

When recorded mail to:
168th and Dodge L.P.
RED Development
One East Washington Street, #300
Phoenix, AZ 85004
Attn: Melissa Goodson

ACCESS EASEMENT AGREEMENT

May This Access Easement Agreement (this "Agreement") is made effective as of the *6th* day of ~~April~~, 2019, by and among **168th and Dodge L.P.**, a Nebraska limited partnership, f/k/a Brown Investment Partnership, Ltd., a Nebraska limited partnership, whose address is c/o RED Development, LLC, One E. Washington, Suite 300, Phoenix, AZ 85004, hereinafter referred to as "Developer", and **Madonna Rehabilitation Hospital**, a Nebraska nonprofit corporation, whose address is 5401 South Street, Lincoln, NE 68506, hereinafter referred to as "Madonna". Developer and Madonna are sometimes herein referred to together as the "Parties" and individually as a "Party."

RECITALS:

WHEREAS, Developer is the owner of a certain tract of land legally described in **Exhibit A** attached hereto and identified as the "Developer Tract" on the Site Plan attached hereto as **Exhibit B**, which is located within Developer's mixed use commercial development (the "Shopping Center"); and

WHEREAS, Madonna is the owner of that certain tract of land located immediately adjacent to the Developer Tract, legally described in **Exhibit C** attached hereto and identified as the "Madonna Tract" on the Site Plan attached hereto as **Exhibit B**, and referred to herein as the "Madonna Tract," on which Madonna has constructed a rehabilitation hospital; and

WHEREAS, Developer and Madonna desire to create an access easement to provide for rights of ingress and egress (but not parking) to Burke Street and to Chicago Street over and across that portion of the Developer Tract commonly referred to as 175th Plaza (the Developer Tract and the Madonna Tract are herein sometimes referred to together as the "Tracts" and individually as a "Tract") as more fully set forth below.

AGREEMENTS:

NOW, THEREFORE, for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable considerations, duly paid, the receipt and sufficiency of which are hereby acknowledged, and the further consideration of the performance of the respective covenants and agreements of Madonna and Developer as hereinafter set forth, the Parties agree as follows:

1. **Grant of Access Easement by Developer.** On and subject to the terms, conditions and limitations of this Agreement, Developer does hereby GRANT and CONVEY to Madonna, its successors and assigns, an appurtenant, non-exclusive access easement and right-of-way for ingress and egress purposes on, over, across and through a portion of the Developer Tract (hereinafter sometimes referred to as "Access Easement Area"), which easement is granted for the benefit of the Madonna Tract.

2. **Use of Access Easements.**

(a) The access, ingress and egress easement granted in this Agreement is for the benefit of and non-exclusive common use by Madonna, its respective successors and assigns in ownership of the Madonna Tract, and its respective tenants, subtenants, licensees, concessionaires, contractors, business invitees and customers, with Developer and its respective successors and assigns, tenants, subtenants, licensees, concessionaires, contractors, business invitees and customers, but only in connection with the business and activities conducted on the Developer Tract.

(b) Nothing contained in this Agreement is intended to create or shall be construed or interpreted as creating any easements, licenses, or other rights for parking on any of the Tracts, respectively, for any of the owners, tenants, subtenants, licensees, concessionaires, contractors, business invitees or customers of the other Tracts.

(c) Developer and Madonna each shall have the right to enact reasonable rules concerning access to, security for, and/or conduct and operations on or use of their respective Tracts. Developer and Madonna each hereby reserve the right to remove and to eject from their respective Tracts any person (including, without limitation, the employees, contractors, invitees and customers of the other Party hereto) or motor vehicle not authorized to use the same or using the same in an unsafe manner or in any manner which is in violation of the above referenced rules or applicable law.

3. **Maintenance of Access Easement Area.** The access roadway within the Access Easement Area shall be maintained in good and serviceable condition and repair by Developer and/or its assigns, including, but not limited to the maintenance, snow removal, sweeping, removal of debris, maintenance of islands, and landscaping, signage, street repairs, lighting and any other maintenance required in Developer's reasonable judgment (collectively, "Maintenance Requirements"), to maintain such Access Easement Area in a condition reasonably required to ensure acceptable access to and from the Tracts and any necessary aesthetics. The costs incurred in connection with performing the Maintenance Requirements shall be referred to herein as "Maintenance Expenses".

(a) **Annual Maintenance Budget.** Developer shall present Madonna with an annual budget listing the various components of the anticipated annual Maintenance Expenses (the "Annual Maintenance Budget"). Such Annual Maintenance Budget shall be delivered to Madonna for approval within the third quarter of each year. Approval by Madonna shall not be unreasonably withheld.

(b) **Payments.** Madonna agrees to pay to Developer, as "Madonna's Share", twenty six percent (26%) of the actual Maintenance Expenses within thirty (30) days following receipt of invoice and reasonable back-up documentation therefor. Any late payments shall accrue a late payment fee equal to ten percent (10%) of such payment.

4. **Covenants Running with the Land.**

(a) The easement and rights hereby created, and all the covenants, agreements and provisions of this instrument, including both the benefits and burdens, shall be continuing rights and covenants running with fee title to the Tracts, and shall bind and inure to the benefit of the Parties hereto and their respective successors and assigns in ownership of fee title to the Tracts.

(b) The easement granted in this Agreement is intended to be an easement appurtenant to the Developer Tract and the Madonna Tract, as applicable, and the respective estates of Developer and Madonna therein, and are not easements in gross. Except as expressly set forth herein, no easements, licenses or other rights of access, use or occupancy are created or reserved hereby with respect to the Tracts, and nothing herein shall be construed as permitting any Party hereto, or its permitted successors or assigns, to use or occupy any portion of the Tract of the other Parties to this Agreement.

(c) Except as set forth herein, the perpetual easements herein granted shall terminate only upon the express mutual written agreement executed by the then owners of the Developer Tract and the Madonna Tract.

5. **Indemnity.**

(a) Each Party hereto (the "Indemnifying Party") shall indemnify and hold the other Parties hereto (the "Indemnified Party") harmless from any and all liability, loss, damage, expense, actions, suits, proceedings, or judgments, including reasonable attorney's fees (collectively, "Losses"), arising from third-party claims of injury to or death of persons or damage to property (collectively, "Claims") resulting from or based upon the use of the easements contained herein, to the extent such injuries, deaths or property damage are caused or contributed to by the negligence or willful misconduct of the Indemnifying Party, or its employees, agents or contractors.

(b) **IN NO EVENT SHALL EITHER PARTY TO THIS AGREEMENT BE LIABLE TO THE OTHER PARTY HERETO FOR ANY SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSS OF PROFITS OR DAMAGES FOR BUSINESS INTERRUPTION ARISING FROM OR CAUSED BY THE ACTION OR INACTION OR COMPARATIVE OR SOLE NEGLIGENCE OF SUCH PARTY UNDER THIS AGREEMENT OR OTHERWISE ARISING FROM THEIR RESPECTIVE ACCESS ROADWAY FACILITIES AS DESCRIBED HEREIN. EACH OF THE PARTIES HERETO HEREBY RELEASES THE OTHER PARTY HERETO AND ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS AND AFFILIATES FROM, AND COVENANTS NOT TO SUE ANY OF THEM FOR ANY SUCH SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES, LOSS OF PROFITS OR BUSINESS INTERRUPTION.**

(c) If any Indemnified Party claims that the Indemnifying Party is liable to such Indemnified Party for any Losses for which an Indemnified Party is entitled to be indemnified hereunder, such Indemnified Party shall send the Indemnifying Party a written notice ("Claim Notice") specifically describing the nature of the Claim, the amount of such Claim and the particular facts or events giving rise to such Claim; provided, however, that any delay in giving any Claim Notice shall not relieve the Indemnifying Party from any obligation hereunder unless (and then solely to the extent) the Indemnifying Party demonstrates actual damage caused by such delay.

(d) If the Indemnifying Party disputes a Claim, the Indemnifying Party shall notify the Indemnified Party of its reason for disputing such Claim within thirty (30) days after receipt of the Claim Notice, and the Indemnifying Party and the Indemnified Party shall use their best efforts to resolve such dispute by negotiation. If they reach a mutual agreement entitling the Indemnified Party to payment of all or a portion of its Claim, the Indemnified Party shall send a notice setting forth the terms of such agreement to the Indemnifying Party who shall execute and return such notice to the Indemnified Party promptly upon receipt thereof.

(e) If the Claim in question is subject to indemnification by the Indemnifying Party pursuant to this Agreement, the Indemnifying Party shall (except as provided below) take control of the defense and investigation of such Claim and shall employ and engage attorneys of its own choice to handle and defend the same, at the Indemnifying Party's cost, risk and expense. The Indemnifying Party shall have the right to settle or compromise any Losses against the Indemnified Party without the consent of such Party, provided that the terms of such settlement or compromise provide for the unconditional release of such Party and require the payment of monetary damages only. The Indemnified Party shall make available to the Indemnifying Party and its counsel, during normal business hours, all books and records of the Indemnified Party relating to such Losses and all personnel of the Indemnified Party knowledgeable as to the circumstances giving rise to such Losses; and each Party shall cooperate in all reasonable respects with the other and render such assistance as may be reasonably requested to ensure prompt and adequate defense of any Losses hereunder. The Indemnified Party shall have the right to employ its own counsel and participate in the defense of any Losses if the Indemnified Party so elects, but the fees and expenses of such counsel shall be at the Indemnified Party's expense, unless: (i) the employment of such counsel shall have been authorized in writing by the Indemnifying Party; (ii) the Indemnifying Party shall have refused to assume the defense of such Losses or shall not have employed counsel to take charge of the defense of such Losses within a reasonable time; or (iii) the Indemnified Party shall have reasonably concluded that there may be defenses available to it which are different from or additional to those available to the Indemnifying Party (in which case the Indemnifying Party shall not have the right or obligation to direct the defense of such Losses on behalf of the Indemnified Party), in any of which events said fees and expenses shall be borne by the Indemnifying Party. Should the Indemnifying Party reject the Indemnified Party's Claim, the Indemnified Party shall have the right, at the Indemnified Party's expense, to compromise or defend, through counsel of the Indemnified Party's own choosing, such Losses without prejudice to any rights the Indemnified Party may have under this Agreement or otherwise in the event indemnification has wrongfully been denied by the Indemnifying Party.

(f) Following the resolution of an Indemnity Claim pursuant to this Section, any Party entitled to a payment of an Indemnity Claim shall be entitled to receive prompt payment of such Indemnity Claim.

(g) Each Party agrees to cause its insurers to waive subrogation against the other Party.

6. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the owners of the Tracts and any subsequent transferee, owner, or assignee, but only during the period of such ownership.

7. **Amendment and/or Modification.** Neither this Agreement nor any term or provision hereof may be changed, waived, discharged, amended or modified orally, or in any manner other than by an instrument in writing signed by Developer and Madonna.

8. **Costs and Attorneys' Fees.** If any Party hereto shall bring any suit or other action against another Party hereto for relief, declaratory or otherwise, arising out of this Agreement, the Parties shall pay their own attorney's fees, but the losing Party shall pay the prevailing Party's actual, reasonable costs and expenses of suit.

9. **Notice.** All notices, demands and requests (collectively, the "Notice") required or permitted to be given under this Agreement must be in writing and shall be delivered either in person, or by express, certified or registered mail, with return receipt requested and all postage and fees prepaid, or by commercial overnight courier delivery, or by all or any combination of the above. Any such notice shall be considered given on the earliest date of: actual receipt, or the first attempted delivery if delivery shall be refused. Any notice from counsel for either Party shall be deemed an official notice from such Party. Such notice shall be given the Parties hereto at the following addresses. Upon at least ten (10) days prior written notice, each Party shall have the right to change its address to any other address within the United States of America. The initial address of the Parties shall be:

To Developer:	168th and Dodge L.P. RED Development One East Washington Street, #300 Phoenix, AZ 85004 Attn: Legal Dept
To Madonna:	Madonna Rehabilitation Hospital 5401 South Street Lincoln, NE 68506 Attn: Mike Munro, General Counsel
With a copy to:	Cline Williams Wright Johnson & Oldfather, L.L.P. 233 South 13 th Street, Suite 1900 Lincoln, NE 68508 Attn: Thomas C. Huston

10. **Governing Law.** This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Nebraska, without giving effect to principles and provisions thereof relating to conflict or choice of laws. Venue for any action under this Agreement shall lie in the State of Nebraska.

11. **Documents.** Each Party to this Agreement shall perform any and all acts and execute **and** deliver any and all documents as may be necessary and proper under the circumstances in order to accomplish the intents and purposes of this Agreement and to carry out its provisions.

12. **Severability.** In the event any term or provision of this Agreement is determined by an appropriate judicial authority to be illegal, invalid or unenforceable for any reason, such illegality, invalidity or unenforceability shall not affect the remaining provisions of this Agreement, and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never been inserted herein.

13. **Headings.** The section or paragraph headings shown in this Agreement are for convenience of reference only and shall not be held to explain, modify, simplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

14. **Counterparts.** This Agreement may be signed in counterparts, any one of which shall be deemed to be an original, and which, when taken together, shall constitute one and the same instrument.

15. **Exhibits.** The Exhibits attached to this Agreement are incorporated herein by this reference for all purposes and shall be considered a part of this Agreement.

16. **No Dedication to Public; No Third-Party Beneficiaries.** The rights and easements created and granted hereunder shall be appurtenant to and shall run with the land as between the property or estate of the grantor, as the servient tenement, and the property or the estate of the grantee, as the dominant tenement. Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Developer Tract or the Madonna Tract to the general public or for the general public or for any public purpose, it being the intention of the Parties hereto that this Agreement shall be strictly limited to and for the purposes herein expressed. This Agreement is not intended to confer upon any person or entity, other than the Parties hereto and their respective successors and assigns in ownership of fee title to the Developer Tract and the Madonna Tract, respectively, any rights or remedies hereunder.

17. **Negation of Fiduciary Relationship.** Neither anything contained in this Agreement nor any act of any Party, shall be deemed or construed by the Parties, or either of them, or by any third party, to create a relationship of principal and agent, partnership, or joint venture, or of any association between or among the Parties. The Parties acknowledge and agree that no Party has an advantage over the others in the negotiation of this Agreement or under the provisions of this Agreement, and that there is no fiduciary or special relationship between the Parties.

18. **Right to Grant Additional Easements.** Developer and Madonna specifically reserve the right to grant additional easements or rights-of-ways upon, over, along or across their respective Tracts, as applicable, to such other persons or entities, including a dedication for public use, or for such purposes as the granting Party may desire, or to use the area covered by the easements granted over such Party's Tract for other purposes, provided that Developer and Madonna, respectively, shall not be unreasonably disturbed in the use and enjoyment of the easements and rights hereby granted. In such event of the grant of additional easements, the percentage shares of the Maintenance Expenses described in paragraph 3 above shall be equitably adjusted.

19. **Entire Agreement.** This Agreement (and any attached exhibits) contains the entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and there are no representations, inducements, promises or agreements, oral or otherwise, not embodied herein. Any and all prior discussions, negotiations, commitments and understandings relating thereto are merged herein. There are no conditions precedent to the effectiveness of this Agreement other than as stated herein, and there are no related collateral agreements existing between the Parties that are not referenced herein. This Agreement shall be filed of record.

List of Exhibits:

Exhibit A – Description of the Developer Tract (Access Easement Area)

Exhibit B – Site Plan

Exhibit C – Description of the Madonna Tract

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first written above.

DEVELOPER:

Developer:

168th and Dodge L.P., a Nebraska limited partnership

By: RED Development of West Dodge, LLC,
General Partner and Manager

By: RED Development, LLC, Manager

By: *Jeff McMahon*
Jeff McMahon, Vice President

STATE OF Kansas)
) ss.
COUNTY OF Johnson)

On May 6, 2019, before me, Katarina Lee, a Notary Public in and for said state, personally appeared Jeff McMahon, Vice President of RED Development, LLC, Manager of RED Development of West Dodge, LLC, General Partner and Manager of 168th and Dodge L.P., a Nebraska limited partnership, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his authorized capacity, and that by his signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Katarina Lee
Notary Public in and for said State



MADONNA:

Madonna Rehabilitation Hospital, a Nebraska nonprofit corporation

By: *Paul Dongilli Jr.*
Name: Paul Dongilli Jr.
Title: President
Date Executed: *4/26/2019*

STATE OF Nebraska)
) ss.
COUNTY OF Lancaster)

On April 26, 2019, before me, Cynthia J. Schumacher Notary Public in and for said state, personally appeared Paul Dongilli Jr., President of Madonna Rehabilitation Hospital, a Nebraska nonprofit corporation, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Cynthia J. Schumacher
Notary Public in and for said State

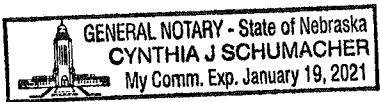
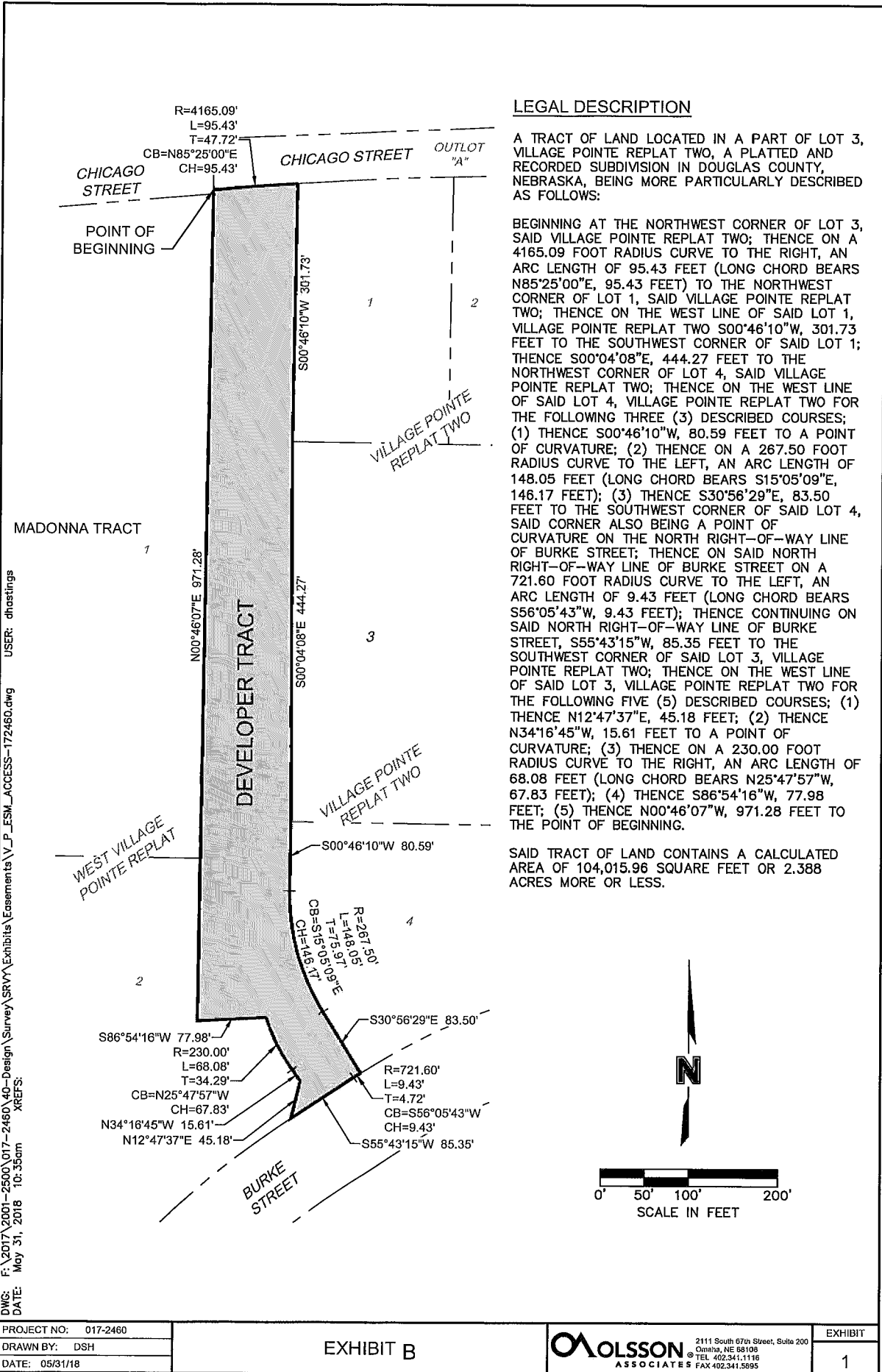


EXHIBIT A
DEVELOPER TRACT/ACCESS EASEMENT AREA

Lot 3, in VILLAGE POINTE REPLAT TWO, an Addition to the City of Omaha, as surveyed, platted and recorded, in Douglas County, Nebraska.



DWS: F:\2017\2001-2500\017-2460\40-Design\Survey\SRV\Exhibits\Exhibits\V_P_ESM_ACCESS-172460.dwg
 DATE: May 31, 2018 10:35am
 USER: dhastings

PROJECT NO:	017-2460
DRAWN BY:	DSH
DATE:	05/31/18

EXHIBIT B

2111 South 67th Street, Suite 200
 Omaha, NE 68108
 © TEL 402.341.1116
 FAX 402.341.5895

EXHIBIT	1
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**EXHIBIT C
MADONNA TRACT**

Lots One (1) and Two (2), West Village Point Replat (being a replat of Lot Eleven (11), West Village Point), a subdivision in Douglas County, Nebraska.