STITZEL PAGE & FLETCHER PC

ATTORNEYS AT LAW

Robert E. Fletcher – rfletcher@firmspf.com – (802)660-2555

VIA ELECTRONIC MAIL & FIRST-CLASS MAIL

TO: Richard McGuire, Town Manager
Erik Wells, Assistant to the Town Manager

FROM: Robert E. Fletcher, Esq.

DATE: January 3, 2019

RE: Catamount Forest – Environmental Contamination

You asked us to assess whether the Town's acquisition of the McCullough property posed undue risks. You provided us with the Phase I ESA dated December 6, 2017, the Initial Site Investigation Report (April 25, 2018) and the Fall 2018 Groundwater Monitoring Report (November 27, 2018).

First, the Fall Groundwater Monitoring Report concludes, among other things, that the risk of a casual visitor to the McCullough property coming in contact with the subsurface contaminants is "unlikely." The same report recommends the impacted subsurface materials be better delineated, and the contaminated soil removed. If that work is pursued and responsibly accomplished, given the post-acquisition uses intended for the property, the Town's potential liability for personal injury suffered by an end-user appears manageable.

Furthermore, with specific reference to land ownership environmental liability, Section 6615 of Title 10 makes the owner of property at which a release or threatened release of hazardous materials occurred potentially liable for (i) the costs to abate the release or threatened release as well as (ii) the State's costs to investigate, remove and remediate any risk to public health or the environment from hazardous materials. 10 V.S.A. § 6615(a). BRELLA offers some protection from certain liabilities to property owners if they are not responsible for or own the property at the time of the release of hazardous materials.

Specifically, an applicant for BRELLA enrollment is not subject to enforcement action by the State provided the applicant is "eligible" for enrollment and is acting in good faith toward meeting the BRELLA obligations. 10 V.S.A. § 6646. And, a property owner who obtains a Certificate of Compliance (COC) is relieved of liability for certain post-COC releases or threatened releases (unlikely to be applicable here); for cleanup costs pursuant to more stringent cleanup standards

effective after the COC issuance; and for natural resource damage provided the enrollee did not cause the release which resulted in the natural resource damage. The identified protections are not available where the applicant fails to abide by the "use restrictions" imposed by the Secretary in the COC. Thus, one risk inherent in the BRELLA process is issuance of a COC with use conditions that interfere with the intended or future uses of the property.

If the November 2018 groundwater monitoring report is an accurate assessment, and less than 1/10th of an acre of impacted land is involved, and the remediation recommendation in that report is voluntarily undertaken using appropriate standards and care, there would seem to be a very low risk that the State would move to enforce the waste statutes against the Town or that the Town would be subjected to liability for the existing conditions, making a BRELLA COC somewhat less important. And, since the expected future use of the property does not involve active development of a site or sites or contemplate any sale or transfer of the property for development, the benefit of enrolling in BRELLA may be further diminished. However, the COC will protect the Town from liability arising from natural resource damage that is proximately caused by the existing conditions on the property. While this, too, seems like a remote possibility, if the costs to apply/comply are not great and the COC conditions on future use accommodate the Town's plans, there would appear to be no significant downside to obtaining a COC.

Please let me know if there is additional information that you need in order to move this project forward.