

VILLAGE OF LOMBARD  
REQUEST FOR BOARD OF TRUSTEES ACTION  
For Inclusion on Board Agenda

  X   Resolution or Ordinance (Blue) \_\_\_\_\_ *Waiver of First Requested*  
\_\_\_\_\_ Recommendations of Boards, Commissions & Committees (Green)  
\_\_\_\_\_ Other Business (Pink)

TO: PRESIDENT AND BOARD OF TRUSTEES  
FROM: Scott Niehaus, Village Manager  
DATE: April 8, 2015 (BoT) DATE: April 16, 2015  
TITLE: Limited Environmental Indemnity Agreement – 435 W. Roosevelt Rd  
SUBMITTED BY: David P. Gorman, Asst. Director of Public Works *DPG*

BACKGROUND/POLICY IMPLICATIONS:

The Department of Public Works transmits for your consideration a resolution authorizing the signatures of the Village President and Village Clerk on a Limited Environmental Indemnity Agreement for the property located at 435 W. Roosevelt Road.

FISCAL IMPACT/FUNDING SOURCE

Review (as necessary):

Village Attorney X \_\_\_\_\_ Date \_\_\_\_\_  
Finance Director X \_\_\_\_\_ Date \_\_\_\_\_  
Village Manager X \_\_\_\_\_ Date \_\_\_\_\_

NOTE: Materials must be submitted to / approved by the Village Manager's Office by 12:00 pm, Wednesday, prior to the Agenda Distribution.

**RESOLUTION**

**R\_\_\_\_\_**

**A RESOLUTION AUTHORIZING SIGNATURE OF  
PRESIDENT AND CLERK ON AN AGREEMENT**

**WHEREAS**, the Corporate Authorities of the Village of Lombard have received a Limited Environmental Indemnity Agreement between the Village of Lombard and Buchanan Energy(S) LLC, as attached hereto and marked Exhibit "A"; and

**WHEREAS**, the Corporate Authorities deem it to be in the best interest of the Village of Lombard to approve such agreement;

NOW, THEREFORE, BE IT RESOLVED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF LOMBARD, DU PAGE COUNTY, ILLINOIS as follows:

**SECTION 1:** That the Village President be and hereby is authorized to sign on behalf of the Village of Lombard said agreement as attached hereto.

**SECTION 2:** That the Village Clerk be and hereby is authorized to attest said agreement as attached hereto.

Adopted this 16th day of April, 2015.

Ayes: \_\_\_\_\_

Nays: \_\_\_\_\_

Absent: \_\_\_\_\_

Approved this 16th day of April, 2015.

\_\_\_\_\_  
**Kieth Giagnorio**  
**Village President**

ATTEST:

\_\_\_\_\_  
**Sharon Kuderna**  
**Village Clerk**

APPROVAL AS TO FORM:

\_\_\_\_\_  
**Thomas P. Bayer**  
**Village Attorney**

## LIMITED ENVIRONMENTAL INDEMNITY AGREEMENT

This LIMITED ENVIRONMENTAL INDEMNITY AGREEMENT is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2015, by **BUCHANAN ENERGY(S) LLC** ("Indemnitor") and the **VILLAGE OF LOMBARD, DuPage County, Illinois** (the "Village"). Indemnitor and Village, together, shall sometimes hereinafter be referred to as the Parties.

### RECITALS

A. **WHEREAS**, Indemnitor is a tenant under a ground lease of certain real property located at 435 W. Roosevelt Road, Lombard, Illinois ("Indemnitor's Property") and legally described in **EXHIBIT A**; and

B. **WHEREAS**, an underground storage tank system, as defined in 40 CFR Part 280 or supplanting federal regulations, owned by Indemnitor or its predecessor in interest ("UST System"), was present on Indemnitor's Property; and

C. **WHEREAS**, a release to the environment of petroleum hydrocarbons, including gasoline and gasoline additives, has occurred in the past at the Indemnitor's Property. (All of the previously mentioned compounds which shall include Benzene, Ethylbenzene, Toluene, Xylene and Methyl Tertiary Butyl Ether (MTBE) and those identified in TACO/RBCA modeling calculations for the soil and groundwater contamination identified at Indemnitor's Property are hereby collectively referred to as "Compounds of Concern"). As a result of said release, the groundwater at the Indemnitor's Property contains detectable concentrations of Compounds of Concern. The soil and groundwater impacted by Compounds of Concern extends or may extend beyond the Indemnitor's Property. The Illinois Emergency Management Agency ("IEMA") has assigned Incident Number 20091237 to the release at the Indemnitor's Property (the "Release"); and

D. **WHEREAS**, Indemnitor desires to limit any potential threat to human health from groundwater impacted with the Compounds of Concern and has requested that the Village enact a Limited Area Groundwater Ordinance ("LGWO") which would prevent the use of water wells as a potable water supply in an area adjacent to and including the Indemnitor's Property. Indemnitor would then use the LGWO as an institutional control for the purpose of assisting Indemnitor in seeking a no further remediation ("NFR") determination from the Illinois Environmental Protection Agency ("IEPA") for the Release. The proposed LGWO is attached hereto as **EXHIBIT B**. The area subject to this Agreement shall be the area in, under and adjacent to Indemnitor's Property which is within the jurisdiction of the Village as described and set forth in the LGWO ("LGWO Area"); and,

**NOW, THEREFORE**, in consideration of the terms and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. This Limited Environmental Indemnity Agreement ("Agreement") is not binding upon the Parties until it is executed by the undersigned representative of the Village of Lombard and, prior to execution, this Agreement constitutes an offer by Indemnitor. The duly authorized

representative of Indemnitor has signed this Agreement, and upon execution by the duly authorized representatives of the Village of Lombard, this Agreement is binding upon Indemnitor, its successors and assigns.

2. The Village agrees that it will adopt the LGWO provided, however, that if the Village does not adopt the LGWO or rescinds the LGWO, this Agreement shall be deemed null and void, and Indemnitor shall have no other obligation pursuant to this Agreement to or remedy against the Village. Nothing contained in this Agreement shall be construed as an admission of liability by Indemnitor for any environmental condition at or adjacent to Indemnitor's Property but, if approved by the Village, Indemnitor will undertake the activities set forth herein irrespective of this non-admission. No breach by the Village, its agents, trustees, employees and its successors in interest of a provision of this Agreement is actionable in law or equity by Indemnitor against the Village, and Indemnitor hereby releases the Village and Village Affiliates (as defined below) from any cause of action it may have against them arising under this Agreement or Environmental Laws (as defined below), regulations or common law.

Specifically, Indemnitor knowingly waives and releases the Village and/or Village Affiliates from any and all claims, debts, dues and obligations of every kind and nature under the Illinois and United States Constitutions as well as under any federal or state statutes or laws, including but not limited to environmental laws related to the subject matter of this Agreement. Indemnitor further waives all remedies (including those which may be available under the Civil Rights Act) which are available to it for the violations of any of the terms of this Agreement, including but not limited to the equitable remedy of specific performance, and agrees not to seek injunctive relief of any sort. Indemnitor covenants not to sue the Village and/or Village Affiliates for a violation of any provision or terms of this Agreement.

3. Indemnitor on behalf of itself, its successors and assigns shall covenant and agree, at its sole cost and expense, to indemnify, defend and hold the Village and the Village's former, current and future officials, trustees, officers, servants, employees, agents, successors and assigns (collectively "Village Affiliates"), both in their capacities as Village representatives and as individuals, harmless from and against any loss, actions, responsibilities, obligations, liability, damage, expenses, claims (whether direct or indirect, existing or inchoate, known or unknown, having arisen or to arise in the future), penalties, fines, injunctions, suits (including but not limited to suits alleging or related to personal injury and/or death), proceedings, disbursements or expenses (including, reasonable attorneys' and experts' fees and disbursements and court costs) (collectively, the "Liabilities"), arising under or relating to any Environmental Laws (as defined below), or any other Liabilities which may be incurred by or asserted against any of the Village Affiliates resulting or arising from, alleged to arise from, or caused by, in whole or in part, from the presence of Hazardous Material (as defined below) on, in or from the Indemnitor's Property (including the groundwater thereunder) and/or any condition of any property (including groundwater) or surface water alleged to have been caused by the migration, transportation, release or threatened release of Hazardous Materials on or from the Indemnitor's Property.

Indemnitor shall assume the expense of defending of all suits, administrative proceedings and disputes of any description with all persons, entities, political subdivisions or government agencies arising out of the matters to be indemnified under this Agreement. In the event that the Village or any of the Village Affiliates is/are named as a defendant(s) in any lawsuit arising out

of the matters to be indemnified under this Agreement, the Village and/or any of the Village Affiliates shall have the right to choose the attorney(s) who represent(s) them in said lawsuit, and the reasonable costs, expenses and fees associated with said attorney(s) in relation to said lawsuit shall be paid by Indemnitor pursuant to the indemnification provisions herein. Indemnitor shall pay, promptly upon entry, any nonappealable order, judgment or other final resolution of any claim or dispute arising out of the matters to be indemnified under this Agreement and shall pay promptly when due any fines, penalties or agreed settlements arising out of the matters to be indemnified under this Agreement. In the event that such payment is not made, the Village or any Village Affiliate, at their sole discretion, may proceed to file suit against the Indemnitor to compel such payment. Indemnitor also agrees that it will not settle or compromise any action, suit or proceeding without both Parties' prior written consent, which consent shall not be unreasonably withheld.

For purposes of this Agreement, "Hazardous Materials" means and includes Compounds of Concern, chemicals known or suspected to cause cancer or reproductive toxicity, pollutants, effluents, contaminants, emissions or related materials, and any items defined as hazardous, special or toxic materials, substances or waste under any Environmental Law, or any material which shall be removed from property located within the Village of Lombard pursuant to any administrative order or enforcement proceeding or in order to place said property in a condition that is suitable for ordinary use. Hazardous Materials shall include each and every element, compound, chemical mixture, contaminant, pollutant, material waste or other substance which is defined, determined or identified as hazardous or toxic under Environmental Law or the release of which is regulated under Environmental Laws. "Environmental Laws" collectively means and includes any present and future local, state, federal or international law, statute, ordinance, order, decree, rule, regulation or treaty relating to public health, safety or the environment (including those laws relating to releases, discharges, emissions or disposals to air, water, land or groundwater, to the withdrawal or use of groundwater, to the use, handling, storage, disposal, treatment, transportation or management of Hazardous Materials) including, without limitation, the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. §6901, et seq., the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. §1801, et seq., the Clean Water Act, 33 U.S.C. §1251, et seq., the Clean Air Act, as amended, 42 U.S.C. §7401, et seq., the Toxic Substances Control Act, 15 U.S.C. §2601, et seq., the Safe Drinking Water Act, 42 U.S.C. §300f, et seq., the Occupational Safety and Health Act, 29 U.S.C. §655, et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136, et seq., the National Environmental Policy Act, 42 U.S.C. §4321, et seq., the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §11001, et seq, and the Illinois Environmental Protection Act and the amendments, regulations, orders, decrees, permits, licenses or deed restrictions now or hereafter promulgated thereunder.

In addition to the indemnity provided above, if the Village or Village Affiliates encounter Hazardous Materials while working in, on or under the LGWO Area or encounter Hazardous Materials migrating from Indemnitor's Property, the Village has the right to remove contaminated soil or groundwater from the area it is working and intends to do work and to dispose of them as it deems appropriate not inconsistent with applicable Environmental Laws so as to avoid causing a further release of the Hazardous Materials and to protect human health and

the environment and to remove and dispose of any contaminated soil and/or groundwater necessary for the Village's work. If Hazardous Materials are found anywhere within the boundaries of the proposed LGWO, there is a presumption that the Hazardous Materials migrated from and are attributable to the Indemnitor's Property.

Prior to taking any such action, the Village will endeavor to give Indemnitor reasonable notice, unless there is an emergency situation (for example, including but not limited to a sewer or water main break), that it intends to perform work in the LGWO Area that may involve site investigation, removing and disposing of contaminated soil or groundwater to the extent necessary for its work. The Village and Indemnitor may engage in a good-faith, collaborative process to arrive at a consensus approach to managing the contaminant-impacted soil or groundwater in the LGWO Area in an attempt to reconcile Indemnitor's preference for performing as much of this work as possible. Any work performed by Indemnitor shall comply with all federal, state and local laws and regulations. The final decision for the management and/or undertaking of the work will be in the discretion of the Village. Failure to give notice is not a violation of this Agreement.

The removal or disposal shall be based upon the site investigation (which may be modified by field conditions during excavation), which Indemnitor may review or may perform, if requested to do so by the Village. If practicable, as determined by the Village, Indemnitor may be allowed to remove and dispose of the contaminated soil and/or groundwater necessary for the Village's work in advance of that work. In any event, Indemnitor shall reimburse the reasonable costs incurred by the Village to perform the site investigation and to dispose of any contaminated soil or groundwater. The parties understand and agree that the Village's soil and groundwater removal will be in conjunction and/or associated with other work being done by the Village in, on, under or near the Indemnitor's Property, and part of the purpose of this paragraph is that if the Village encounters contaminated soil and/or groundwater while working on its utilities, or on a municipal project or otherwise, it will not be responsible in any way for the cost associated with encountering, removing and/or disposing of the contaminated soil and/or groundwater. In addition, it is specifically understood and agreed between the parties that the Village will not be identified at any time, in any place, document or manifest as the owner, generator or transporter of contaminated soil or groundwater taken from Indemnitor's Property. If asked, Indemnitor will cooperate with the Village in the removal and disposal of such soil and groundwater and will sign all necessary documents and manifests for the proper transportation and disposal of the soil and/or groundwater.

4. If requested by the Village, Indemnitor shall immediately deliver to the Village any and all records, documents (including writings, drawings, graphs, charts, photographs, photo records, and other data compilations from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form), or reports of any kind (including all written, printed, recorded or graphic matter however produced or reproduced and all copies, drafts and versions thereof not identical in each respect to the original) which relate or refer (which means, in addition to their customary and usual meaning, assess or assessing, concern or concerning, constitute or constituting, describe or describing, discuss or discussing, embody or embodying, evidence or evidencing, mention or mentioning and reflect or reflecting) environmental matters and/or conditions associated directly or indirectly with the Indemnitor's Property (including the groundwater thereunder), including but not limited to written reports or a

site assessment, environmental audits, soil test reports, water test reports, laboratory analysis and documents, reports or writings relating or referring to the Indemnitor's Property provided, however, that nothing in this paragraph shall require the Indemnitor to deliver to the Village those communications and documents that are encompassed by the attorney-client privilege and/or the attorney work product doctrine.

5. Any notice required or permitted to be given to either party shall be deemed to be received by such party (i) three (3) days after deposit in the United States Registered or Certified Mail, Return Receipt Requested, or (ii) one (1) business day after deposit with a nationally recognized overnight delivery service guaranteeing next business day delivery, or (iii) upon personal delivery to the party to whom addressed provided that a receipt of such delivery is obtained, or (iv) on the same business day as transmitted and confirmed by telecopy provided that a confirmation copy is concurrently deposited in United States Certified or Registered Mail, Return Receipt Requested. Such notices shall be addressed to the parties at the following addresses:

If to Indemnitor: Buchanan Energy(s) LLC  
Attn: Steve Buchanan  
7315 Mercy Road  
Omaha, NE 68124  
Phone: 402-558-9850

If to the Village: Village of Lombard  
255 E. Wilson Avenue  
Lombard, Illinois 60148-3926  
Attn: Scott Niehaus, Village Manager  
Phone: 630-620-5705  
Facsimile No.: (630) 620-8222

with a copy to: Klein, Thorpe and Jenkins, Ltd.  
20 North Wacker Drive - Suite 1660  
Chicago, Illinois 60606-2903  
Attn: Dennis G. Walsh

or to the parties at such other addresses or telecopy numbers as they may designate by notice to the other party as herein provided.

6. This Agreement has been made and delivered in the State of Illinois and shall be construed according to and governed by the internal laws of the state of Illinois without regard to its conflict of law rules. If any provision hereof shall be held invalid, prohibited or unenforceable under any applicable laws of any applicable jurisdiction, such invalidity, prohibition or unenforceability shall be limited to such provision and shall not affect or invalidate the other provisions hereof or affect the validity or enforceability of such provision in any other jurisdiction, and to that extent, the provisions hereof are severable. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law.

7. Failure of the Village to require performance of any provision of this Agreement shall not affect the Village's right to require full performance thereof at any time thereafter, and the waiver by the Village of a breach of any provision of this Agreement shall not constitute or be deemed a waiver of a similar breach in the future, or any other breach, or nullify the effectiveness of such provisions of this Agreement. The rights and remedies of the Village of this Agreement are cumulative. The exercise or use of any one or more thereof shall not bar the Village from exercise or use of any other right or remedy provided herein or otherwise provided by law, nor shall exercise or use of any right or remedy by the Village waive any other right or remedy. The parties are aware of 42 U.S.C. §9607(e), and waive any rights they may otherwise have to assert that such statute does not permit, or renders invalid, the waivers or indemnity provisions contained in this Agreement.

8. This Agreement shall be binding upon the Indemnitor and the successors and assigns. No transfer of Indemnitor's rights or obligations hereunder shall be made without the prior written approval of the Village, which approval shall not be unreasonably withheld.

9. This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof. This Agreement may not be amended, modified, revised, supplemented or restated except by a writing signed by each of the parties hereto. In construing this Agreement or determining the rights of the parties hereunder, no party shall be deemed to have drafted or created this Agreement or any portion thereof. This Agreement shall terminate upon the Village rescinding the Limited Area Groundwater Ordinance.

10. Indemnitor will pay and discharge all reasonable costs, attorney's fees and expenses that shall be made and incurred by the Village in enforcing the covenants and agreements of this Agreement.

11. The executing representatives of the parties to this Agreement represent and certify that they are fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind that party to it.

**IN WITNESS WHEREOF**, the parties have executed this Limited Environmental Indemnity Agreement as of the day, month and year first above written.

**VILLAGE OF LOMBARD**

**BUCHANAN ENERGY(S) LLC**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: STEVE J. BUCHANAN

Title: \_\_\_\_\_

Title: PRESIDENT



## **EXHIBIT A**

## Legal Descriptions

A. Site 528

Address: 435 West Roosevelt Road, Lombard, Illinois

The North 215 feet of the West 265 feet, as measured on the West and North lines of the West half of the Northeast quarter of Section 19, Township 39 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois (except therefrom part dedicated for public roads recorded as Document R67-30910 and that part taken by condemnation in Case 86ED77 recorded as Document R88-243350).

Also being described as:

Lot 1 of Mobil's Roosevelt and Finley Subdivision of the North 700 feet to the West 770 feet, of the Northeast 1/4 of Section 19, Township 39 North, Range 11 East of the Third Principal Meridian, Lombard, DuPage County, Illinois, described as: Beginning at the Northeast corner of said Lot 1, said point being on the South right of way line of Roosevelt Road (Illinois Route 38) (100 feet wide); thence South 02 degrees 17 minutes 41 seconds East 165.00 feet along the East line of said Lot 1 to the Southeast corner of said Lot 1; thence South 87 minutes 42 minutes 46 seconds West 215.00 feet along the South line of said Lot 1 to the Southeast corner of said Lot 1, said point being on the East right of way line of Finley Road (100 feet wide); thence North 02 degrees 17 minutes 41 seconds West 150.00 feet along said East right of way and West line of said Lot 1; thence North 42 degrees 42 minutes 32 seconds East 21.21 feet along said East right of way and West line of said Lot 1 to the Northwest corner of said Lot 1, said point being on the South right of way line of Roosevelt Road (Illinois Route 38); thence North 87 degrees 42 minutes 46 seconds East 200.00 feet along said South right of way line and North line of said Lot 1 to the place of beginning.

## **EXHIBIT B**

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE PROHIBITING THE USE OF GROUNDWATER AS A POTABLE WATER SUPPLY BY THE INSTALLATION OR USE OF POTABLE WATER SUPPLY WELLS OR BY ANY OTHER METHOD**

**WHEREAS**, a certain property located within the Village of Lombard, Illinois, located at 435 W. Roosevelt Road, has been used over a period of time as a gasoline service station; and

**WHEREAS**, because of said use, concentrations of certain chemical constituents in the groundwater beneath the Village of Lombard may exceed Class I groundwater quality standards for potable resource groundwater as set forth in 35 Illinois Administrative Code 620 or Tier 1 remediation objectives as set forth in 35 Illinois Administrative Code 742; and

**WHEREAS**, the Village of Lombard desires to limit potential threats to human health from groundwater contamination while facilitating the redevelopment and productive use of properties that are the source of said chemical constituents;

**NOW, THEREFORE, BE IT ORDAINED** by the President and Board of Trustees of the Village of Lombard, Du Page County, Illinois, as follows:

**SECTION 1:** Use of groundwater as a potable water supply prohibited.

The use of, or attempted use of, groundwater, as a potable water supply, from within the property boundaries of the property located at 435 W. Roosevelt Road, Lombard, Illinois, and the properties identified in the attached map (Exhibit A) by the installation or drilling of wells or by any other method is hereby prohibited. This prohibition applies to governmental bodies, including the Village of Lombard.

**SECTION 2:** Penalties.

Any person violating the provisions of this ordinance shall be subject to a fine of up to \$750.00 for each violation.

**SECTION 3:** Definitions.

"Person" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, or any other legal entity, or their legal representatives, agents or assigns.

"Potable water" is any water used for human or domestic consumption, including, but not limited to, water used for drinking, bathing, swimming, washing dishes, or preparing foods.

**SECTION 4:** Repealer.

All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed insofar as they are in conflict with this ordinance.

**SECTION 5:** Severability.

If any provision of this ordinance or its application to any person or under any circumstances is adjudged invalid, such adjudication shall not affect the validity of the ordinance as a whole or of any portion not adjudged invalid.

**SECTION 6:** Effective date.

This ordinance shall be in full force and effect from and after its passage, approval and publication as required by law.

**SECTION 7:** That this Ordinance shall be in full force and effect from and after its passage, approval and publication in pamphlet form, as provided by law.

Passed on first reading this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

First reading waived by action of the Board of Trustees this \_\_\_\_ day of \_\_\_\_\_, 2015.

Passed on second reading this \_\_\_\_\_ day of \_\_\_\_\_, 2015, pursuant to a roll call vote as follows:

AYES: \_\_\_\_\_

NAYS: \_\_\_\_\_

ABSENT: \_\_\_\_\_

**APPROVED** by me this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Keith Giagnorio, Village President

ATTEST:

\_\_\_\_\_  
Sharon Kuderna, Village Clerk

Published by me in pamphlet form this \_\_\_\_\_ day of \_\_\_\_\_,  
2015.

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Sharon Kuderna, Village Clerk

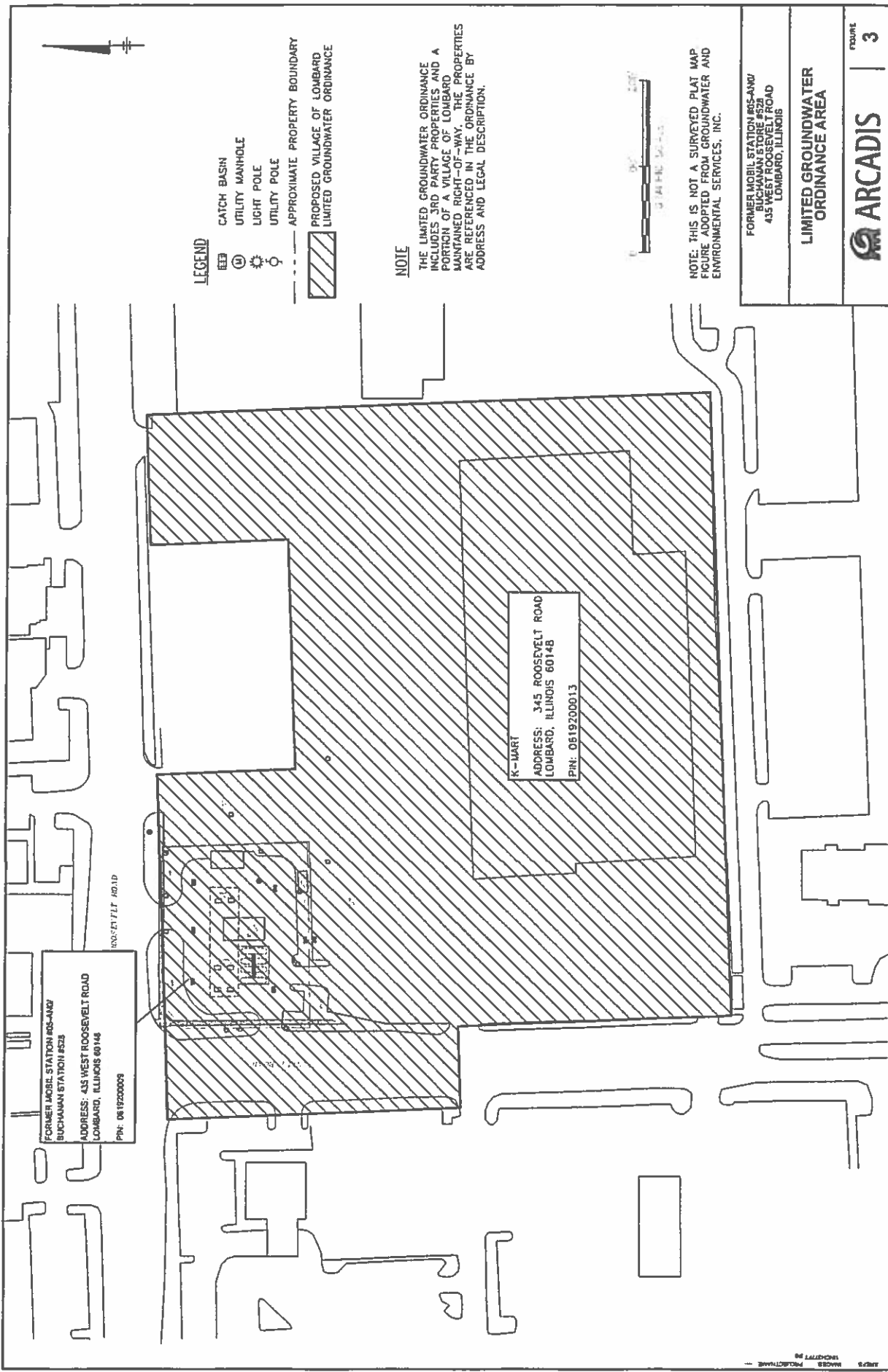


Exhibit A