

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

In the Matter of:

Respondent
Developers Diversified Realty, Inc.
3300 Enterprise Parkway
Beachwood, OH 44122

Facility
The Newport School
12101 Tech Road
Silver Spring, MD 20904

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. TSCA-03-2009-0022

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CERTIFICATE OF SERVICE

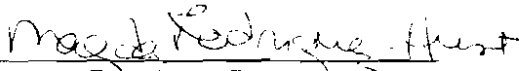
I, the undersigned, hereby certify that, on December 17, 2008, the original and one true and correct copy of this Consent Agreement/Final Order and enclosures (Docket No. TSCA-03-2009-0022) was hand-delivered to and filed with the Regional Hearing Clerk (3RC30), U.S.EPA - Region III, 1650 Arch Street, Philadelphia, PA, 19103-2029. On December 17, 2008, a true and correct copy of the Consent Agreement/Final Order and enclosures (Docket No. TSCA-03-2009-0022) was sent by Certified Mail, Return Receipt Requested, to the addresses listed below.

David E. Weiss, Senior Vice President
DDR Flex Corporation
3300 Enterprise Parkway
Beachwood, OH 44122

Chris Salata, Legal Counsel
Developers Diversified Realty
3300 Enterprise Parkway
Beachwood, OH 44122

Greg Smith, Legal Counsel
Ulmer Berne, LLP
88 East Broad St.
Columbus, OH 43215

Date: 12/17/08


Magda Rodriguez-Hunt
Compliance Officer
U.S. EPA - Region III

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Subject: **Toxic Substances Control Act**
Tech Center 29 Phase II LP
Docket No. TSCA-03-2009-0022
Consent Agreement and Final Order

From: William C. Early, Regional Counsel *WCE for*
Office of Regional Counsel (3RC00)

Abe Ferdas, Director *AF for*
Land and Chemicals Division (3LC00)

To: Renée Sarajian, Regional Judicial Officer
Office of Regional Counsel (3RC00)

The attached Consent Agreement has been negotiated pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22, with specific reference to 40 C.F.R. § 22.13(b) and .18(b)(2), in settlement of alleged violations of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 201 *et seq.*, by Tech Center 29 Phase II LP. A civil penalty of TWO THOUSAND EIGHT HUNDRED THIRTY SEVEN dollars (\$ 2,837.00) has been calculated in accordance with the statutory factors of TSCA Section 207(c) and EPA's "Interim Final Enforcement Response Policy for AHERA", dated January 31, 1989, as supplemented by the "Gravity Based Penalty Matrices for Violations, which occur after January 30, 1997, for AHERA Interim Final ERP" effective January 30, 1997, and EPA's September 21, 2004 "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective Date: October 1, 2004)". TSCA Section 207(a) provides that any civil penalty under AHERA from a local education agency ("LEA") be reduced by the LEA's costs spent complying with AHERA requirements. The LEA in this case demonstrated it spent \$4000 to come into compliance, thereby reducing the cash component of the penalty to ZERO (\$ 0) dollars.

We concur with the terms of the attached Consent Agreement and we recommend that you sign the Final Order, in accordance with the Consolidated Rules at 40 C.F.R. § 22.18(b)(3).

cc: Chris Salata, Legal Counsel
Developers Diversified Realty

Greg Smith, Legal Counsel
Ulmer Berne LLP

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

IN RE:

Respondent

Tech Center 29 Phase II LP
3300 Enterprise Parkway
Beachwood, OH 44122

Facility:

Newport School
12101 Tech Road
Silver Spring, MD 20904

Docket No: TSCA-03-2009-0022

Consent Agreement

CONSENT AGREEMENT

I. Preliminary Statement

This Consent Agreement ("CA"), issued under the authority set forth in sections 16 and 207 of TSCA, 15 U.S.C. §§ 2615 and 2647, is entered into, through delegation, by the Director, Land and Chemicals Management Division, U.S. Environmental Protection Agency - Region III ("EPA" or "Complainant") and Tech Center 29 Phase II Limited Partnership ("Tech Center 29"). This CA includes the assessment of a civil penalty against Tech Center 29 Phase II Limited Partnership, ("Respondent"), because it was, at the time of the violations alleged herein, a local education agency liable for violations which occurred at The Newport School (the "Facility"), pursuant to the Toxic Substances Control Act ("TSCA"), Subchapter II (the Asbestos Hazard Emergency Response Act or "AHERA") 15 U.S.C. §§ 2641 to 2656; and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the

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Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, with specific reference to the provisions set forth at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

This Consent Agreement and the accompanying Final Order (collectively referred to herein as the "CAFO") address violations by Respondent of AHERA and the federal regulations implementing AHERA as set forth at 40 C.F.R. Part 763 Subpart E, and resolve Complainant's civil claims against Respondent arising from the violations of TSCA alleged herein.

II. General Provisions

1. For purpose of this proceeding only, Respondent admits the jurisdictional allegations set forth in this CAFO.
2. Except as provided in paragraph 1. above, Respondent neither admits nor denies the specific factual allegations and conclusions of law set forth in this CAFO.
3. Respondent agrees not to contest EPA's jurisdiction with respect to the execution of this CA, the issuance of the accompanying Final Order, or the enforcement of the CAFO.
4. For the purposes of this proceeding only, Respondent hereby expressly waives its right to a hearing on any issue of law or fact set forth in this CA and any right to appeal the accompanying Final Order.
5. Respondent shall not deduct for civil taxation purposes the civil penalty specified in this CAFO.
6. Section 22.13(b) of the Consolidated Rules of Practice provides that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a

proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order.

7. By signing this CA, Respondent certifies to EPA that, upon investigation and to the best of its knowledge, the Facility is in compliance with the provisions of the Asbestos Hazard Emergency Response Act ("AHERA"), Subchapter II of TSCA, 42 U.S.C. §§ 2641-2656, and regulations promulgated thereunder.
8. Respondent consents to the issuance of this CAFO and agrees to comply with its terms.
9. Respondent shall bear its own costs and attorney's fees.
10. Nothing in this CAFO shall relieve Respondent of its obligation to comply with all applicable federal, state, and local laws and regulations.
11. By signing and executing this CA, Respondent certifies that it has already spent at least FOUR THOUSAND DOLLARS (\$ 4,000.00) since the Maryland Department of Environment's August 14, 2007 inspection for purposes of complying with Subchapter II of TSCA and the regulations promulgated thereunder, in accordance with § 207(a) of TSCA, 15 U.S.C. § 2647(a), and that Respondent has provided Complainant with all supporting cost documentation and information.
12. This CAFO shall apply to and be binding upon the EPA, Respondent, and the officers, directors, successors, and assigns of Respondent.

III. EPA's Findings of Fact and Conclusions of Law

13. Complainant has determined that Respondent has violated requirements of TSCA and the federal regulations implementing AHERA set forth at 40 C.F.R. Part 763, Subpart E. In

accordance with the Consolidated Rules of Practice as set forth at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), Complainant alleges the following findings of fact and conclusions of law.

14. Respondent, Tech Center 29, was the "Local Education Agency" ("LEA") as that term is defined under Section 202(7) of TSCA, 15 U.S.C. § 2642(7) and 40 C.F.R. § 763.83, because at the time of the violations alleged herein it was the owner of a nonpublic, non-profit elementary, or secondary school building, including the Facility, and as such, was responsible for ensuring that the Facility was in compliance with the requirements of AHERA.
15. The Facility, The Newport School, located at 12101 Tech Road, Silver Spring, MD, 20904 was at the time of the violations alleged herein a "school" as that term is defined at Section 202(12) of TSCA, 15 U.S.C. § 2642(12) and 40 C.F.R. § 763.83.
16. At the time of the violations alleged herein, the Facility was a "school building" as that term is defined at Section 202(13) of TSCA, 15 U.S.C. § 2642(13) and 40 C.F.R. § 763.83. The Newport School no longer occupies 12101 Tech Road, Silver Spring, MD 20904, so the facility is not currently a "school building."

COUNT I

17. The allegations contained in Paragraphs 1 through 16 are incorporated herein by reference.
18. 40 C.F.R. § 763.85(a)(2) requires that any building leased or acquired on or after October 12, 1988, that is to be used as a school building shall be inspected as described under

paragraphs (a)(3) and (4) of 40 C.F.R. § 763.85 prior to use as a school building.

19. During an August 14, 2007 inspection of The Newport School, the MDE's duly authorized inspector observed that Tech Center 29 had not completed an initial inspection of The Newport School building.
20. By failing to conduct an initial inspection of the school building, Respondent violated the requirements of 40 C.F.R. § 763.85(a)(2).

COUNT II

21. The allegations contained in Paragraphs 1 through 20 are incorporated herein by reference.
22. 40 C.F.R. § 763.93(a)(3) requires that if a local education agency begins to use a building as a school after October 12, 1988, the local education agency shall submit a management plan for the school to the Agency designated by the Governor prior to its use as a school.
23. During an August 14, 2007 inspection of The Newport School, the MDE's duly authorized inspector observed that Tech Center 29 had not submitted a management plan for the school to the Agency designated by the Governor prior to its use as a school.
24. By failing to submit a management plan, Respondent violated the requirements of 40 C.F.R. § 763.93(a)(3).

Count III

25. The allegations contained in Paragraphs 1 through 24 are incorporated herein by reference.

26. 40 C.F.R. § 763.93(g)(4) requires that the local education agency shall, at least once each school year, notify in writing parent, teacher, and employee organizations of the availability of management plans and shall include in the management plan a description of the steps taken to notify such organizations and a dated copy of the notification.
27. During the August 14, 2007 inspection of The Newport School, the MDE's duly authorized inspector observed that the school had not provided parents, teachers and employee organizations with notification of the availability of management plans.
28. By failing to provide parents, teachers and employee organizations with notification of the availability of the management plans, Respondent violated the requirements of 40 C.F.R. § 763.93(g)(4)

IV. Settlement Recitation

29. Based on the above Findings of Fact and Conclusions of Law, EPA concludes that Respondent is liable for a civil penalty pursuant to Section 207(a) of TSCA, 15 U.S.C. § 2647(a), for Respondent's TSCA violations. In full settlement of the violations alleged in this Consent Agreement, in consideration of each provision of this Consent Agreement and the accompanying Final Order, and pursuant to Sections 207(a) and (c) of TSCA, 15 U.S.C. §§ 2647(a) and (c), and other relevant factors, Complainant and Respondent have determined that a civil penalty of TWO THOUSAND EIGHT HUNDRED THIRTY SEVEN DOLLARS (\$ 2,837.00) is appropriate.
30. The aforesaid assessed penalty is based upon EPA's consideration of a number of factors, including, but not limited to, the statutory factors set forth in Section 207(c) of TSCA, 15

U.S.C. § 2647(c), *i.e.*, the significance of the violation, the culpability of the violator, and the ability of the violator to continue to provide educational services to the community. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's *Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act* ("ERP"), dated January 31, 1989, adjusted for inflation pursuant to 40 C.F.R. Part 19.

31. Respondent certifies that it has spent FOUR THOUSAND DOLLARS (\$ 4000.00) since MDE's August 14, 2007 inspection to comply with Subchapter II of TSCA. Therefore, pursuant to sections 16(a)(2)(C) and 207(a) of TSCA, 15 U.S.C. §§ 2615(a)(2)(C) and 2647(a), EPA agrees to the remittance of TWO THOUSAND EIGHT HUNDRED THIRTY SEVEN DOLLARS (\$ 2,837.00) of the civil penalty assessed against the Respondent.
32. Respondent consents to the assessment of a TWO THOUSAND EIGHT HUNDRED THIRTY SEVEN DOLLAR (\$ 2,837.00) civil penalty with a cash component of ZERO DOLLARS (\$ 0).

V. Reservation of Rights

33. This CAFO resolves only the civil claims for the specific violations alleged in this CAFO. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the

environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under Subchapter II of TSCA, 15 U.S.C. §§ 2641 to 2656, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

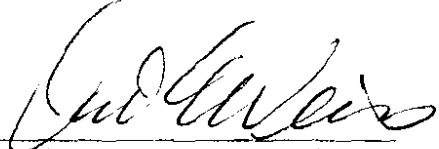
VI. Effective Date

34. The effective date of this CAFO is the date on which the Final Order is filed with the Regional Hearing Clerk pursuant to the Consolidated Rules of Practice.

The undersigned representative of Respondent certifies that he or she is fully authorized by Respondent to execute this Consent Agreement and to legally bind Respondent to this Consent Agreement.

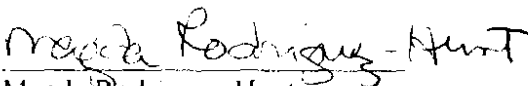
For Respondent:

12/3/08
Date


David E. Weiss, Senior Vice President
DDR Flex Corporation
General Partner of DDR Tech 29 Limited Partnership,
Which is General Partner of Tech Center 29 Phase II LP

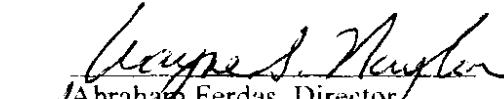
For Complainant:

12/5/08
Date


Magda Rodriguez-Hunt
Enforcement Officer

Accordingly I hereby recommend that the Regional Administrator or his designee issue the Final Order attached hereto.

12/15/08
Date


Abraham Ferdas, Director
Air and Chemicals Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

IN RE:

Respondent

Tech Center 29 Phase II LP
3300 Enterprise Parkway
Beachwood, OH 44122

Docket No. TSCA-03-2009-0022

Final Order

Facility

Newport School
1201 Tech Road
Silver Spring, MD 20904

FINAL ORDER

The undersigned accepts and incorporates into this Final Order by reference all provisions set forth in the foregoing Consent Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT, pursuant to Sections 16 and 207 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2615 and 2647, and 40 C.F.R. § 22.18(b)(3) of the Consolidated Rules of Practice, and having determined, based on the representations of the parties in the attached Consent Agreement, that the civil penalty agreed to therein was based upon a consideration of the factors set forth in Section 207(c) of TSCA, 15 U.S.C. § 2647(c), Respondent is assessed a civil penalty of TWO THOUSAND EIGHT HUNDRED THIRTY SEVEN DOLLARS (\$ 2,837.00), but that the cash component of that civil penalty will be ZERO DOLLARS (\$0).

In accordance with Section 207(a) of TSCA, 15 U.S.C. § 2647(a), the TWO THOUSAND EIGHT HUNDRED THIRTY SEVEN DOLLAR (\$ 2,837.00) civil penalty assessed against the Respondent is hereby remitted. The civil claims for the specific violations alleged in the Consent Agreement are hereby resolved. The effective date of this Final Order is the date that it is filed with the Regional Hearing Clerk.

12/17/08
Date

Renee Sarajian

Renee Sarajian
Regional Judicial Officer
U.S. Environmental Protection Agency, Region III

