

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

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

X

TO: PRESIDENT AND BOARD OF TRUSTEES

FROM: William T. Lichter, Village Manager

DATE: February 26, 2008 (B of T) Date: March 6, 2008

TITLE: 310 S. Main Street - Letter Agreement to amend the existing Access Agreement

SUBMITTED BY: Department of Community Development *dash*

BACKGROUND/POLICY IMPLICATIONS:

The Department of Community Development transmits for your consideration a resolution authorizing signatures of President and Clerk on a Letter Agreement for the property located at 310 S. Main Street. (DISTRICT #1)

Staff recommends approval of this request.

Please place this item on the March 6, 2008 Board of Trustees agenda.

Fiscal Impact/Funding Source:
Review (as necessary):

Village Attorney X

Finance Director X

Village Manager X

W. T. Lichter

Date

Date

Date

2/27/08

NOTE: All materials must be submitted to and approved by the Village Manager's Office by 12:00 noon, Wednesday, prior to the Agenda Distribution.



MEMORANDUM

TO: William T. Lichter, Village Manager
FROM: David A. Hulseberg, AICP, Director of Community Development *DLH*

DATE: February 26, 2008

SUBJECT: 310 S. MAIN STREET – LETTER AGREEMENT

GAP Development is requesting that the Village of Lombard agree to enter into a Letter Agreement that would hereby extend the requirements of the existing Access Agreement for the property at 310 S. Main Street (Prairie Path Villas).

Background:

The property, now mixed-use with commercial and condominiums, formerly operated as a gas station/auto service/repair establishment and car wash. The underground storage tanks leaked in years past resulting in the Village right-of-way becoming contaminated. The existing Access Agreement, signed in June 2006 by the Village and GAP Development, was to ensure the remediation of contaminated soils along the northeastern corner of this property and into the Village's right-of-way. Gap Development attempted to remediate the area via soil-vapor extraction; however, the contaminants were not lowered to the specified levels in the original agreement. It is the opinion of GAP Development and their environmental consultant that the specified levels are achievable through natural degradation of the contaminants.

This Letter Agreement provides an extension and amendment to the existing Access Agreement with the following key terms and conditions:

- 1) The date that the contaminants shall be below the specified levels is extended to March 6, 2013.
- 2) GAP Development will provide \$100,000.00 letter of credit to guarantee the work under this agreement and for the duration of the agreement.
- 3) GAP Development will reimburse the Village and/or the Village's Affiliates for any additional costs incurred from work in this area that encounters the contaminants.

DAH/NH:mh

Recommendation: Staff recommends that the Village Board of Trustees approve a resolution authorizing the Village President and Clerk to enter into a Letter Agreement with Gap Development for the property located at 310 S. Main Street.

Village Counsel prepared the Letter Agreement as submitted.

- 4) The Department of Public Works must approve all work within the Village's right-of-way.
- 5) Should the contaminants not reach the specified levels at the end of the six-year period, the Village has the right to draw upon the letter of credit in the amount \$50,000.00.

Brigitte O'Brien, Village Clerk

ATTEST:

William J. Mueller, Village President

Approved this _____ day of _____, 2008.

Absent:

Nays:

Ayes:

Adopted this _____ day of _____, 2008.

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

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

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

here to and marked Exhibit "A" to amend the existing Access Agreement.
the Village of Lombard to authorize the execution of the Letter Agreement as attached
WHEREAS, the Corporate Authorities deem it to be in the best interest of

previously entered into an Access Agreement with GAP Development and,
WHEREAS, the Corporate Authorities of the Village of Lombard have

**A RESOLUTION AUTHORIZING SIGNATURES OF
PRESIDENT AND CLERK ON A LETTER AGREEMENT**

LETTER AGREEMENT

The VILLAGE OF LOMBARD ("Village") and GAP DEVELOPMENT ("GAP") do hereby agree that with respect to the property commonly known as 300 S. Main Street, Lombard, Illinois (the "Site") and the right-of-ways adjacent to the boundaries of the Site as follows:

1. The Village and GAP had previously entered into an Authorization, Acknowledgment and Indemnification for Ground Penetration and Remediation Work and Temporary Access Agreement ("Access Agreement") and a Tiered Approach to Corrective Action Objectives Agreement ("TACO Agreement") in June of 2006. Any terms used in this Letter Agreement with initial capital letters that are defined in either the Access Agreement and/or the TACO Agreement shall have the same meaning herein as are ascribed to such terms in the Access Agreement and/or TACO Agreement unless otherwise defined or the context dictates otherwise. The purpose of this Letter Agreement is to amend the Access Agreement to the extent provided for herein and as such, in the event of any conflict or inconsistency between the terms of this Letter Agreement and the terms of the Access Agreement, the terms of this Letter Agreement shall govern and control provided, however, that all other terms of the Access Agreement remain unchanged and in full force and effect including, but not limited to, the Guaranty of Performance and Payment which shall also be applicable to this Letter Agreement.

2. The Village is willing to extend the date upon which GAP shall complete the Work and take all steps necessary to have the soils impacted by Contaminants on the Village's Property above the applicable Illinois Pollution Control Board Construction Worker Objectives (as set forth in the Tiered Approach to Cleanup Objectives, 35 Ill. Adm. Code 742) treated and/or removed by a "dig and haul" method for an additional six (6) years up to and including March 6, 2013, on the following terms and conditions:

A. GAP, upon the execution of this Letter Agreement, shall deliver to the Village, an irrevocable and unconditional letter of credit for the benefit of the Village in the face amount of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) issued by a financial institution acceptable to the Village and having an expiration date no earlier than twenty-four (24) months following the date of issuance and allowing for draws thereupon, in whole or in part, upon receipt of a letter signed by the Village Manager or Village Treasurer that an Event Default has occurred. The letter of credit shall automatically be extended for two (2) additional periods of twenty-four (24) months each (for a total of six (6) years) unless the issuing financial institution notifies the Village at least thirty (30) days in advance of the expiration date that the financial institution does not intend to extend or renew the letter of credit in which case the Village shall be allowed to draw upon the letter of credit for the full amount if GAP does not replace the letter of credit within seven (7) days of the expiration date. In the event of a draw by the Village, GAP agrees to immediately replenish the letter of credit so that its face value remains at \$100,000.00 at all times until the final expiration date of six (6) years. If GAP completes the Work to the reasonable satisfaction of the Village prior to the expiration of the letter of credit without an Event of Default by GAP, the letter of credit shall be promptly returned to GAP.



(1) GAP, its successors and assigns shall defend, indemnify and hold harmless the Village and its former, current and future officers, directors, employees, agents, contractors and those others using the Village's Property under permit from the Village ("Village's Affiliates") and each of them, from and against any and all civil liabilities, actions, responsibilities, obligations, losses, damages, and claims, and all costs and expenses, including but not limited to attorney's fees and expenses (collectively, "Losses") pursuant to any federal, state and local laws (including the common law), statutes, ordinances, rules, regulations and

C. In consideration for the Village's agreement herein, GAP further agrees as follows:

The parties understand and agree that the Village's and/or Village's Affiliates' soil and groundwater removal may be in conjunction and/or associated with other work being done by the Village in, on, under or near the Site, and part of the purpose of this paragraph is that if the Village and/or Village's Affiliates 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 and/or Village's Affiliates 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 the Village's Property. If asked, GAP will cooperate with the Village and/or Village's Affiliates 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.

B. In the event that the Village undertakes any construction, redevelopment, repair, maintenance or other activities of any kind in, on, near or under the Village's Property, or if the Village and/or Village's Affiliates encounter Contaminants while working in, on or under or near the Site, or encounter Contaminants migrating from near the Site, there is a presumption that the Contaminants migrated from and are attributable to the Site. GAP shall reimburse the Village and/or Village's Affiliates, within 30 days of request for payment, for all costs and fees (including attorneys' fees, engineering fees and other consultants' fees and related costs) that the Village and/or Village's Affiliates incurs relating to any Remediation Activities (which shall mean any environmental investigation, cleanup, abatement, remedial or removal action due to the presence of Contaminants) including, but not limited to, the costs required to identify, manage, handle, dispose and transport soils and groundwater impacted by Contaminants.

Tier I residential remediation objectives (as set forth in the Tiered Approach to Cleanup Objectives, Title 35, Part 742) 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 Contaminants and to protect human health and the environment. If Contaminants are found anywhere near the Site, there is a presumption that the Contaminants migrated from and are attributable to the Site. GAP shall reimburse the Village and/or Village's Affiliates, within 30 days of request for payment, for all costs and fees (including attorneys' fees, engineering fees and other consultants' fees and related costs) that the Village and/or Village's Affiliates incurs relating to any Remediation Activities (which shall mean any environmental investigation, cleanup, abatement, remedial or removal action due to the presence of Contaminants) including, but not limited to, the costs required to identify, manage, handle, dispose and transport soils and groundwater impacted by Contaminants.

(3) GAP shall assume the expense of defending 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 Letter Agreement. In the event that the Village or any of the Village's Affiliates is/are named as a defendant(s) in any lawsuit arising out of the matters to be indemnified under this Letter Agreement, the Village and/or any of the Village's Affiliates shall have the right to choose the attorney(s) who represent(s) them in said lawsuit, and the reasonable costs, expenses and fees

(2) GAP and its successors and assigns hereby agree to release, waive, covenant not to sue and forever discharge the Village's Affiliates, and each of them, for any claim, suit, or action, whether or not well founded in fact or in law, which GAP, its contractors, agents or employees have, or may have, arising out of any evaluation, examination, testing, sampling or environmental appraisal or other work conducted by GAP, their contractors, agents or employees at or on the Site and/or Village Property. Notwithstanding any other provision of this Letter Agreement, as between the Village's Affiliates on one hand, and GAP, on the other hand, under no circumstances shall the Village's Affiliates be liable for losses arising from the existence of Contaminants on the Site and/or Village Property or emanating from or contained in the Site and/or Village Property (including the groundwater thereunder), and the duty to defend, hold harmless and indemnify under this paragraph shall apply to all such Losses.

Village Property (including the groundwater thereunder).
 release of Contaminants (or allegations of the same) on or from the Site and/or for the recovery of any costs related to the migration, release, or threatened Property (including the groundwater thereunder); and the imposition of any lien 42 U.S.C. §9601 (22)) of Contaminants on or from the Site and/or Village release (as defined by 42 U.S.C. §9601(22)) or threatened release (as defined by Village Property; (iii) any condition of any property (including groundwater) or such violations) relating to or arising out of Contaminants on the Site and/or (including civil penalties sought to be imposed by governmental authorities for (including the groundwater thereunder) of any environmental law or regulation from the Site and/or Village Property (including the groundwater thereunder); arising out of Contaminants on the Site and/or Village Property or emanating and/or Village Property including the groundwater relating to or and in any manner whatsoever incurred relating to (i) any condition of the Site existing or inchoate, known or unknown, having arisen or to arise in the future, cleanup, or abatement, whether asserted or unasserted, direct or indirect, claim, suit or action and/or any Losses relating to environmental investigation, on the Site and/or Village Property, including but not limited to any Losses or on account of (either directly or indirectly) the existence of the Contaminants other requirements relating to or which the Village's Affiliates may incur from

associated with said attorney(s) in relation to said lawsuit shall be paid by GAP pursuant to the indemnification provisions herein.

D. The Director of the Village's Public Works Department must approve all Work on or impacting the Village's Property in writing.

E. If requested by the Village, GAP shall immediately deliver to the Village any and all records, documents (including writings, drawings, graphs, charts, photographs, phonorecords, 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 to the environmental matters and/or conditions associated either directly or indirectly with the Site and/or the Village Property (including the groundwater thereunder), including but not limited to written reports of a site assessment, environmental audits, soil test reports, water test reports, laboratory analysis and documents, reports or writings relating or referring to the Site and/or the Village Property.

F. The occurrence of any one of the following shall constitute an Event of Default by GAP under this Agreement:

- (1) Failure to comply with any material term, provision or condition of this Letter Agreement, the Authorization, Acknowledgment and Indemnification For Ground Penetration and Remediation Work and Temporary Access Agreement (as modified by this Letter Agreement) and/or the TACO Agreement.
- (2) Failure to reimburse the Village and/or Village's Affiliates, within 30 days of receiving an invoice for any of the costs, fees, expenses and losses that the Village and/or Village's Affiliates incurs relative to any Remediation Activities in accordance with paragraph 2B. Specifically, the parties acknowledge and agree that Village shall have the right to draw upon the letter of credit for reimbursement of any costs incurred by the Village and/or Village's Affiliates relative to any Remediation Activities undertaken by or on behalf of the Village and/or Village's Affiliates.

- (3) Failure to renew or replace the letter of credit and/or to keep the face value of the letter of credit at \$100,000.00 for the entire six (6) year period in accordance with paragraph 2A of this Letter Agreement.

- (4) Failure to have the soils impacted by Contaminants on the Village's Property above the applicable Illinois Pollution Control Board Construction Worker Objectives (as set forth in the Tiered Approach to Cleanup Objectives, 35 Ill. Adm. Code 742) treated and/or removed within six (6) years of the execution of this Agreement. If at the end of the six-year time period, GAP fails to demonstrate to the Village's satisfaction that the Contaminants on the Village's

Property do not exceed the Construction Worker Objectives, the Village shall be allowed to draw upon the letter of credit for the amount of fifty thousand dollars (\$50,000.00), provided, however that GAP'S obligation to complete the corrective action by a "dig and haul" method of responding to the contamination shall not be limited, reduced or released by the letter of credit or any action taken by the Village with respect to the letter of credit.

IN WITNESS WHEREOF, the VILLAGE has caused this Letter Agreement to be signed by its duly authorized representative, and be binding upon it, its successors and assigns.

VILLAGE OF LOMBARD, ILLINOIS

By _____
(Printed)
Its: _____

ATTEST:

Village Clerk

IN WITNESS WHEREOF, Owner/Operator, GAP DEVELOPMENT, has caused this Letter Agreement to be signed by its duly authorized representative, and be binding upon it, its successors and assigns

By: _____
(Printed) ~~DAVID A. WEBER~~
Its: _____
~~SICHER~~

DATE: 2/22/08

