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November 13, 2012

Hon. Eric K. Shinseki  
Secretary of Veterans Affairs  
United States Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

Re: Request for Reconsideration

Please be advised that our firm represents Citizens for Smart Growth, Inc. a/k/a Grow Smart Louisville ("Grow Smart"). Grow Smart is a non-profit organization formed for the purpose of working to promote smart growth in Louisville/Jefferson County, Kentucky. Grow Smart works to educate citizens on the different phases of development; to advocate transparency throughout the planning and design process; and to facilitate communication between developers and citizens to create the most positive outcome for all parties involved.

The Department of Veterans Affairs ("VA") prepared and finalized its June 8, 2012 Programmatic Environmental Assessment ("PEA") for its proposed action for site selection, construction, and operation of a replacement Louisville VA medical center ("VAMC"). Soon thereafter, the VA selected and acquired the approximately 36-acre Brownsboro Road Site, located southeast of the highly trafficked and congested intersection of the Watterson Expressway (I-264) and Brownsboro Road in Louisville, KY ("Brownsboro Road Site").

The VA is required to follow the provisions set forth in the National Environmental Protection Act ("NEPA") for the selection, construction, and operation of the VAMC site. NEPA was enacted to address major federal actions as they may impact environmental and community considerations, and to encourage productive and enjoyable harmony between people and their environment. The VAMC is a major federal action subject to NEPA regulation. The VA prepared an Environmental Assessment ("EA"). In its EA, the VA decided to compile a tiered NEPA analysis consisting of a Programmatic EA (PEA) for, in part, site selection with verbiage indicating that it may later perform a Site Specific EA (SEA) to evaluate and analyze the potential effects of construction and operation of the VAMC. The PEA set forth the VA's Finding of No Significant Impact (FONSI) thereby asserting that an Environmental Impact Statement ("EIS") is not required.

The VA's failure to prepare an EIS and its FONSI determination are unreasonable, arbitrary and capricious, an abuse of its discretion, not in accordance with the law, and in clear error of judgment for the VA failed to develop an evidentiary adequate record for its conclusion that no EIS was required. Furthermore, the (1) VA failed to abide by its own regulations; (2) the VA improperly utilizes segmentation and tiering failing to consider connected actions and items in the same document, and the PEA's cumulative or indirect impact analysis is legally inadequate; (3) the VA's approach and use of tiering was unlawful, unreasonable, arbitrary, and capricious, abuse of its discretion, and a clear error of judgment; and (4) VA's reliance on future mitigation measures to avoid preparing an EIS was unlawful, unreasonable, arbitrary, and capricious, abuse of its discretion, and a clear error of judgment.

**I. VA'S FAILURE TO FOLLOW ITS OWN REGULATIONS**

**A. VA VIOLATED ITS 10 ACRE RULE**

The VA selected the Brownsboro Road Site that consists of approximately 36 acres. One of the VA's own regulations sets forth, in part, that

"...An environmental impact statement shall be prepared in accordance with the following procedures: (1) Typical Classes of Action Which Normally Do Require Environmental Impact Statements: ... (ii) Acquisition of land in excess of 10 acres for development of a VA medical center facility; ..." (emphasis added) 38 CFR 26.6.

The VA purchased the approximately 36 acre Brownsboro Road Site. It is evident that an EIS is mandated since the VA's acquisition of real property was over 10 acres.

**B. VA VIOLATED ITS DEGRDATION OF FARMLAND RULE**

"...An environmental impact statement shall be prepared in accordance with the following procedures: ... (2) Specific Criteria for Typical Classes of Action Which Normally Do Require Environmental Impact Statements: (i) Probable significant degradation of ... prime farmlands ..." (emphasis added) 38 CFR 26.6.

The Brownsboro Road Site is identified as "prime farmland" by the VA in its PEA. An EIS is mandated because the VAMC will cover most, if not all, of the Brownsboro Road Site destroying any capacity to farm the land.

**C. VA VIOLATED ITS 20% INCREASE TRAFFIC RULE**

"...An environmental impact statement shall be prepared in accordance with the following procedures: ... (2) Specific Criteria for Typical Classes of Action

Which Normally Do Require Environmental Impact Statements: ... (ii) An increase in average daily vehicle traffic volume of at least 20 percent on access roads to the site or the major roadway network; ...” (emphasis added) 38 CFR 26.6.

The Brownsboro Road Site is located in a highly congested and trafficked area. There are significant delays at & near the Brownsboro Road Site. The addition of the VAMC will exacerbate the already burdensome situation. Grow Smart believes that a prior traffic study that was relied upon by the VA is flawed and that the average daily vehicle traffic volume will increase by at least 20%. Grow Smart is in the process of retaining a traffic consultant who will review this matter.

**D. VA VIOLATED ITS RULE ON PROBABLE CONFLICT WITH OR SIGNIFICANT EFFECT ON ZONING OR COMPREHENSIVE LAND USE PLANS**

“...An environmental impact statement shall be prepared in accordance with the following procedures: ... (2) Specific Criteria for Typical Classes of Action Which Normally Do Require Environmental Impact Statements: ... (vi) Probable conflict with, or significant effect on, local or regional zoning or comprehensive land use plans” (emphasis added) 38 CFR 26.6.

The Brownsboro Road Site is designated as a Planned Development District (“PD”) under the Land Development Code for all of Louisville-Jefferson County Kentucky (“LDC”). Under the LDC, a PD is designed to, in part, promote diversity and integration of uses and structures in a planned development through flexible design standards that: Create new development that is livable, diverse, and sustainable; Respect and reinforce existing communities, integrating new development with existing development to ensure compatibility; Promote development patterns and land uses which reduce transportation needs and which conserve energy and natural resources; Lower development and building costs by permitting smaller networks of utilities and streets and the use of shared facilities; Protect and enhance natural resources; Promote the development of land that is consistent with the applicable form district; Encourage a variety of compatible architectural styles, building forms, and building relationships within a planned development; and Preserve the historic development patterns of existing neighborhoods.

The PD District Code also implements the various provisions of Cornerstone 2020, a comprehensive land use plan for Louisville- Jefferson County, Kentucky, which addresses matters for a more livable, attractive, mobile, and efficient and environmentally sensitive community.

The Brownsboro Road Site was rezoned to PD for mixed-use which included residential living (high end patio homes) that would be located adjacent to existing neighborhood homes.

Furthermore, it incorporated green space, trees, and walking paths. It also would have included high-end restaurants providing a community feel.

The location of the VAMC at the Brownsboro Road Site is in direct contradiction of the language and tenets of the applicable zoning and comprehensive land use plans. Consequently, the VA's own regulation mandates that an EIS be prepared.

**II. THE PEA IMPROPERLY UTILIZES SEGMENTATION AND TIERING,  
AND THE PEA'S CUMULATIVE OR INDIRECT IMPACT ANALYSIS IS  
INADEQUATE**

The VA violated NEPA by improperly segmenting and tiering the project into separate phases considering the phases independent of each other. The PEA issued by the VA regarding site selection fails to consider all connected actions of the project. The VA fails to specifically consider later stages of the project such as design, construction, and operation of the VAMC as stated in the PEA. Regulations require that the connected actions should be analyzed in the same document. The earlier stages of site selection have no independent utility apart from the later stages, and the later stages cannot proceed unless and until the earlier stages are complete.

The VA decided to compile a tiered NEPA analysis consisting of a PEA for site selection later to perform a SEA to evaluate and analyze the potential effects of construction and operation of the VA medical center. The VA has not prepared an EIS, the predicate for an agency to engage in tiering under the regulations; therefore, the VA's use of tiering is unlawful. The separation of the PEA and the anticipated SEA, and the issuance of a separate EA for each tier at different time, essentially divides the project in segments in contravention of regulations requiring the frontloading of all general project information in the PEA and then following up with more specific information on elements of the project in the SEA. The PEA is not sufficient and that the VA is circumventing the need for an EIS.

The tiered analysis, at this stage, allows the VA to make an irretrievable commitment of resources and may cause surface disturbances and other actions at or near the Brownsboro Road Site; thereby, foreclosing the use of alternative locations before taking a "hard look" at the impact of the Brownsboro Road Site for the VAMC. The VA cannot select the Brownsboro Road Site in the PEA, go forward with the project, and then analyze and presumably approve the site specific consequences of the site in the SEA. The issuance of a SEA cannot cure the deficiencies in the PEA.

For instance, the impact of increased traffic should be properly analyzed prior to making site selection and undertaking further action. What if it is later determined that the traffic situation can not be adequately overcome? VA should not move forward, using our tax dollars, without fully understanding the ramifications of the VAMC at the Brownsboro Road Site. Also, by its own admission in the PEA, the VA has not specifically assessed the effects of the future proposed construction and operation of the VAMC.

According to regulation, a record of decision is required to be issued. A record of decision according to regulation has not been issued for the Brownsboro Road Site. “Until an agency issues a record of decision..., no action concerning the proposal shall be taken which would limit the choice of reasonable alternatives. Also, “... agencies shall prepare environmental impact statements in the following manner... Agencies shall not commit resources prejudicing selection of alternatives before making a final decision...” (emphasis added) 40 CFR 1506.1(a)(2) and 40 CFR 1502.2(f).

Therefore, all stages must be collectively considered in a single EA. Segmentation and tiering of the environmental analysis for the different stages deprives the public of important and relevant information about the effects of the project before decisions are made and actions taken. The PEA violates NEPA by failing to consider cumulative and indirect impacts. The PEA must consider the impacts on construction, design, and operation of the VA medical facility.

An EIS effectuates the overreaching look-before-leaping purpose of NEPA, the consideration of the whole-direct, indirect, and cumulative-up front. An EIS provides this guarantee.

### **III. VA’S RELIANCE ON FUTURE MITIGATION MEASURES TO AVOID PREPARING AN EIS IS UNREASONABLE, ERROR OF JUDGMENT, AND ARBITRARY AND CAPRICIOUS**

The VA stated in its PEA that the “[Brownsboro Road Site] could result in significant impacts to transportation (traffic). ... To mitigate the traffic impact of the proposed VAMC, VA would consult and work with pertinent Federal, State, and local regulatory agencies...”

The VA’s reliance upon mitigation measures which may reduce this project’s impact below the level of significance under NEPA, thus eliminating the need for an EIS is unreasonable, clear error in judgment, and arbitrary and capricious. There are court decisions which hold that the mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency’s decision not to prepare an EIS.

Furthermore, the PEA defines “Significance Criteria” for transportation and parking if it “could have a significant effect on infrastructure if it would increase demand over capacity, requiring a substantial system expansion or upgrade, or if it would result in substantial system deterioration over the current condition. For instance, [a site] could have a significant effect on traffic if it would increase the volume of traffic beyond the existing road capacity, cause parking availability to fall below minimum local standards, or require new or substantially improved roadways or traffic control systems”.

The PEA addresses a traffic study which states “that traffic in the Brownsboro Site area currently operates below acceptable LOS [level of service]... [A]dditional traffic associated with the proposed VAMC would further increase these delays and could have a significant adverse effect on traffic”.

The VA improperly relied upon mitigation measures to conclude that traffic concerns will not rise to a significant level. VA provides no factual support in the PEA for the conclusion that mitigation measures will reduce the impacts of the project to a less than significant level. The VA has failed to provide support to show that mitigation measures will be effective, and that mitigation measures are not supported by the record.

#### **IV. EXPANSION CAPABILITY**

The VAMC should have expansion capability. The attendees at the August 15, 2012 public meeting held on behalf of the VA at the Clifton Center in Louisville, KY were informed that the footprint of the VAMC (hospital, parking, and supporting physical plant facilities) will most likely cover the entire Brownsboro Road Site. Locating the VAMC at the Brownsboro Road Site is like squeezing an elephant in a rabbit hole. There is nowhere to expand. The Brownsboro Road Site is sandwiched between an expressway, a highway, and single home residential developments. It appears that the VAMC's ability to expand at the Brownsboro Road Site is severely limited, if not totally prevented.

#### **V. MOVE TO A DOWNTOWN LOUISVILLE LOCATION**

There is still time to choose an alternate location for the VMAC.

Grow Smart believes that the Downtown alternative location is better for the VA, its patients, and the greater metropolitan area. There are 12 medical facilities within a one (1) mile of the Downtown location which would allow the VAMC to benefit from the synergies of one of the most progressive medical areas in the United States and provide superior care for our Veterans. The Downtown Site is accessible to Louisville residents and those who live in the surrounding counties. It has entries from all directions (10 exit ramps) from interstates I-65, I-71 and I-64 and multiple secondary roads. There are several thousand public surface and structural parking spaces, and there are approximately 4,000 hotel rooms within one (1) mile of the Downtown location.

Whereas, the Brownsboro Road Site presently has 2 small general practice clinics (one in a grocery store and the other staffed by one physician at a time). There are only 2 interstate exit ramps from I-264 and 2 secondary roads. The current plan calls for 2,400 parking spaces. There are no hotels within one (1) mile.

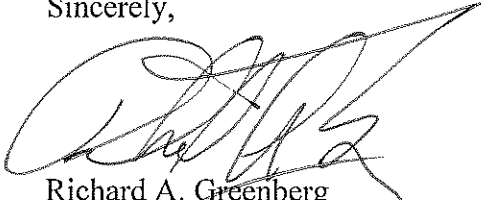
The United States Government Accountability Office ("GAO") has addressed in various reports that Congress and the Administration have encouraged the VA to look for more opportunities for joint ventures as a means of avoiding costs by maximizing available resources to build a new facility or jointly use a facility. In addition, a blue ribbon panel recommends that the VA exploit opportunities to share care resources, improve access to care, lower or avoid costs, improve training opportunities, and expand the effectiveness of research programs by partnering or

affiliating with entities such as universities and other academic programs. Locating the VAMC to Downtown Louisville would facilitate the stated objectives by being in close proximity to our major medical providers and researchers. The VAMC would thrive and be vibrant in downtown Louisville, KY, benefiting both the Veterans and the community as a whole.

### CONCLUSION

The PEA is unlawful. It fails to consider connected actions and items in the same document. It does not properly evaluate the effect of reasonably foreseeable impacts in deciding whether the VAMC will have significant impact on the human environment. It unlawfully uses tiering to artificially segment the project. The VA's conclusions that mitigation measures would reduce the Impact of the project to an insignificant level is arbitrary and capricious, unreasonable, clear error of judgment, and not supported by the record. For the foregoing reasons, Grow Smart hereby respectfully requests that the VA vacate the PEA and the FONSI and prepare an EIS. Grow Smart also requests that the VA reconsider its site selection and locate the VAMC at the alternate site in Downtown Louisville, KY. Grow Smart hereby reserves and does not waive any rights or claims, including, without limitation, the right to amend this request for reconsideration.

Sincerely,



Richard A. Greenberg  
Counsel for Grow Smart Louisville

cc: Mr. Jeff Leikin, VA Project Manager, 425 I Street NW, Washington, DC 20001