

Ricardo Woods
rwoods@burr.com
Direct Dial: (251) 345-8257
Direct Fax: (251) 706-2413

Burr & Forman LLP
420 North 20th Street
Suite 3400
Birmingham, AL 35203

Office
Fax (205) 458-5100

BURR.COM

May 3, 2022

VIA EMAIL AND CERTIFIED MAIL

Cammie Ashmore
ADEM, Stormwater Management Branch
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400

Re: Inspection of Leased Structural Controls under the City of Mobile's MS4 Permit No. ALS000007 and the February 2022 Storm Water Management Program Plan ("SWMP Plan")

Dear Ms. Ashmore:

I have been asked by the City of Mobile (the "City") to provide a legal opinion as to whether the City can be required to conduct inspections of Leased Structural Controls ("LSCs"). My findings, as the City's attorney, are summarized below.

During the course of ADEM's 2022 audit, ADEM informed the City that, in addition to the City's current inspection obligations under the City's MS4 Permit and SWMP Plan, ADEM expects the City to conduct inspections of LSCs. These LSCs were identified in the City's SWMP Plan (see table enclosed) as being distinct from other structural controls because the LSCs, though located on two properties owned by the City, are subject to long-term leases. Five of these LSCs are subject to the City's long-term lease with the Japanese Garden Foundation, Inc. ("Garden Lease") and the remaining eleven LSCs are subject to the City's long-term lease with Sunbelt Golf Corporation of Mobile ("Golf Lease") (the Garden Lease and Golf Lease collectively referred to as "Leases").

The City cannot be required by ADEM to conduct inspections of the LSCs for the following reasons:

Inspections of the LSCs are outside the scope of the City's obligations under the current MS4 Permit. Part II.B.1.a of the MS4 Permit explicitly limits the City's inspection obligations to those structural controls which are owned and maintained by the City. While the City owns the properties upon which the LSCs are located, the City is not in possession or control of the properties, as the properties are under long-term Leases with third parties. Additionally, the LSCs are not maintained by the City, as stated in the Leases and the SWMP Plan, and therefore do

not fall within the City's inspection obligations under the MS4 Permit. Part II.B.1.a of the MS4 Permit states as follows:

1. **Storm Water Collection System Operations**
 - a. **Structural Controls**
 - i. **For Permittee owned/maintained structural controls**, the structural control shall be operated in a manner to reduce the discharge of pollutants, to the MEP.
 - ii. **For Permittee owned/maintained structural controls**, the Permittee shall include in the SWMPP and implement the following:
 - 1) A map of the structural controls and should be updated as needed;
 - 2) **Inspection** of existing and newly constructed structural controls on a semi-annual basis, at a minimum;

The Garden Lease establishes that the lessee is solely responsible for all maintenance on the property and for any costs associated with the property.

9.2 ~~This Lease is a Net Lease.~~ The Foundation recognizes that this lease is a net lease, and **all** taxes, insurance, utilities, **maintenance** and repair costs, and other costs related to the property or any other improvements, assessments and any other obligation incurred with respect thereto shall be the **sole responsibility and obligation of Foundation.**

12.1 Foundation will be solely responsible for the procurement, **maintenance**, and **compliance with all permits**, licenses and other authorizations required for the use of the property and for the lawful operation thereof. Foundation assumes all responsibility of compliance with the requirements of the Flood Ordinance, as amended, of the City of Mobile and of securing any permits, whether city, state or federal, to construct and maintain structures and other improvements comprising the authentic Japanese Garden Complex.

The Golf Lease likewise makes the lessee, not the City, solely responsible for all maintenance and costs associated with the property.

Section 4.4. Lessee's Duty to Keep Project Premises in Good Repair. Lessee covenants and agrees with the Lessor that throughout the term of this Lease, Lessee, at its sole cost and expense, will take good care of the demised premises and the improvements thereon and the sidewalks, curbs and vaults adjoining the demised premises, if and when the obligation to maintain them is imposed by governmental authority and will keep the same in good order and condition, and make all necessary repairs thereto, interior and exterior, structural, non-structural, ordinary and extraordinary, and unforeseen and foreseen. Lessor shall not be required to furnish any services or facilities or to make any repairs or alterations in or to the demised premises and the improvements thereon, and Lessee hereby assumes the **full and sole responsibility** for the condition, operation, repair, replacement, maintenance and management of the demised premises, and the improvements thereon.

The SWMP Plan, which was developed pursuant to the MS4 Permit and approved by ADEM, confirms that LSCs are structural controls operated and maintained by the lessee.

1. Structural Control – The storm water management facility is a structural control as defined by the NPDES Permit;
2. Leased Structural Control – The storm water management facility is a structural control as defined by the NPDES Permit and located on property leased from the City. The City has a lease agreement that requires the lessee to operate and maintain the storm water management facility; or,

Section 3.3.1.5 of the SWMP Plan specifically lists the Garden Lease and Golf Lease as two leases entered into by the City that designate the lessees as solely responsible for maintaining the properties subject to said leases. Because the City does not maintain the LCSs, or have any obligation to do so, the LSCs do not fall within the scope of the inspection requirement provided in Part II.B.1.a of the MS4 Permit.

Additionally, because the Leases are long-term leases under which the third party lessees are solely responsible for operating and maintaining all aspects of the properties, the City has no control over the LSCs located thereon and will not have any control over the LSCs during the current MS4 Permit term and for subsequent permit terms until the Leases expire. Part I.A. of the MS4 Permit defines the area to which its permit requirements apply as the area within the city limits “that are regulated by the [City].” The fact the LSCs are operated, controlled, and regulated by the third party lessees – not the City – precludes the LSCs from being subject to any of the MS4 Permit’s requirements.

For these reasons, the City does not intend to expand its obligations under the City's MS4 Permit and will not conduct any inspections of the LSCs. Upon the City’s receipt of ADEM's

Cammie Ashmore

May 3, 2022

Page 4

Audit Report, the City will update its SWMP Plan to clarify that LSCs are excluded from the City's MS4 Permit Area.

Sincerely,

A handwritten signature in black ink, appearing to read "Ricardo Woods", with a stylized, cursive script.

Ricardo Woods

RAW/sje