furnished by Consultant to Client under this Agreement without the prior written consent of Consultant, and in the absence of such consent, Consultant shall have no liability to Client for claims resulting from such disclosure. Client further agrees to, defend and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from Client's disclosure to a third party, and/or a third party's use of, any data, reports or other information furnished by Consultant.

30. Controlling Law. This Agreement shall be governed by the law of the State of Ohio without regard to its conflict of laws procedures.

31. Location of Litigation. In the event that Client wishes to commence litigation against Consultant, Client agrees that it may bring such litigation only in the Court of Common Pleas for Lake County, Ohio or in the U.S. District Court for the Northern District of Ohio, Eastern Division or such other courts which include Lake County, Ohio within their territorial jurisdictions.

32. Expenses of Litigation. In the event litigation in any way related to the services performed hereunder is initiated against Consultant by Client, its contractors, or subcontractors, and such litigation concludes with the entry of a final judgment favorable to Consultant, Client shall reimburse Consultant for all of its attorneys' fees and other expenses related to said litigation. Such expenses shall include, but shall not be limited to, the cost to Consultant for any time spent and expenses incurred, in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

33. Alternative Dispute Resolution. In the event of a dispute between Consultant and Client which is not resolved in good faith negotiation, Client agrees to negotiate in good faith to find or craft an alternative dispute resolution mechanism.

34. Time Limit for Claims. Client agrees that it will not pursue claims against Consultant more than two (2) years after Consultant's performance of the work from which the claim arises or to which it relates.

35. Extension of Protections. Client agrees to extend any and all limitations, s and waivers provided by Client to Consultant to those individuals and organizations Consultant retains for proper execution of the work. These include, but are not limited to, Consultant's officers, directors, and employees and their heirs and assigns, as well as Consultant's agents, subconsultants and subcontractors and their officers, directors, employees, and their heirs and assigns.

36. Instruments of Service. All reports, boring logs, field data, field notes, laboratory test data, calculations, estimates and other documents prepared by Consultant are copyrighted instruments of service. In the case of a failure to pay the Consultant by the Client, all such instruments of service will be considered the rightful property of the Consultant, not the Client, and returned to the Consultant in accordance with the Failure to Pay paragraph of these provisions. These instruments of service will be retained by Consultant for a period of ten (10) years following completion of the work, during which time they will be made available to Client, upon prior request, for review at reasonable times. Further, the contents of this proposal may not, for any purpose, be copied, or be provided or otherwise communicated, in whole or in part, to any party other than Client or Client's legal counsel.

37. Photographs. Photographs of any completed project embodying the services of Consultant provided hereunder may be made by Consultant and shall be considered as its property and may be used by it for publication, marketing or other promotional purposes.

38. Severability. The provisions of this Agreement shall be deemed severable, and the invalidity or unenforceability of any provision shall not affect the validity and enforceability of the other provision hereof. If any provision of this Agreement is unenforceable for any reason whatsoever, such provision shall be appropriately limited and given effect to the extent that it may be enforceable.

39. Survival. The above terms and conditions regarding limitation of liability and shall survive the completion of the services under this Agreement and the termination of this Contract for any cause.

40. Titles. The titles used in this Agreement are for general reference only and are not part of the Agreement.

41. Merger. This Agreement constitutes the entire Agreement between Consultant and Client, and all negotiations and oral understandings between the parties are merged herein. This Agreement can be supplemented and/or amended only by a written document executed by both Consultant and Client.

Initial by Client: WHR

Initial by Consultant: JAS