

f  
907022

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of:

**New York Job Development Authority  
d/b/a Empire State Development Corporation**

**ORDER ON CONSENT**

and

**Dunkirk Acquisition, LLC**

**Index # R9-20020214-8**

**Willowbrook Avenue**

**Dunkirk, New York**

**(Chautauqua Co.)**

**Respondents**

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of Article 27, Titles 9 and 13 of the Environmental Conservation Law of the State of New York ("ECL") entitled "Industrial Hazardous Waste Management" and "Inactive Hazardous Waste Disposal Sites," respectively. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Titles 9 and 13 and Section 3-0301.
2. Since on or about September 1999, Empire Specialty Steel, Inc. ("Empire"), owned and operated steel manufacturing and finishing facilities located on Willowbrook Avenue in Dunkirk, New York. Exhibit "A" of this Order is a survey showing the real property owned by Empire (the "Site") which is designated as "Parcel I on Exhibit A.
3. On or about June 30, 2001, Empire abruptly ceased operations leaving a substantial amount of containerized hazardous wastes on the Site. Empire has not been responsive to the Department's efforts to have such wastes properly removed from the Site in a timely fashion.
4. New York Job Development Authority d/b/a Empire State Development Corporation ("ESDC") is a public benefit corporation created under the laws of the State of New York. By a promissory note and security agreement of October, 1999, the New York Job Development Authority, a public benefit corporation created under Article 8, Title 8 of the New York Public Authorities Law, doing business as ESDC, agreed to lend \$10,000,000 to the Chautauqua Region Industrial Development Agency ("IDA"). The IDA subsequently endorsed the Note to Empire, the Site's owner and operator. To secure the obligation to make payment pursuant to the terms of the Note,

Empire granted ESDC a mortgage on the real property designated as Parcel I in attached Exhibit A, that is the subject of this Order, together with all fixtures, chattels, contracts, permits, intangibles, and articles of personal property attached to or used in connection with such real property. Said mortgage is recorded in the Office of the County Clerk of Chautauqua County at Book 02434, Page 0372. ESDC has never owned or operated the Site, has not yet taken title to the property, and is not otherwise responsible under law to remediate the existing on-site environmental contamination.

5. Pursuant to a foreclosure proceeding and auction, ESDC anticipates acquiring the assets of Empire which were secured by the Empire mortgage.

6. Dunkirk Acquisition LLC ("DAC"), a wholly-owned subsidiary of Universal Stainless and Alloy Products, Inc. ("Universal"), has entered into an asset purchase agreement (the "ESDC/DAC Asset Purchase Agreement") with ESDC to purchase, for good consideration, select assets of Empire including the Site. The transactions contemplated by the ESDC/DAC Asset Purchase Agreement are expected to be consummated on or about February 14, 2002, or as soon thereafter as practicable. For purposes of this Order, the term "ESDC/DAC Closing" shall mean the date on which the transactions contemplated by the ESDC/DAC Asset Purchase Agreement actually are consummated. Hereinafter, the transactions contemplated by the ESDC foreclosure proceeding and ESDC/DAC Asset Purchase Agreement are referred to as the "Transactions." ESDC may take title in the foreclosure proceeding in contemplation of the Transactions. The Transactions are conditioned upon the agreements between the Department, ESDC, and DAC contained within this Order.

7. The Site historically has been subject to regulation pursuant to ECL Article 27, Title 9. Pursuant to ECL 71-2727.3, the Commissioner of Environmental Conservation (the "Commissioner") may issue orders requiring corrective action, including corrective action beyond the facility boundary where necessary to protect human health and the environment, for all releases of hazardous waste or constituents from any solid waste management unit at any treatment, storage or disposal unit which is either permitted or seeking a permit under ECL Article 27, Title 9, or which has interim status according to regulations adopted thereunder.

8. In August 1995, AL Tech Specialty Steel Corp. entered into a Corrective Action Order (DEC File NO. R4-1467-93-02) which required implementation of a corrective action program consisting of a Resource Conservation and Recovery Act ("RCRA") Facility Assessment, a RCRA Facility Investigation, and Corrective Measures Implementation at the Site. Section XIV of the AL Tech Order provides that the provisions of the AL Tech Order shall be deemed to bind any subsequent owner or operator of the facility or part thereof.

9. The Site has also been identified by the Department as an inactive hazardous waste disposal site which has been determined to pose a significant threat to public health and the environment. The Site has been listed on the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* as Site Number 9-07-022 and has been classified by the Department as Classification 2 pursuant to ECL 27-1305.4.b.

10. Pursuant to ECL 27-1313.3.a, whenever the Commissioner "finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the order." Any person under such order pursuant to ECL 27-1313.3.a has a duty imposed by ECL Article 27, Title 13 to carry out the remedial plan committed to under order.

11. ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Titles 9 and 13 or any rule or regulation promulgated pursuant thereto, or any term or condition of any certificate or permit issued thereto, or any final determination or order of the Commissioner, shall be liable for civil, criminal and/or administrative sanctions. The Department also has the power, *inter alia*, to provide for the prevention and abatement of all water, land, and air pollution. See, e.g., ECL 3-0301.1.i.

12. The Department contends that after the Transactions are consummated and title to the Site is transferred to ESDC and subsequently to DAC, ESDC and DAC may be subject to the provisions of the AL Tech Order as a subsequent owner or operator of the facility as well as subject to an Order under ECL Article 27, Titles 9 and 13, as the owner of a site which has been determined to be a significant threat. The Department has determined that it is in the public interest to issue this Order as a means of resolving ESDC's and DAC's potential liability for any environmental contamination existing on the Site prior to consummation of the Transactions which could otherwise result solely by reason of ownership pursuant to ESDC's foreclosure and the DAC lease and/or purchase of the Site.

13. Respondents, having waived their right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, agree to be bound by its terms. Respondents consent to and agree not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agree not to contest the validity of this Order or its terms.

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. Obligations of ESDC

1. ESDC has completed at its own expense and to the Department's satisfaction, the activities recited in the Interim Remedial Measures Workplan incorporated herein and attached hereto as Exhibit B.
2. ESDC shall pay, by check payable to the Commissioner of Environmental Conservation and sent to the Department's Region 9 office, the sum of Two-hundred-Thousand Dollars (\$200,000) within 14 days of the effective date of this order.

These funds are to be credited to a State Superfund cost center and used for remedial activities and hazardous waste management at the Site.

II Obligations of DAC

- A. DAC shall pay, by check payable to the Commissioner of Environmental Conservation and sent to the Department's Region 9 office, the sum of Two-hundred-Thousand Dollars (\$200,000) according to the following schedule:

<u>Amount</u>	<u>Due Date</u>
\$50,000	April 1, 2002
\$50,000	July 1, 2002
\$50,000	October 1, 2002
\$50,000	January 1, 2003

These funds are to be credited to a State Superfund cost center and used for remedial activities and hazardous waste management at the Site.

- B. For a period not to exceed fifty (50) years from the effective date of this order, DAC hereby agrees to accept and to treat at its wastewater facility, without receipt of further consideration, all contaminated water generated from the Lucas Avenue Plant site, to include water collected from sumps, manholes, lines or future remedial activities which may generate contaminated groundwater requiring treatment. Such agreement is contingent upon DAC's ability to remain in compliance with any applicable discharge permits, as well as the availability of treatment capacity in the context of other wastewater treatment requirements relating to operations at the Site.

III. Upon the earlier of the date that DAC occupies, controls, and/or takes title to the Site, DAC consents to provide, upon reasonable notice, full access to the facility to any duly designated employee, consultant, contractor or agent of the Department, including RealCo, and any duly designated employee, consultant, contractor or agent of the Department or any other State agency for the purposes of performing and overseeing any remedial, compliance and closure activities required at the Site, including those specifically required under the AL Tech Order as well as any that may subsequently be identified. All such persons who enter the Site shall comply with DAC's health and safety requirements.

IV. DAC shall exercise due care at the Site with respect to any and all environmental contamination that may be present as of the date of the DAC Closing ("Existing Contamination") and shall refrain from any actions that may either exacerbate management of the Existing Contamination or interfere with any remedial, compliance or closure activities.

V. DAC recognizes that implementation of remedial, compliance and closure activities at the Site may interfere with its use of the property and may require interruption of certain operations. The Department recognizes that, to the extent possible, such interference shall not preclude DAC from conducting normal business operations at the Site. The Department acknowledges that DAC will continue to operate certain portions of the Site that may be subject to remedial, compliance and closure obligations under the AL Tech Order.

VI. DAC agrees to cooperate fully with RealCo and the Department in the implementation of all remedial, compliance, and closure activities, including but not limited to DAC's filing institutional controls and RealCo's and/or the Department's maintenance of engineering controls at the Site, and further agrees not to interfere with such activities. In the event that DAC becomes aware of any action or occurrence which causes or threatens a release of hazardous wastes, substances, pollutants or contaminants at or from the Site or any location associated with the Dunkirk Facility that constitutes an emergency situation or that may present an immediate threat to public health, welfare or the environment, DAC shall immediately take all appropriate action to prevent, abate, and minimize such release or threat of release and shall immediately notify the Department.

VII. A. In consideration of the payments required under Paragraphs I and II and the commitments recited in Paragraphs III through VI of this Order, and subject to Subparagraphs VII.B., VII.C, and VII.D. below:

1. The Department hereby individually releases ESDC and DAC and their officers, directors, agents, employees, shareholders, and any ESDC successor lenders pursuant to Article 27, Titles 9 and 13 and Section 71-2705 of the ECL, Section 107(a) of CERCLA, and any other statutory, regulatory or common law provision including seeking injunctive relief in the nature of remedial and/or corrective action at the Site and/or recovery of costs incurred by the Department at the Site, including but not limited to, any and all claims for damages (including natural resource damages), fees (including regulatory fees), fines, penalties, oversight costs or any other claims which relate to Existing Contamination or arise out of the release or threat of release of hazardous wastes and/or substances at or from the Site and the implementation of any corrective and/or remedial action designed to address such releases which occurred prior to the effective date of this Order. In addition, ESDC and DAC are hereby relieved of any and all obligation as a subsequent owner/operator for assuming the obligations and responsibilities of AL Tech and its successors pursuant to Section XIV of the AL Tech Corrective Action Order, and

2. The Department shall forbear from bringing any action or proceeding, civil or administrative, against ESDC and DAC and their officers, directors, agents, employees, shareholders, and any ESDC successor lenders pursuant to Article 27, Title 9 or 13 or Section 71-2705 of the ECL, Section 107(a) of CERCLA, or any other statutory, regulatory or common law provision including seeking injunctive relief in the nature of remedial and/or corrective action at the Site and/or recovery of costs incurred by the Department at the Site, including but not limited to, claims for damages (including natural resource damages), fees (including regulatory fees), fines, penalties or any other claims which arise out of the release or threat of release of hazardous wastes and/or substances at or from the Site and the implementation of any corrective and/or remedial action designed to address such releases which occurred prior to the effective date of this Order.

B. The release described in Subparagraph VII.A.1 of this Paragraph and the forbearance described in Subparagraph VII.A.2 of this Paragraph are expressly limited to the Existing Contamination and do not in any way affect the liability of DAC or its officers, directors, agents, employees and shareholders with respect to any contamination, release or threat of release, or any violation of law, rule, regulation, permit or order that is attributable to DAC's operations at the Dunkirk Site or that occurs subsequent to the time DAC occupies, controls, and/or takes title to portions of the Site, except that if DAC's operations after the DAC Closing contribute to or exacerbate any environmental condition existing prior to the DAC Closing, DAC's liability for the

investigation and remediation of such condition shall be limited to that portion of the investigation and remediation costs caused by, and reasonably allocable to, operations after the DAC Closing.

C. The release described in Subparagraph VII.A.1 and the forbearance described in Subparagraph VII.A.2 of this Paragraph shall take effect upon the effective date of this Order and shall remain in effect for so long as DAC is in compliance with its specific obligations pursuant to this Order.

D. The release described in Subparagraph VII.A.1 of this Order and the forbearance described in Subparagraph VII.A.2 of this Order shall apply only to DAC's officers, directors, agents, employees and shareholders to the extent that any liability alleged is based solely upon their status as an officer, director, agent, employee or shareholder of DAC. The Department expressly reserves its right to bring suit or take administrative action against any such party in the event that liability is founded upon a claim that any such party generated hazardous substances that were disposed at either the Site, or that any such party transported or arranged for the transportation of hazardous substances to the Site, or that any such party disposed of or arranged for the disposal of hazardous substances at the Site.

E. These releases shall be deemed to be administrative settlements within the meaning of Section 113 of CERCLA and shall be deemed to fully satisfy the requirements for such releases as set forth in any and all applicable laws, including but not limited to CERCLA and General Obligations Law Section 15-108.

VIII. In the event DAC proposes to convey all or any part of its interest in the Site, DAC shall, not less than sixty days prior to the consummation of such proposed transaction, notify the Department in writing of the nature and extent of the proposed conveyance, and shall notify the transferee, with a copy to the Department, of the applicability of this Order, and the terms and conditions of this Order shall be binding upon such transferee.

IX. The Department will not, so long as DAC is in full compliance with the terms of this Order, seek to obtain additional monies from DAC for remediation of the Existing Contamination at the Site, but will, if no other sources of funds are available, seek to obtain such funding as may be authorized by law from the hazardous waste remedial fund, from other State funds as may be authorized and legally available for this purpose, or from any other source that may be authorized by law, in such amount as may be necessary to complete all actions the Department, in its sole discretion, deems necessary. Nothing in the AL Tech Order or this Order shall be construed as requiring the Department or the State of New York to undertake any environmental investigation

or remediation actions.

X. DAC shall not be in default under this Order, and shall not suffer any penalty under this Order or be subject to any action or proceeding, if it cannot comply with any requirement hereof because of an action of a national, state or local government body or court, or an act of God, war, strike, riot, catastrophe, or other unforeseeable event which is not caused by DAC's negligence or misconduct and which could not have been avoided by DAC through the exercise of due care. DAC shall notify the Department, in writing, within 10 business days of obtaining knowledge of any such event and, if necessary, shall request an appropriate modification to this Order. Relief under this Paragraph shall not be available if DAC fails to comply with this notice requirement. DAC shall have the burden of proving that an event falls within the meaning of this Paragraph.

XI. Except as set forth above, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the Department's civil, criminal or administrative rights or authorities, nor shall anything contained in this Order be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

XII. Except as provided herein, nothing contained in this Order shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Order. The Department, ESDC, and DAC expressly reserve any and all rights (including, but not limited to, any right of contribution), defenses, claims, demands and causes of action they may have with respect to any matter, transaction or occurrence relating in any way to the Site against any person not a party hereto.

XIII. By consenting to the issuance of this Order, ESDC and DAC do not admit or intend to acknowledge any liability or fault with respect to any matters arising out of or relating to the Site. The provisions, terms and conditions of this Order, and any actions or submissions thereunder, shall not, in any action, proceeding or litigation whatsoever, whether brought by the State or any other party, be construed as or operate as an admission that ESDC and/or DAC have violated any law or regulation or otherwise committed a breach of duty at any time with regard to the Site.

XIV. The failure of ESDC and/or DAC to comply with any term of this Order, unless excused pursuant to Paragraph X, shall be a violation of this Order. The Department shall notify the non-complying party in writing of any alleged violation of this Order. Upon receipt of a written notice of violation of this Order from the Department, the non-complying party shall take prompt action to cure all instances of non-compliance. If, after notice and a reasonable opportunity to cure, said party remains out of compliance with this Order, the Department may terminate the release and forbearance described



in Paragraph VII as against the non-complying party.

XV. ESDC and DAC and their officers, directors, agents, employees, and shareholders shall be bound by this Order and shall be entitled to the benefit of the releases and covenants contained herein to the extent set forth in Paragraph VII of this Order. Any change in ownership or corporate status of ESDC and/or DAC including, but not limited to, any transfer of assets or real or personal property shall in no way alter their respective obligations under this Order.

XVI. This Order constitutes the entire agreement between the Department and ESDC and DAC concerning the Site. No term, condition, understanding or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound.

XVII. The effective date of this Order is the date it is signed by the Commissioner or her designee.

DATED: Buffalo, New York

*February 13, 2002*

ERIN M. CROTTY  
Commissioner  
New York State Department of  
Environmental Conservation

  
By: Gerald F. Mikol  
Regional Director

Exhibit B

**INTERIM REMEDIAL MEASURES COMPLETED BY ESDC**

1. **Waste Water Treatment Plan (WWTP):** Operate facility WWTP to neutralize all of spent acids in the 500,000 gallon holding tanks; discharge neutralized effluent into the City of Dunkirk sewer system.
2. **Kolene Tank:** Remove all of the acids from the pickling facility and process those acids through the WWTP neutralization process. Inspect Kolene tanks to assure that no breach of the facilities has occurred.
3. **Chemical Bulk Storage:** Remove the virgin acids and chemicals from the facility.
4. **Pickle House Tanks:** These tanks have been addressed pursuant to Item Number 1, above. No further action is required to secure the pickle house tanks.
5. **Brigham Road Plant:** Test contents of totes at this location. Upon receipt of analytical results, characterize and properly dispose of tote contents.

CONSENT BY Respondent

Respondent hereby consents to the issuance and entry of the foregoing Order, waives its right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained therein.

Respondent NY Job DEVELOPMENT AUTHORITY 2/3/12  
EMPIRE STATE DEVELOPMENT  
By Garry P. Ryan Corp.  
Title CONTROLLER  
Date 2/12/02

(Seal)

Corporate

State of NEW YORK  
County of NEW YORK

On this 12<sup>th</sup> day of February, 2002, before me personally came GARRY P. RYAN to me known, who being by me duly sworn did depose and say that he resides at \_\_\_\_\_ that he is the CONTROLLER of JDA/DBA the corporation described in and which executed the foregoing instrument; and that he signed his name as authorized by said corporation.

Barbara S. Ware  
NOTARY PUBLIC

BARBARA S. WARE  
Notary Public, State of New York  
No. 31-4523943  
Qualified in New York County  
Commission Expires

February 25, 2003

CONSENT BY Respondent

Respondent hereby consents to the issuance and entry of the foregoing Order, waives its right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained therein.

Respondent Dunkirk Acquisition, LLC

By Paul A. McShane

Title Executive Officer

Date 2/13/02

(Seal)

Corporate

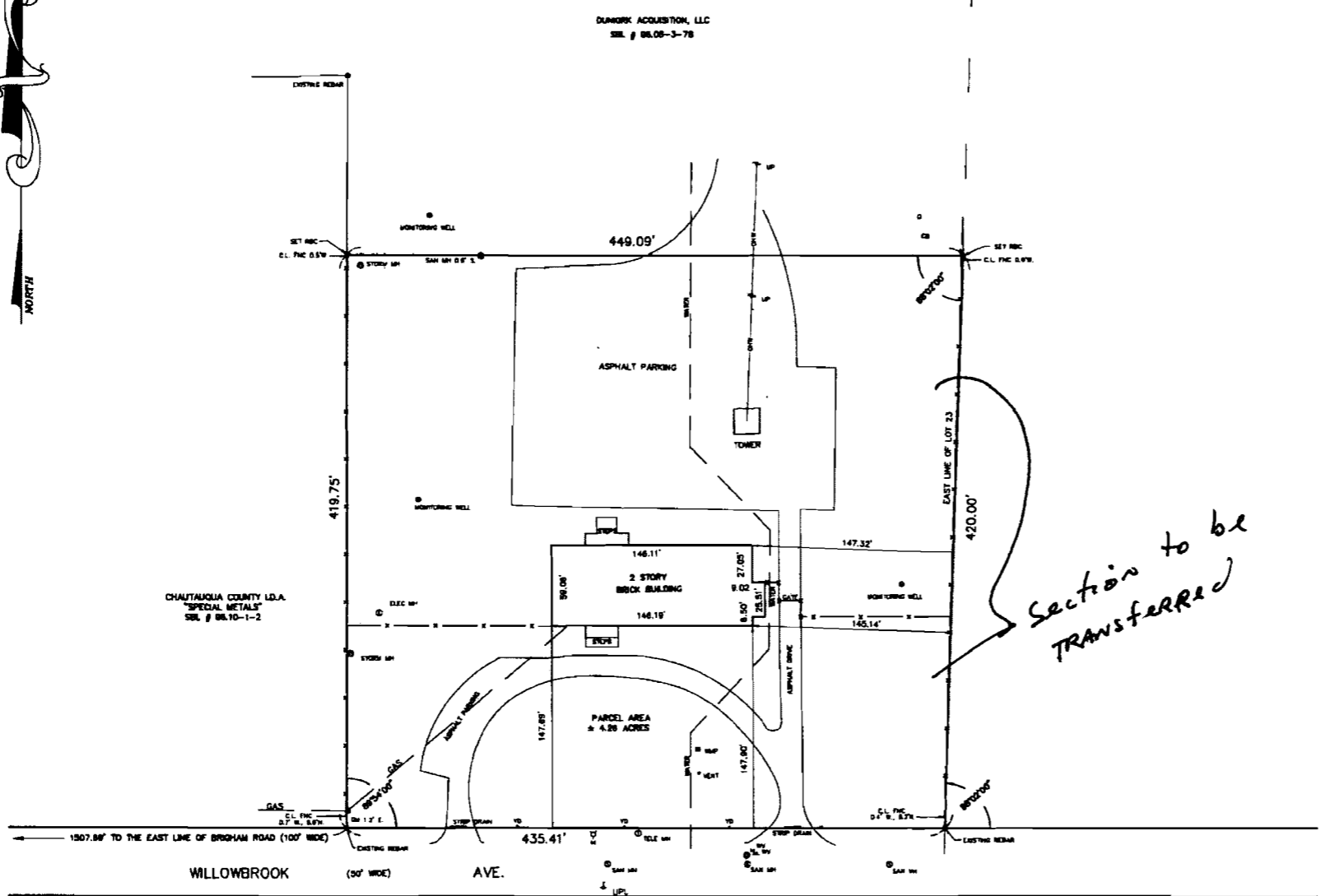
State of New York  
County of Chautauque

On this 13 day of February, 2002, before me personally came Paul A. McShane to me known, who being by me duly sworn did depose and say that he resides at 176 Falcon Valley Dr. that he is the Executive Officer of the Dunkirk Acquisition, LLC corporation described in and which executed the foregoing instrument, and that he signed his name as authorized by said corporation.

Ellen Luczkowiak  
NOTARY PUBLIC

ELLEN LUCZKOWIAK  
No. 01LU5060915  
Notary Public, State of New York  
Qualified in Chautauque County  
My Commission Expires 05/28/ 2007

NOTE: THIS SURVEY WAS PREPARED WITHOUT THE BENEFIT OF AN ABSTRACT OF TITLE AND IS SUBJECT TO ANY STATE OF FACTS THAT MAY BE REVEALED BY AN EXAMINATION OF SUCH.



**LEGEND**

△ CONC MON	CONCRETE MONUMENT	● TREE NAME	DECIDUOUS TREE
⊙ PIN	NAIL	* TREE NAME	CONIFEROUS TREE
⊙ REBAR	REBAR	⊙ M/H	MANHOLE
⊙ IRON PIPE	IRON PIPE	⊙ C/B	ROUND CATCH BASIN
⊙ GROUND SHOT (HARD)	GROUND SHOT (HARD)	⊙ C/B	CATCH BASIN
⊙ GROUND SHOT (SOFT)	GROUND SHOT (SOFT)	⊙ STORM M/H	STORM MANHOLE
⊙ U/P	UTILITY POLE	⊙ SAN M/H	SANITARY MANHOLE
⊙ U/P/A	U/P/A	⊙ CO	CLEANOUT
⊙ CUT	CUT WIRE	⊙ T/BOX	TELEPHONE BOX
⊙ HYD	HYDRANT	⊙ ELEC BOX	ELECTRIC BOX
⊙ M/M	WATER METER	⊙ POST	POST
⊙ W/V	WATER VALVE	⊙ SIGN	TWO POST SIGN
⊙ G/M	GASLINE MARKER	⊙ SIGN	ONE POST SIGN
⊙ G/M	GAS METER	⊙ LP	ONE HEAD LIGHT POLE
⊙ G/V	GASLINE VALVE		

**PROPOSED DESCRIPTION**  
Lands to be conveyed to Rem-Tronics, Inc.

ALL THAT TRACT OR PARCEL OF LAND situate in the City of Dunkirk, County of Chautauque and State of New York, being part of Lot Number 23, Township 8, Range 12 of the Holland Land Company's Survey, bounded and described as follows:

**BEGINNING** at a point in the north line of Willowbrook Avenue (50' wide) distant one thousand, five hundred seven and sixty-nine hundredths (1,507.69) feet easterly from the westerly line of Brigham Road (100' wide) as measured along said north line of Willowbrook Avenue, said point also being the southeast corner of lands conveyed to Chautauque County I.D.A. by Special Metals;

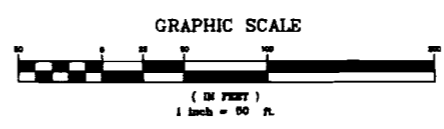
Thence easterly along the north line of Willowbrook Avenue a distance of four hundred thirty-five and forty-one hundredths (435.41) feet to a point in the east line of Lot Number 23;

Thence northerly at an interior angle of 86°02'00" and along the east line of Lot Number 23 a distance of four hundred twenty and no hundredths (420.00) feet to a point;

Thence westerly at an interior angle of 86°02'00" a distance of four hundred forty-nine and nine hundredths (449.09) feet to a point;

Thence southerly along the easterly line of said Chautauque County I.D.A., a distance of four hundred nineteen and seventy-five hundredths (419.75) feet to the Point or Place of Beginning, containing 4.25 acres of land, more or less.

*Section to be transferred*



PART of L. 23 of the HOLLAND COMPANY'S SURVEY  
VILLAGE of DUNKIRK, CITY of DUNKIRK, COUNTY of CHAUTAUQUE, STATE of NEW YORK

DATE	JOB	REVISION	DESCRIPTION

Drawn by: **RLV** SCALE: **1"=50'**  
 Checked by: **BNW** DATE: **7/18/09**  
 CAD FILE: **SMB/71.DWG** JOB NO: **2008.01.31.00**

BOOK: **382** PAGE: **21** MAP: **58871**