

MISC 2003203737

RICHARD H. ...  
LEGACY DEVELOPMENT, L.L.C.  
ROYCE LEGACY, LLC

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RECORDED

**DECLARATION OF  
COVENANTS, CONDITIONS AND RESTRICTIONS  
FOR A PART OF LEGACY, A SUBDIVISION  
IN DOUGLAS COUNTY, NEBRASKA**

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THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS ("Declaration"), is made and entered into as of the 16<sup>th</sup> day of October, 2003, by and between LEGACY DEVELOPMENT, L.L.C., an Iowa limited liability company ("Developer"), and ROYCE LEGACY, LLC, a Nebraska limited liability company ("Royce"), (the foregoing parties, and their respective successors and assigns are hereinafter collectively referred to as the "Parties").

**WITNESSETH:**

WHEREAS, Developer is the owner of approximately 27 acres of property located in Douglas County, Nebraska, which is legally described as Lots 96 through 103, inclusive, Legacy, a subdivision, as surveyed, platted and recorded in Douglas County, Nebraska, and depicted on Exhibit A (the "Site Plan") as the **Legacy West Shopping Center** ("Shopping Center").

WHEREAS, Royce has contracted with Developer for the purchase of Lots 100, 101 and 102, Legacy, a subdivision as surveyed, platted and recorded in Douglas County, Nebraska, as depicted on the Site Plan and referred to herein as the "Royce Parcel."

WHEREAS, that portion of the Shopping Center excluding the Royce Parcel is referenced herein as the "Developer Property," and is more particularly described as Lots 97, 98, 99, and 103, Legacy, a subdivision as surveyed, platted and recorded in Douglas County, Nebraska.

WHEREAS, Developer intends that the Shopping Center, including the Royce Parcel, will form a unified shopping center to be known as Legacy West Shopping Center.

NOW, THEREFORE, the Parties hereby declare that the Royce Parcel and the Developer Property shall be held, sold, leased and conveyed subject to the following easements, restrictions, covenants and conditions which are for the purpose of protecting the value and desirability of, and which shall run with the real property and be binding on all parties having any right, title or interest in such Properties or any, part thereof, their heirs, successors and assigns and shall inure to the benefit of each owner or occupant thereof. Further, in

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consideration of the premises, the promises and covenants of the Parties hereto, the mutual benefits and advantages accruing to them, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## **ARTICLE I DEFINITIONS**

Section 1.1 "Building Area" shall mean all of those areas on each Parcel shown as Building Envelopes on Exhibit A, together with those portions of the expansion areas and Building Envelopes which are from time to time covered by a Building or other commercial structure.

Section 1.2 "Building Envelopes" shall mean all those areas on the Parcels located within the "Building Envelope Lines" as shown on Exhibit A.

Section 1.3 "Common Area" shall mean all real property within each Parcel which is intended for the common use and mutual enjoyment of the Owners, in keeping with the spirit and intent of this Declaration. "Common Area" shall include all non-publicly-dedicated streets, and all areas on each Parcel which are not Building Area, together with those portions of the Building Area on each Parcel which are not from time to time actually covered by a building or other commercial structure or which cannot under the terms of this Declaration be used for Buildings. Canopies which extend over the Common Area, together with any columns or posts supporting the same, and sidewalks adjacent to a Building, shall be deemed to be a part of the Building to which they are attached and not a part of the Common Area.

Section 1.4 "Owner" shall mean and refer to the record owner of a fee simple title or to the Tenant under the lease, whether one or more persons or entities, to any Parcel which is a part of the Properties, as hereinafter defined, but excluding those having such interest merely as security for the performance of any obligation.

Section 1.5 "Parcels" or "Properties" shall mean and refer to the Developer Property and the Royce Parcel.

Section 1.6 "Permittee" shall mean all owners, their Tenants or licensees of the Properties, and each of their respective officers, directors, employees, agents, contractors, customers, vendors, suppliers, visitors, and invitees.

Section 1.7 "Tenant" shall mean and refer to the designated Tenant or lessee under a lease agreement for parts of the Properties or improvements constructed on the Properties, and including any sublessees or subtenants of a Tenant.

## **ARTICLE II EASEMENTS**

Section 2.1 Definitions and Documentation. For the purposes of this Article, the following will apply:

- (a) A Party granting an easement is called the "Grantor", it being intended that the grant shall thereby bind and include not only such Party but also its successors and assigns.

(b) A Party to whom the easement is granted is called the "Grantee", it being intended that the grant shall benefit and include not only such Party but its successors, assigns, Tenants and Permittees; although not for the direct benefit of Permittees, the Grantee may permit from time to time its Tenants and Permittees to use such easements; provided, however, that no such permission nor the division of the dominant estate shall permit or result in a use of the easement in excess of the use contemplated at the date of the creation of such easement.

(c) The term "Building(s)" means the building(s) which has (have) been, will be or may be constructed within a Party's Permissible Building Area, but such term does not include Common Area Improvements (as that term is hereinafter defined).

(d) The term "Common Area Improvements" means all improvements which will be or may be constructed on the Common Areas under the terms of this Declaration, and all other improvements which would be part of the "Common Area" under the above definition, and all improvements constructed from time to time in replacement of the same or in such redesign of the same as may be agreed to by the Parties.

(e) The term "Common Utility Facilities" means utility systems and facilities from time to time situated on or serving the Properties, up to the building wall of any Building, for use or service in common by the Owners and Permittees or for the service of the Common Area, such as the following: storm drainage, retention and disposal facilities and sanitary sewer systems, manholes, underground domestic and fire protection water systems, underground natural gas systems, underground electric power cables and systems, underground telephone and television cables and systems, and all other utility systems and facilities for such common use or service, including, without limitation, those installed under the provisions of this Declaration and as replacements thereto.

(f) The term "Improvements" means Building(s) and the Common Area Improvements on a Parcel.

(g) The word "in" with respect to an easement granted "in" a particular Parcel means, as the context may require, "in", "to", "on", "over", "through", "upon", "across", and "under", or any one or more of the foregoing.

(h) The term "Party" means Developer or Royce and "Parties" means both of the foregoing, or any successor person(s) acquiring any interest of a Party in or to any portion of such Party's Parcel.

(i) The term "Permissible Building Area" means an area designated on the Site Plan as the Building Envelopes within which a Building of a certain size and height may be constructed as hereinafter more fully provided. No building, structure or improvements (other than Common Area Improvements) shall be erected or maintained outside of a Permissible Building Area.

(j) The term "Separate Utility Facilities" means any of the following not for use in common by other Parties or for service of the Common Area: storm drainage facilities and sanitary sewer systems (including, without limitation, underground storm and sanitary sewer systems), underground domestic and fire protection water systems, underground natural gas systems, underground electric power, cables and systems,

underground telephone and television cables and systems, and all other utility systems and facilities reasonably necessary for the use or service of any Improvement (as that term is defined in Section 2.1(f)) situated on any Parcel.

(k) All easements granted herein are non-exclusive and are irrevocable and perpetual, except as otherwise provided in this Declaration.

(l) All easements herein shall be easements appurtenant and not easements in gross.

(m) In the event a Party transfers or conveys a portion of its Parcel in accordance with the terms of this Declaration, those easements granted under this Article II which benefit, bind, and burden the remainder of the Parcel not transferred or conveyed shall benefit, bind, and burden the portion of the Parcel so transferred or conveyed, and those easements granted under this Article II which benefit, bind, and burden the portion so transferred or conveyed shall benefit, bind, and burden the remainder of the Parcel of which it was a part.

(n) All easements granted hereunder shall exist by virtue of this Declaration, without the necessity of confirmation by any other document. Likewise, upon the termination of any easement (in whole or in part) or its release in respect of all or any part of any Parcel, in accordance with the terms hereof, the same shall be deemed to have been terminated or released without the necessity of confirmation by any other document. However, upon the request of a Party, the other Parties will sign and acknowledge a document memorializing the existence (including the location and any conditions), or the termination (in whole or in part), or the release (in whole or in part), as the case may be, of any easement, if the form and substance of the document is approved by the other Parties. No grant of an easement pursuant to this Article II shall impose any greater obligation on any Party to construct or maintain its Building except as expressly provided in this Declaration.

Section 2.2 Easements for Use of Common Area. Developer, as the Owner of the Shopping Center, hereby creates and grants to Royce and to all Permittees of the Shopping Center (each being a Grantee), non-exclusive easements in the Common Areas in and on the Shopping Center for:

- (a) ingress to and egress from the Parcels;
- (b) the passage of vehicles;
- (c) the passage and accommodation of pedestrians; and
- (d) the doing of such other things as are authorized or required to be done on the Common Area under this Declaration;

Provided, however, that such easements are limited to such portions of the Common Area as are now or hereafter from time to time set aside or intended to be set aside, maintained and authorized for such use under this Declaration, including those portions of the Common Area shown on Exhibit A.

Provided further that, except as specifically provided for herein, the Parties hereby specifically disclaim any intention to create any reciprocal parking easements or to create easements for the loading and unloading of vehicles between the Royce Parcel and the Developer Property.

(e) Enjoyment of the easements granted by this Section shall commence on the date the Improvements on the Common Area in question are substantially completed.

(f) Each Party hereby reserves the right to eject from the Common Area on its Parcel any person not authorized to use the same. In addition, each Party reserves the right to close off the Common Area of its Parcel for such reasonable periods of time as may be legally necessary in the reasonable opinion of its attorneys to prevent the acquisition of prescriptive rights by anyone. Before closing off any part of the Common Areas as provided above, such Party must give notice to the other Parties of its intention to do so and must coordinate its closing with the activities of the other Parties so that no unreasonable interference with the operation of the Properties occurs.

(g) The easements provided for in this Section 2.2 are subject to the rights to use the Common Area for other purposes provided for in this Declaration; provided, however, that no changes shall be made in the Common Area or in the location or design of Common Area Improvements, except as otherwise herein provided.

Section 2.3 Ingress, Egress and Parking. [Intentionally Deleted].

Section 2.4 Easements for Utility Facilities. Developer, as the Owner of the Shopping Center, hereby creates and grants to Royce and to all Permittees of the Shopping Center (each being a Grantee), perpetual easements to the Shopping Center, except within Permissible Building Area, as shown on Exhibit A, for the installation, use, operation, maintenance, repair, replacement, relocation and removal of Common Utility Facilities and Separate Utility Facilities serving the Parcels.

(a) All Separate Utility Facilities installed in the Common Area, whether installed under this Section or otherwise, and all Common Utility Facilities, shall be underground if reasonably possible and the location of the Separate Utility Facilities shall be subject to the approval of the Party across whose Parcel the same are to be located.

(b) Except as otherwise provided herein, the Grantee of any easement for Separate Utility Facilities under this Section shall be responsible, as between such Grantee and the Grantor, for the installation, maintenance, repair and removal at Grantee's cost of all Separate Utility Facilities installed by the Grantee pursuant to the easement grant, as well as for all Separate Utility Facilities installed by the Grantee on its own parcel. Any such installation, maintenance, repair, replacement, relocation and removal of Separate Utility Facilities shall be performed by Grantee only after thirty (30) days advance notice to Grantor of Grantee's intention to do such work. However, in the case of an emergency, any such work may be immediately performed after giving such advance notice to Grantor as is practicable under the circumstances. In addition, the Parties agree that all such installation, maintenance, repair and removal shall be performed in a manner that causes as little disturbance to Grantor as may be practicable under the circumstances and any and all portions of the surface area of Grantor's Parcel which may have been excavated, damaged or otherwise disturbed as a result of such

work shall be restored, at the sole cost and expense of Grantee, to essentially the same condition as the same were in prior to the commencement of any such work. .

(c) Grantee shall defend, indemnify and hold Grantor harmless from and against any and all liens, losses, liabilities, costs or expenses (including reasonable attorneys fees), incurred in connection with Grantee's exercise of the Separate Utility Facilities easements under this Section 2.4, except to the extent occasioned by Grantor's negligent or wrongful act or omission to act.

(d) The Grantor of any easement for Separate Utility Facilities under this Section 2.4 may use the utility facilities installed pursuant to such easement; provided, however, that the increase in costs incurred in order to make such utility facilities adequate to serve Grantor's additional use shall be borne by such Grantor; and provided, further, that Grantor gives written notice within the time period called for under subparagraph (1) and otherwise complies with the requirements of subparagraphs (2), (3) and (4) of the following subparagraph (e) of this Section 2.4.

(e) The Grantor of any easement under this Section 2.4 may relocate on its Parcel any Separate Utility Facilities or Common Utility Facilities installed thereon under any easement granted by it; provided, however, that such relocation:

(1) may be performed only after Grantor has given Grantee thirty (30) days' written notice of its intention to relocate such facilities;

(2) shall not interfere with or diminish the utility services to the Grantee (however, temporary interferences with and diminutions in utility services shall be permitted if they occur during the non-business hours of the Grantee, and Grantee has been so notified under Subsection 2.4. Grantor shall promptly reimburse Grantee for all costs, expenses and losses Incurred by Grantee as a result of such interferences or diminutions, or both);

(3) shall not reduce or unreasonably impair the usefulness or function of the facilities in question;

(4) shall be located underground, if reasonably possible; and

(5) shall be performed without cost or expense to Grantee, and, if Common Utility Facilities or Separate Utility Facilities which provide service to the Grantee are involved, in accordance with plans approved by the Grantee.

(f) All Common Utility Facilities lying within any Common Area shall for all purposes be deemed to be included within the definition of Common Area Improvements.

(g) Nothing herein shall be construed to grant any Party the right to utilize or drain into any detention facilities or retention located on any other Party's Parcel, except as permitted for the Shopping Center pursuant to the easements granted in this Declaration.

Section 2.5 Construction Easements.

(a) Developer, as Owner of the Shopping Center, hereby creates and grants to Royce easements in the Common Area of the Shopping Center, and where applicable, in the Permissible Building Area on Developer's Property in the Shopping Center prior to the construction of any improvements thereon, for the following:

(1) The initial construction of the improvements contemplated within this Declaration.

(2) With respect to any Parcels on which fresh dirt is dumped, the area shall be sloped to meet any contiguous property within the Shopping Center or public roads, and shall be smoothed in a level manner consistent with the contours of the adjoining property or in accordance with a grading plan approved by the Grantor, which approval shall not be unreasonably withheld, conditioned or delayed.

(b) The location of all easements under this Section 2.5 shall be subject to the approval of Grantor.

(c) Each Grantee agrees to pay the Grantor the additional cost of construction, maintenance, repair and replacement of any improvement or structure constructed by Grantor which arises on account of Grantee's exercise of its easement rights under this Section 2.5. Each Grantee further agrees to use due care in the exercise of the rights granted under this Section 2.5 and, in the event the exercise of the rights granted under this Section 2.5 requires Grantee to enter upon the Parcel of Grantor, to first obtain the consent of Grantor as to the methods and timing in the exercise of such rights.

(d) Each Party covenants and agrees, respectively, that its exercise of such easements shall not result in damage or injury to the Buildings or other Improvements of any other Party, and shall not interfere with or interrupt the business operation conducted by any other Party in the Shopping Center. Provided further, the Parties agree that once the final topcoat of asphalt paving has been placed on the Royce Parcel, all construction traffic from the Developer's Property and the Royce Parcel will be limited to the use of the following roadways: Wright Street, 175<sup>th</sup> Street and 177<sup>th</sup> Street and other streets or driveways that are not on the Royce Parcel and that do not interfere with traffic flow to or on the Royce Parcel. In addition, each Grantee, at its sole cost and expense, shall promptly repair, replace or restore any and all improvements of Grantor which have been damaged or destroyed in the exercise by Grantee of the easements granted under this Section 2.5 and shall defend, indemnify and hold Grantor harmless from and against all liens, losses, liabilities, costs or expenses (including reasonable attorneys' fees) incurred in connection with or arising out of Grantee's exercise of said easements, except to the extent occasioned by Grantor's negligent or wrongful act or omission to act.

(e) Grantee's improvements in such easements shall, for purposes of maintenance, operation, insurance, taxes, repairs, reconstruction and restoration under this Declaration, be deemed to be part of the Grantee's parcel and Building and shall be deemed not to be part of the Grantor's Parcel or Building for such purposes.

(f) Except as reasonably necessary for and during the construction of any building (in which case a Party may have a temporary structure(s) on its own Parcel), no structure of a temporary character shall be erected or allowed to remain on any Parcel.

Section 2.6 Self-Help Easements. Upon completion of construction of an enclosed building area on the Royce Parcel, Developer hereby grants to Royce easements in the Common Area of Developer's Parcel for the installation, construction, repair, maintenance, relocation and removal of any and all Separate Utility Facilities and Common Area improvements, if such installation, construction, repair, maintenance, relocation or removal is required or permitted under the other provisions of this Declaration. Royce shall defend, indemnify and hold Developer harmless from and against all liens, losses, liabilities, costs or expenses (including attorney's fees) incurred in connection with or arising out of Royce exercise of said easements, except to the extent occasioned by the negligent or wrongful act or omission to act by Developer. The duration of the easements granted under this Section shall be coterminous with the respective provisions of the Declaration which give Royce the right or the obligation to perform the work described in this Section.

Section 2.7 Abandonment of Easements. After the expiration of the term of this Declaration, the perpetual easements granted pursuant to Sections 2.3 and 2.4 hereof, or all or any part or parts thereof, may be abandoned and terminated, if the use thereof shall have ceased and cessation thereof continues for a continuous period of five (5) years. Thereafter, the then record owner of the fee of the Parcel burdened with such easement may give written notice by United States certified mail, return receipt requested, mailed to the then record owner of the fee of the Parcel benefited by such easement and the then record owner, if any, of any leasehold interest in such benefited Parcel, stating that such easement has been abandoned and may place of record in the Real Property Records of Douglas County, Nebraska, an affidavit that such abandonment has taken place and that such notice has been properly given. If the then record owner of the fee of the benefited Parcel fails to place of record in the Real Property Records of Douglas County, Nebraska, within ninety (90) days after the giving of such notice, an affidavit that such easement has not ceased to be used for such continuous five (5) year period, such easement shall thereupon be conclusively deemed abandoned and any person having or thereafter acquiring an interest in the Parcel previously burdened shall hold and take such interest free of and unencumbered by such easement.

Section 2.8 Easements to Public Utilities. Any grant or other conveyance of an easement permitted hereunder to a public utility by Grantor on its Parcel shall, without necessity of further recital in the conveyance instrument, be deemed to include the following conditions, covenants and restrictions to which such public utility and its successors shall be bound unless stated otherwise in such instrument.

- (a) The easement is non-exclusive;
- (b) All facilities installed pursuant to the easement shall be underground, except for manhole and manhole covers which shall be flush with adjacent grade, and except as otherwise shown on plans approved by Grantor;
- (c) Grantor retains the right to use the surface areas as Grantor sees fit;
- (d) Grantor reserves the right to require Grantee to relocate its facilities (and vacate the easement) to another location on Grantor's Parcel, subject to the conveyance of a similar easement, all at Grantor's cost and expense;



(e) Grantee shall not, in its use or installation, interfere with other installations and easements in the area;

(f) Grantee shall make adequate provisions for the safety and convenience of all persons using the area;

(g) Grantee, following Installation or other work, shall replace and restore the areas and improvements to the condition in which they were immediately prior to performance of such installation and work;

(h) Grantee shall defend, indemnify and hold harmless Grantor against all loss, liability, and costs (including reasonable attorneys' fees) which may result to Grantor from the negligent act or omission of, its agents, employees and contractors; and

(i) Grantee shall not permit any claim, lien or encumbrance to attach against Grantor's Parcel or any interest therein.

Section 2.9 No Barrier Agreement. No barriers, fences, grade changes or other obstructions shall be erected so as to impede or interfere in any way with the free flow of vehicular and pedestrian traffic between those portions of the Properties from time to time devoted to pedestrian access, vehicular roadways or parking area, or in any manner unreasonably restrict or interfere with the use and enjoyment by any of the Parties of the rights and easements created by this Article II. The preceding sentence shall not prohibit the reasonable designation and relocation of traffic and pedestrian lanes. In addition, each owner may temporarily close or block traffic on its Parcel for the time necessary for the purpose of protecting ownership rights and preventing creation of easements to the public and unrelated third parties (provided, however; that prior to closing off any portion of the Common Area, as herein provided, such Owner shall give fifteen (15) days written notice to each other Owner of its intention to do so and shall attempt to coordinate such closing with each other Owner, so that no unreasonable interference in the passage of pedestrians or vehicles shall occur), and may temporarily fence off portions of its Parcel as reasonably required for the purpose of repair, construction and reconstruction.

### **ARTICLE III RESTRICTIONS**

Section 3.1 Land Use and Building Type. Every Parcel shall be used only for businesses customarily located in office and retail shopping centers in the regional area, including, but not limited to, financial institutions, service shops, offices, retail stores selling retail merchandise normally carried in other quality retail shopping centers, and bars and restaurants, but subject to the restrictions set forth herein.

Section 3.2 Completion of Improvements. All Buildings on the Shopping Center shall be constructed within the Permissible Building Areas only. Weather permitting, all paving and landscaping will be finished upon completion of the Building, but in no event shall it be installed later than ninety (90) days after the Building is occupied. Total construction time from pouring footings to the completion of the Building ready for occupancy shall not exceed eighteen months, weather permitting.

Section 3.3 Nuisances. No Parcel shall be used for anything other than purposes which may be permitted by applicable zoning regulations, and no Parcel may be used for any purpose which would violate Section 3.1 or which would constitute a nuisance.

Section 3.4 Use Restrictions.

(a) During the term of this Declaration no portion of the Properties may be used for any of the following purposes without the written consent of Developer and Royce:

(1) A bowling alley.

(2) A service station or truck stop, except for gasoline pumps in conjunction with a convenience store located on either of the Outparcels.

(3) A flea market.

(4) A school, except for a tutorial center similar to a Sylvan Learning Center.

(5) A car wash, except on an Outparcel and where the same shall have constructed and shall use sanitary sewer, water and storm water drainage lines located within an adjacent public right of way that does not use the lines and systems solely utilized by the Royce Parcel.

(b) During the term of this Declaration, no portion of the Properties may ever be used for any of the following uses whatsoever:

(1) An adult type bookstore or other establishment selling or exhibiting pornographic materials or live nudity.

(2) A massage parlor (which does not include tanning parlors, health spas or clubs or beauty salons that offer massages as an incidental part of the tanning parlors, health and fitness and beauty services.

(3) A skating rink.

(4) A mortuary.

(5) A mobile home or trailer court, labor camp, junkyard or stockyard.

(6) A land fill, garbage dump or for the dumping, disposing, incineration or reduction of garbage.

Section 3.5 Use Restrictions on the Developer Property. No portion of the Shopping Center, excluding the Royce Parcel, may be sold, leased, or otherwise directly or indirectly, used or occupied for any of the following purposes:

(a) For so long as following the initial opening there is operated on the Royce Parcel a Colton's or other steakhouse restaurant, the Developer Property shall not be used for the operation of a steakhouse restaurant or food service establishment whose sales of steak (which for purposes hereof shall not include hamburger) exceed 30% of

its total sales (provided, however, such restriction shall not operate to preclude a Ruth's Chris Steakhouse, Morton's Steakhouse, or Ryan's Steakhouse restaurant), it being understood that it shall not be deemed a failure to operate when such failure is caused by remodeling, labor disputes, force majeure (including reconstruction as a result of a fire or casualty) or conditions beyond the control of the operator of the business;

(b) For so long as following the initial opening there is operated on the Royce Parcel a Fox & Hound or similar food and alcoholic beverage facility including more than ten (10) televisions for viewing by its customers and includes more than two (2) billiards tables, the Developer Property shall not be used for the operation of a "Competing Business." As used herein, a "Competing Business" shall mean any facility which allows the use of three (3) or more billiards tables by its customers or patrons. By way of illustration, and not of limitation, the facilities known as "Tanners," "Players," and "Champs" are examples of operations which, as currently operated, constitute Competing Businesses. It shall not be deemed a failure to operate when such failure is caused by remodeling, labor disputes, force majeure (including reconstruction as a result of a fire or casualty) or conditions beyond the control of the operator of the business.

(c) For so long as, following the initial opening, there is operated on the Royce Parcel a Ted's Montana Grill or similar steakhouse restaurant whose business includes the sale of prepared, ready-to-eat bison or food sales of "gourmet hamburgers" exceeds fifty percent (50%) of the gross sales of such restaurant ("gourmet hamburgers" means ground meat sandwiches exclusive of fast-food/quick-serve sandwiches), the Developer Property shall not be used for the operation of any restaurant or food service establishment which includes the sale of prepared, ready-to-eat bison or whose sales of gourmet hamburgers exceeds fifty percent (50%) of gross sales of such restaurant, it being understood that it shall not be deemed a failure to operate when such failure is caused by remodeling, labor disputes, force majeure (including reconstruction as a result of a fire or casualty) or conditions beyond the control of the operator of the business.

## ARTICLE IV CONSTRUCTION

### Section 4.1 Buildings.

(a) Design and Construction. The Buildings within the Shopping Center shall be designed so that the exterior elevation of each shall be architecturally and aesthetically compatible and so that building wall footings shall not encroach from one Parcel onto another Parcel; provided, however, that Royce decision shall be final with respect to its Buildings. The design and construction shall be of high quality. No Building in the Shopping Center shall exceed forty (40) feet in height above finished grade as measured from finished floor to roof; provided, however that the main sign building pediment or entrance canopy pediment on any Building constructed on the Royce Parcel may exceed said height limitation, but shall not exceed in any event forty-five (45) feet. **No Building in those areas of the Developer Property shown as Lot 99 on the Site Plan may exceed twenty-six feet (26') in height above finished grade as measured from finished floor to roof.** No Building shall have a metal exterior (although a Building may have a standing metal seam roof or canopy features) and no rooftop signs shall be permitted on any Building constructed in the Shopping Center unless approved in advance by Royce and Developer.

(b) Location. No Building shall be constructed on any Parcel (as either immediate development or future expansion) except within the Permissible Building Areas. The front wall(s) of the Building(s) on the Royce Parcel shall be constructed approximately in the locations shown on the Site Plan.

(c) Fire Protection. Any Building constructed in the Shopping Center shall be constructed and operated in such a manner which will preserve the sprinklered rate on the other Buildings in the Shopping Center.

(d) Completion of Improvements. All Improvements shall comply with the Site Plan unless changes are approved in writing by the Parties. Weather permitting, all paving and landscaping will be finished upon completion of the building, but in no event shall it be installed later than ninety (90) days after the Building is occupied. Total construction time from pouring footings to the completion of the building ready for occupancy shall not exceed one (1) year, subject to Unavoidable Delays.

## **ARTICLE V DEVELOPMENT MAINTENANCE AND TAXES**

### Section 5.1    Development.

(a) "Parking Area" Ratio. Each Party hereto agrees that at all times there shall be independently maintained on each Parcel parking areas sufficient to accommodate no fewer than four (4) paved full size automobile parking spaces for each one thousand (1,000) square feet of floor area contained within the Buildings on such Parcel, or the number of parking spaces required by applicable law, whichever is greater; provided, however, that ten (10) paved full size automobile parking spaces for each 1,000 square feet of floor area contained within the Buildings on a Parcel, or the number of parking spaces required by applicable law, whichever is greater, will be required for space devoted to restaurants; and, provided further, that twelve (12) paved full size automobile parking spaces for each 1,000 square feet of floor area contained within the Buildings on a Parcel, or the number of parking spaces required by applicable law, whichever is greater, will be required for space devoted to restaurants serving alcohol.

(b) Subdivision. Subject to the provisions of this Declaration, the Parties reserve the right to subdivide, convey, lease or assign their respective Parcels or any portion thereof through any means including, but not limited to, subdivision, lease, ground lease, condominium declaration or air-lot condominium declaration.

Section 5.2    Maintenance. Each Party hereto shall maintain the Buildings on its Parcel in good order and condition and state of repair in accordance with the standards of good shopping center operation. Developer shall maintain the Common Areas and other areas of the Shopping Center, excluding the Buildings on the Royce Parcel, in good order and state of repair in accordance with the standards of good shopping center operation, including (but not limited to) sweeping and removal of trash, litter and refuse, painting and striping of parking areas, repair and replacement of paving as necessary, maintenance of landscaped areas (including replacement and replanting), removal of ice and snow from driveways and parking areas, and maintenance and repair or lighting standards and signs. Each of the Parties covenants that it, in addition to other requirements of this Section, will keep the inside and outside of all glass in the doors and windows of its Buildings clean; will maintain its Buildings at its own expense in a

clean, orderly and sanitary condition and free of insects, rodents, vermin and other pests; will not permit accumulation of garbage, trash rubbish and other refuse, and will remove same at its own expense, and will keep such refuse in proper containers or compactors in places designated therefore until called for to be removed; and will keep the common areas on its Parcel clear of accumulations of ice and snow. The Parties confirm their intention that the maintenance and repair of the Shopping Center should be of such a character that the Shopping Center's appearance will be that of a unified shopping center and, accordingly, the Parties agree to cooperate with each other in good faith with respect to said maintenance and repair and to the extent reasonably possible coordinate such repair and maintenance.

Section 5.3 Taxes. Each of the Parties hereto agrees to pay or cause to be paid, prior to delinquency, directly to the appropriate taxing authorities, all real property taxes and assessments which are levied against that part of the real property and improvements owned or leased by it.

## **ARTICLE VI INSURANCE/INDEMNIFICATION/CASUALTY**

### Section 6.1 Insurance.

(a) The Owner of each Parcel shall procure and maintain in full force and effect throughout the term of this Declaration commercial general liability insurance and property damage insurance against claims for personal injury, death, or property damage occurring upon in or about its Parcel with combined single limit coverage of not less than Two Million Dollars (\$2,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) in the aggregate. The Owner of each Parcel shall provide the other Parties with certificates of such insurance from time to time upon written request to evidence that such insurance is in force. Such insurance may be written by additional premises endorsement on any master policy of insurance carried by the party which may cover other property in addition to the property covered by this Declaration. Such insurance shall provide that the same may not be canceled without at least thirty (30) days prior notice to the other Parties.

(b) At all times during the term of this Declaration, the Owner of each Parcel shall keep Improvements on its Parcel insured against loss or damage by fire, lightning and other perils and events as may be customarily insured against under an "all-risk" policy of property and casualty Insurance, with such insurance to be for the full replacement value of the insured Improvements.

(c) Each Owner's policies of insurance provided for in this Article VI shall name such Owner as the named insured and the other Parties as additional insureds as their respective interests may appear, and each of them shall provide to the other certificates evidencing the fact that such insurance has been obtained.

(d) Each Owner of a Parcel, each for itself and its property insurer, hereby releases the others, and their tenants, employees and agents from and against any and all claims, demands, liabilities or obligations whatsoever for damage to each other's property or loss of rents or profits of an Owner resulting from or in any way connected with any fire or other casualty, whether or not such fire or other casualty shall have been caused by the negligence or the contributory negligence of the Party being released or by any agent, associate or employee of the Party being released, this release being to

the extent that such damage or loss is covered by the property insurance which the releasing Party is obligated hereunder to carry, or, if the releasing Party is not carrying that insurance, then to the extent such damage or loss would be covered if the releasing Party were carrying that insurance.

(e) Notwithstanding anything to the contrary contained in this Section 6.2, so long as the net worth of a Party or its parent company shall exceed One Hundred Million Dollars (\$100,000,000.00), and so long as such Party or any affiliate thereof is owner or lessee of its Parcel, such Party shall have the right to satisfy its obligations under this Article VI by self-insuring and retaining the financial risk for any claim.

## **ARTICLE VII EMINENT DOMAIN**

Section 7.1 Owner's Right to Award. Nothing herein shall be construed to give any Party any interest in any award or payment made to the other Parties in connection with any exercise of eminent domain or transfer in lieu thereof affecting said other Party's Parcel or giving the public or any government any rights in said Parcel. In the event of any exercise of eminent domain or transfer in lieu thereof of any part of the Common Areas located on the Shopping Center, the award attributable to the land and improvements of such portion of the Common Areas shall be payable only to the Owner thereof, and no claim thereon shall be made by the Owners of any other portion of the Common Areas.

Section 7.2 Collateral Claims. All other Owners of the Common Areas may file collateral claims with the condemning authority for their losses which are separate and apart from the value of the land area and Improvements taken from another Owner.

Section 7.3 Tenant's Claim. Nothing in this Article VII shall prevent a Tenant from making a claim against an Owner pursuant to the provisions of any lease between such Tenant and such Owner for all or a portion of any such award or payment.

Section 7.4 Restoration of Common Areas. The Owner of any portion of the Common Areas so condemned shall promptly repair and restore the remaining portion of the Common Areas within its respective Parcel as nearly as practicable to the condition of the same immediately prior to such condemnation or transfer, to the extent that the proceeds of such award are sufficient to pay the cost of such restoration and repair and without contribution from any other owner.

## **ARTICLE VIII MISCELLANEOUS**

Section 8.1 Rights and Obligations of Lenders. If by virtue of, any right or obligation set forth herein a lien shall be placed upon the Parcel of any Party hereto, such lien shall expressly be subordinate and inferior to the lien of any first lien holder now or hereafter placed on such Parcel. Any holder of a first lien on any Parcel, and any assignee or successor in interest of such first lien holder, shall be subject to the terms and conditions of this Declaration.

Section 8.2 Release from Liability. Any person acquiring fee or leasehold title to any Parcel, shall be bound by this Declaration only as to the Parcel or portion of the Parcel acquired by such person. In addition, such person shall be bound by this Declaration only during the period such person is the fee or leasehold owner of such Parcel or portion of the Parcel, except

as to obligations, liabilities or responsibilities that accrue during said period. Although persons may be released under this Section 8.2, the easements, covenants and restrictions in this Declaration shall continue to be benefits to and servitudes upon said Parcels running with the land.

Section 8.3 Breach.

(a) Remedies. If any Party shall fail to perform any covenant or condition contained in this Declaration, the aggrieved Party(ies) shall give the defaulting Party at least thirty (30) days written notice of such alleged default. If such default shall not have been cured within said period of thirty (30) days after the service of notice of default (or if such default be not reasonably susceptible of being cured within said period of thirty (30) days, and said defaulting Party shall not have in good faith commenced curing such default within said thirty (30) day period and shall not thereafter prosecute curing such default with diligence and continuity to completion) the aggrieved Party(ies) may Institute legal proceedings for full and adequate relief from the consequences of said default or threatened default.

(b) Right of Entry. The defaulting Party hereby grants to the aggrieved Party(ies) a nonexclusive right of entry and non-exclusive easements across and under any and all parts of the defaulting owners Parcel (excluding the right to enter in or upon any Buildings on such Parcel) for all purposes reasonably necessary to enable the aggrieved Party(ies) (acting directly or through agents, contractors or subcontractors) to perform any of the terms, provisions, covenants or conditions of this Declaration which the defaulting Owner shall have failed to perform, after notice and time to cure, as aforesaid, but only such notice and time to cure as shall be reasonable or practicable under the circumstances need be given in the event of any emergency. Any amounts so expended may be withheld from amounts otherwise payable to the defaulting owner or collection may be sought otherwise and in any event the Defaulting owner shall pay such amount with interest at the rate of two percent (2%) per annum over the then existing prime rate of interest announced from time to time by Citibank, N. A. or its successors (but in no event exceeding the maximum rate per annum permitted by law).

Section 8.4 Non-Merger. This Declaration shall not be subject to the doctrine of merger.

Section 8.5 Duration.

Section 8.6 Headings. The headings herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this document nor in any way affect the terms and provisions hereof.

Section 8.7 Entire Agreement. This Declaration constitutes the entire agreement between the Parties hereto as to the matters set forth in this Declaration. The Parties do not rely upon any statement, promise or representation not herein expressed, and this Declaration once executed and delivered shall not be modified or altered in any respect except by a writing executed and delivered in the same manner as required by this document.

Section 8.8 Estoppel Certificates. Each Party shall upon not less than thirty (30) days from receipt of written notice from any other Party execute and deliver to such other Party a certificate stating that (a) either this Declaration is unmodified and in full force and effect or is

modified (and stating the modification); and (b) whether or not to the best of its knowledge the other Party or Parties are in default in any respect under this declaration and if in default, specifying such default.

Section 8.9 Notice. Any notice required or permitted to be given under this Declaration shall be in writing and shall be made by personal delivery or deposit in the United States Mail as Certified Mail, Return Receipt Requested, postage prepaid, or deposit with a recognized national overnight courier and addressed to the party being notified at the address given below (or such other address which any party may designate for itself from time to time hereafter by written notice to the other parties):

Developer: Legacy Development, L.L.C.  
16820 Frances Street  
Suite 102  
Omaha, Nebraska 68130  
Attention: Mr. Jeff Johnson

Royce: Royce Legacy, LLC  
c/o Lawrence R. James, II  
444 Regency Parkway, Suite 300  
Omaha, Nebraska 68114

any such notice, request or other communication shall be considered given or delivered, as the case may be, on the date of hand or overnight courier delivery or upon deposit in the United States mail as provided above. Rejection or other refusal to accept or inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice, request or other communication.

Section 8.10 Assignment. The rights and obligations of any party hereunder may be assigned in whole or in part to any person acquiring the entire interest of such Party in its Parcel or to one or more ground lessees or lessees which rights and obligations shall be expressly assumed by such ground lessee or lessees for the term of the ground lease or lease between such Party and such ground lessee or lessee.

Section 8.11 Exhibits. Each reference herein to an exhibit refers to the applicable exhibit that is attached to this Declaration. All such exhibits constitute a part of this Declaration and by this reference are expressly made a part hereof.

Section 8.12 Limitation of Liability. Any person acquiring fee or leasehold title to any of the Properties or any portion thereof, shall be bound by this Declaration only as to the Parcel or portion of the Parcel acquired by such person. In addition, such person shall be bound by this Declaration only during the period such person is the fee or leasehold owner of such Parcel or portion of the Parcel; and, upon conveyance or transfer of the fee or leasehold interest shall be released from liability hereunder, except as to the obligations, liabilities or responsibilities that accrue prior to such conveyance or transfer. Although persons may be released under this Section, the easements, covenants and restrictions in this Declaration shall continue to be benefits to and servitudes upon said tracts running with the land.

Section 8.13 Term and Enforcement. The easements, restrictions and obligations created and imposed herein shall be effective upon the date hereof, shall run with the land in perpetuity, and shall inure to the benefit of and be binding upon the parties, their heirs,



executors, administrators, successors, successors in title, assigns and tenants, including any ground lessee under a ground lease and the customers, employees and invitees of such parties. Said easements, restrictions and obligations shall be unaffected by any change in the ownership of any property covered by this Declaration or by any change of use, demolition, reconstruction, expansion or other circumstances, except as specified herein.


Section 8.14 Severability. In the event any provision or portion of this Declaration is held by any court of competent jurisdiction to be invalid or unenforceable, such holding will not effect the remainder hereof, and the remaining provisions shall continue in full force and effect at the same extent as would have been the case had such invalid or unenforceable provision or portion never been a part hereof.

Section 8.15 Counterparts. This Declaration may be executed in one or more counterparts, each of which shall be deemed an original and all such counterparts shall constitute one and the same instrument.

(SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the Parties hereto have executed and delivered this Declaration as of the day and year first written above.

LEGACY DEVELOPMENT, L.L.C., an Iowa limited liability company

By: 

Name: Jeff Johnson

Its: Managing Member

ROYCE LEGACY, LLC, a Nebraska limited liability company

By: 

Name: Lawrence R. James, II

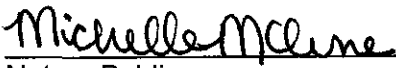
Its: Manager

STATE OF NEBRASKA     )  
  ) SS.  
COUNTY OF DOUGLAS    )

I, the undersigned, a Notary Public in and for the County and State aforesaid, do hereby certify that Jeff Johnson, personally known to me to be the Managing Member of Legacy Development, L.L.C., an Iowa limited liability company, and personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Managing Member, appeared before me this day in person and acknowledged that he signed, sealed and delivered the foregoing instrument as such Managing Member, and as his free and voluntary act of said limited liability company for the uses and purposes therein set forth; and on his respective oath stated that he was duly authorized to execute said instrument.

Given under my hand and Notarial Seal this 16 day of October, 2003.



  
Notary Public

My commission Expires: \_\_\_\_\_

STATE OF NEBRASKA     )  
  ) SS.  
COUNTY OF DOUGLAS    )

I, the undersigned, a Notary Public in and for the County and State aforesaid, do hereby certify that Lawrence R. James, II, personally known to me to be the Manager of Royce Legacy, LLC, and personally known to me to be the same person whose name is subscribed to the foregoing instrument as such Manager, appeared before me this day in person and acknowledged that he signed and delivered the foregoing instrument as such Manager, and as his free and voluntary act of said limited liability company for the uses and purposes therein set forth; and on his respective oath stated that he was duly authorized to execute said instrument.

Given under my hand and Notarial Seal this 16 day of October, 2003.



Kristin M. Drain  
Notary Public

My Commission Expires: \_\_\_\_\_

00169423.5

**Acknowledgment and Agreement of Lien Holder**

The undersigned, Great Western Bank ("Bank"), is the holder of a first priority lien which encumbers the Shopping Center, as evidenced by a Deed of Trust recorded on September 30, 2003 as Instrument No. 2003190219 of the records of Douglas County, Nebraska and a Deed of Trust recorded on September 30, 2003 as Instrument No. 2003190226 of the records of Douglas County, Nebraska (collectively, the "Indenture"). Bank hereby consents to the recording of this Declaration and states, on behalf of itself and its successors and assigns, that the Indenture shall be subject to the terms and conditions of this Declaration, and in the event of any foreclosure of the Indenture, this Declaration shall continue without interruption.

**GREAT WESTERN BANK**

By: B. D.

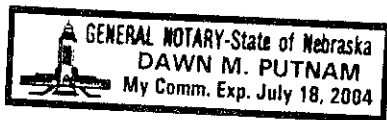
Name: BRIAN DIEDRICHSEN

Its: VICE PRESIDENT

STATE OF NEBRASKA     )  
  ) SS.  
COUNTY OF DOUGLAS    )

I, the undersigned, a Notary Public in and for the County and State aforesaid, do hereby certify that BRIAN DIEDRICHSEN personally known to me to be the VICE PRESIDENT of Great Western Bank, and personally known to me to be the same person whose name is subscribed to the foregoing instrument as such VICE PRESIDENT, and as his free and voluntary act of said Great Western Bank for the uses and purposes therein set forth; and on his respective oath stated that he was duly authorized to execute said instrument.

Given under my hand and Notarial Seal this 15<sup>th</sup> day of October, 2003.

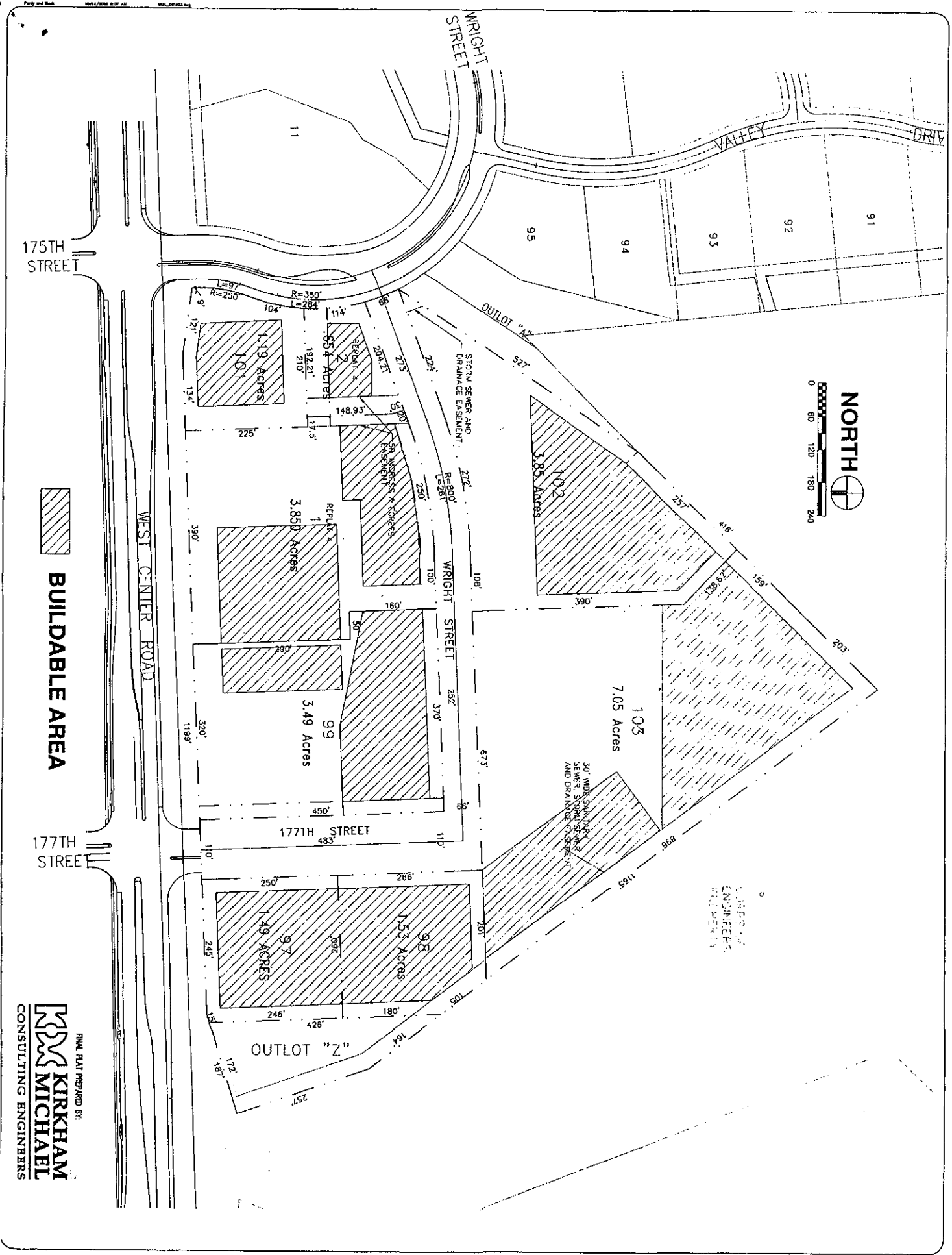


Dawn M. Putnam  
Notary Public

My Commission Expires: July 18, 2004

**EXHIBIT "A"**

**SITE PLAN**



**BUILDABLE AREA**

FINAL PLAN PREPARED BY:  
**KIRKHAM MICHAEL**  
 CONSULTING ENGINEERS

OWNER'S ENGINEERS  
 HILL PERINI

EXH. A	PROJECT NO. 1000 DATE 10/14/03 SHEET NO. 1000	 1918 Grant Street, Suite 200 Omaha, Nebraska 68104 (402) 492-4448	<b>LEGACY</b> 180TH STREET AND WEST CENTER ROAD OMAHA, NEBRASKA	<b>EXHIBIT A</b> <b>OCTOBER 14, 2003</b>
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