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Polk County Iowa
JULIE M. HAGGERTY RECORDER
File# 2013-00044047

BK 14524 PG 940-949

RETURN TO:

Return to Preparer: Lisa R. Wilson, Wilson Law Firm, P.C. 1906 Ingersoll Ave., Ste. 2, Des Moines, IA 50309, (515) 369-2502

CROSS ACCESS AND JOINT USE AGREEMENT

THIS CROSS ACCESS AND JOINT USE AGREEMENT ("Agreement") is made and entered into this 7th day of November, 2012, by and between Ingersoll Square Condominium Association, Inc., an Iowa corporation ("Association"), and Ingersoll Square II Investments, L.L.C., an Iowa limited liability company ("Ingersoll Square II")(collectively "Parties").

RECITALS

WHEREAS, the Association manages the common areas contained in the condominium development known as Ingersoll Square more particularly described on Exhibit "A" attached hereto ("Condominium Property"); and

WHEREAS, Ingersoll Square II is the owner and developer of certain real property adjacent to the Condominium Property more particularly described on Exhibit "B" attached hereto ("Apartment Property"); and

WHEREAS, the Eastern wall of the building located on the Apartment Property will rest on the Western footing of the building located on the Condominium Property; and

WHEREAS, the Apartment Property building will utilize an Air Well on the Condominium Property and the Condominium Property will use a staircase to the pool on the Apartment Property; and

WHEREAS, the Association and Ingersoll Square II desire to grant to one another cross easements for vehicular and pedestrian ingress/egress across each property, as well as easements for parking and any structural overlap; and

WHEREAS, the Association has also agreed to grant Ingersoll Square II a perpetual easement for the use and enjoyment of certain recreational areas/facilities located within the Condominium Property.

NOW, THEREFORE, in consideration of the mutual obligations set forth herein, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Grant of Easements to Ingersoll Square II. The Association, by authority of its Members, hereby grants to Ingersoll Square II a perpetual, non-exclusive easement for (a) vehicular and pedestrian ingress and egress; and (b) parking; and (c) the structural overlap of the Eastern wall of the Apartment Property building and the Western footing of the Condominium Property building; and (d) the Air Well (as defined below) over, on, under and/or across the Condominium Property.
2. Grant of Easements to Association. Ingersoll Square II, by authority of its Members, hereby grants to the Association a perpetual, non-exclusive easement for (a) vehicular and pedestrian ingress and egress; and (b) parking; and (c) the structural overlap of the Eastern wall of the Apartment Property building and the Western footing of the Condominium Property building; and (d) use and encroachment of the Westernmost pool staircase over, on, under and/or across the Apartment Property.
3. Grant of Recreational and Fitness Facilities Easement. The Association, by authority of its Members, hereby grants to Ingersoll Square II a perpetual, non-exclusive easement to use and enjoy the pool and fitness facility (collectively "Facilities") located on the Condominium Property as set forth in Exhibit "C" attached hereto. The Easement set forth in this Paragraph 3 shall be subject to such hourly, security and other use restrictions as the Association may reasonably impose with respect to the Condominium Property and the Facilities. The Association may, in its sole and absolute discretion, temporarily or permanently relocate, reduce in size, limit accessibility and/or use, charge for use or close the Facilities; provided, however, in the event the Association chooses to close the Facilities and/or eliminate its operating costs, Ingersoll Square II shall have the option of keeping the Facilities open and operating at its sole cost and expense and the Association shall be solely responsible for restricting access or use by its Members, their guests and invitees, at the Association's sole cost and expense.
4. Maintenance of Easements/Facilities.
 - (a) Facilities. The Association at all times shall be responsible for all operating, repair, maintenance or replacement of the Facilities; provided, however, all costs associated therewith shall be shared pro-rata based on the number of units contained on each respective property. The Association's costs and expenses associated with the Facilities shall be reimbursed by Ingersoll Square II to the Association monthly, commencing upon 50% occupancy of the Apartment Property building. The Association's costs of managing the Facilities shall be subject to review and testing by a CPA of Ingersoll Square II's choosing, at Ingersoll Square II's sole cost and expense. In the event Ingersoll Square II has failed to timely reimburse the Association for any and all Facilities expenses and such failure to reimburse has continued for more than thirty (30) days, Ingersoll Square II's use shall be suspended in its entirety until such default is fully remedied.
 - (b) Access/Parking Easements. The Parties shall be responsible for the maintenance of all access and parking easement areas located within their respective properties including the costs associated therewith, such costs to be shared pro-rata based on the number of units contained on each respective property. All access easement areas shall be maintained in a good and safe condition, including but not limited to maintaining all paved surfaces and curbs, mowing and removing snow, ice and other debris as necessary.
 - (c) Failure to Maintain. If either Party fails to maintain its respective easement area as required hereunder for a period of thirty (30) days after notice thereof, the non-defaulting owner

shall have the right but not the obligation to perform such maintenance at the defaulting owner's expense with interest at the highest rate permitted by law.

5. Air Well. An "air well" is currently constructed on and is a part of the Northwest corner of the Condominium Property building, into which air is exhausted from the below grade parking garage, projecting 6 feet to the East of the Apartment Property boundary and extending North 9 feet from the face of the existing Condominium Property building ("Air Well"). The Apartment Property building will also require use of said Air Well to exhaust air from the Apartment Property parking garage HVAC system. The Parties each agree to unconditionally and perpetually refrain from constructing anything in or across the Air Well.

6. Party Wall. It is contemplated the Apartment Property building and Condominium Property building will share a common wall and structural footing. The following restrictions shall apply:
 - (a) General Rules of Law. Each wall, including any shared structural components, which is built as a part of the original construction of the buildings upon the respective Apartment and Condominium properties and placed on the shared property line shall constitute a party wall, and, to the extent not inconsistent with the provisions of this Section, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts or omissions shall apply thereto.

 - (b) Sharing of Repair and Maintenance. The costs of reasonable repair and maintenance of a party wall shall be shared by the Parties pro-rata based on the number of units contained on each respective property.

 - (c) Destruction by Fire or Other Casualty. If the party wall is destroyed or damaged by fire or other casualty, either Party may restore the wall and such restoration costs shall be shared pro-rata based on the number of units contained on each respective property, subject, however, to the right of a party to call for a larger contribution from the other party that may have liability for negligence or willful acts or omissions related to such fire or other casualty.

7. Insurance.
 - (a) Property Insurance/Waiver of Claims. The Parties shall maintain adequate property insurance for their respective properties. The Parties hereby release one another from any and all liability (to the other or anyone claiming through or under them by way of subrogation or otherwise) for any loss or damage covered by property insurance or coverable by a customary policy of insurance, even if such loss or damage shall have been caused by the fault or negligence of the other owner, or anyone for whom such owner may be responsible.

 - (b) Liability Insurance. The Parties shall obtain and keep in full force and effect, each at its sole cost and expense, a policy of comprehensive public liability insurance covering their respective properties, written by a responsible casualty or indemnity company authorized to do business in Iowa, on an "occurrence basis" not a "claims basis", with a combined general liability insurance limit of at least \$2,000,000 and at least \$1,000,000 per occurrence of injury or property damage. The amount of insurance required by this Section shall be adjusted at the end of each five (5) year period during this Agreement by the amount necessary to continue insurance coverage at a comparable level considering the effects of inflation.

(c) **Evidence of Insurance.** As soon as practicable following execution of this Agreement, the Parties shall provide to each other evidence that the insurance coverage required hereunder is in full force and effect. In the event that any such insurance renews or is terminated, the insured owner shall promptly provide the other owner with evidence that such coverage will be renewed or replaced upon termination with insurance that complies with these provisions.

- 7. **Indemnification.** The Parties shall exercise the rights herein granted to them with due care, and shall indemnify, defend, protect and hold harmless the other ("Indemnified Party") from and against any and all claims, costs and liabilities (including reasonable attorneys' fees and costs) arising from property loss or damage or personal injury or death occurring on the indemnifying owner's parcel by reason of any act or omission of the indemnifying owner or its employees, agents, licensees, contractors and invitees, except for claims, costs and liabilities to the extent arising from the gross negligence or willful misconduct of an Indemnified Party.
- 8. **Eminent Domain of Easement Area.** If an easement area, or any part thereof, is taken by eminent domain or conveyed under threat of eminent domain, then any award for such a taking or damages paid as a result of such taking shall be the sole and exclusive property of the owner of the property taken. The other owner may, however, file a collateral claim with the condemning authority over and above the value of the easement area (or portion thereof) being so taken to the extent of any damage suffered by the other owner resulting from the taking of access to the other owner's property or use of the taken property.
- 9. **Notice.** All notices or other communications provided for herein shall be in writing and shall be deemed validly given when (a) delivered personally; (b) sent by certified or registered mail, postage prepaid; (c) sent by reputable overnight delivery service; or (d) sent by telephone facsimile transmission, receipt confirmed, and pending the designation of another address, addressed as follows:

If to Association: Ingersoll Square Condominium Association, Inc.
Attention: President
1906 Ingersoll Avenue Suite 4
Des Moines, Iowa 50309

If to Ingersoll Square II: Ingersoll Square II Investments, L.L.C.
Attention: Robert J. Caluzzi
1906 Ingersoll Avenue
Suite 4
Des Moines, Iowa 50309

- 10. **Easements Runs With the Land.** The easements granted herein run with the land and binds and benefits the Parties hereto, their successors, assigns, lessees, invitees and licensees.
- 11. **Owners.** The term "Association" shall refer to entity responsible for the management of all common areas on behalf of any present or future owner or owners of legal or equitable title to all or any portion of the Condominium Property, and any mortgagee(s) of the Condominium Property, and their respective successors, assigns lessees, invitees and licensees during any period of ownership. The term "Ingersoll Square II" shall refer to any present or future owner

or owners of legal or equitable title to all or any portion of the Apartment Property, and any mortgagee(s) of the Apartment Property, and their respective successors, assigns, lessees, invitees and licensees during any period of ownership.

12. Non-Exclusive Use. The easements granted hereby shall be non-exclusive and shall be used in common by the Parties hereto and their employees, agents, occupants, invitees, lessees, successors and assigns.
13. Amendment and Termination. This Agreement may not be amended or terminated except by an instrument in writing signed by the Parties, or their respective successors and/or assigns, and any attempted amendment or termination without all such signatures shall be of no force or effect.
14. No Merger. No easement granted hereby shall be extinguished by the doctrine of merger, regardless of common ownership of the burdened and benefited properties or any other fact, and merger of an easement granted hereunder with any other interest may be effected only by a writing signed by the Parties.
15. Not a Public Dedication. No use hereunder shall be deemed to constitute all or any portion of the easement areas as a public way or a quasi-public way, but to the contrary the easement area shall constitute and remain the private property of its respective owners.
16. Rules and Regulations. In addition to the permissible restrictions discussed in this Agreement, the easements granted herein shall be subject to each Party's right to adopt and enforce reasonable rules and regulations with respect to such easements and that Party's property.
17. Miscellaneous. All provisions of this Agreement are severable and the invalidity or unenforceability of any provision of this Agreement will not affect the validity or unenforceability of any other provision. This Agreement will be governed by and construed in accordance with the laws of the State of Iowa.
18. Entire Agreement. This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written, between the parties hereto with respect to the subject matter hereof. This Agreement shall be recorded in the Office of the Polk County Recorder.
19. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
20. Default. In the event of default by either Party pursuant to any of the terms of this Agreement for more than sixty (60) days following written notice of such, the prevailing party in any litigation or enforcement action shall be entitled to reimbursement by the defaulting party for any of the prevailing party's reasonable attorney fees, court costs, and other associated costs of enforcement. In addition to the foregoing, the defaulting party is subject to liquidated damages of \$1,000/day until the default is remedied. The Parties agree and acknowledge that damages in the event of default by either party would be difficult or impracticable to ascertain and the liquidated damages provided for herein are fair and reasonable under the circumstances.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

-Signature Page-

“ASSOCIATION”

INGERSOLL SQUARE CONDOMINIUM ASSOCIATION, INC.

BY: [Signature]
ROBERT J CALUZZI
ITS: President

“INGERSOLL SQUARE II”

INGERSOLL SQUARE II INVESTMENTS, L.L.C.

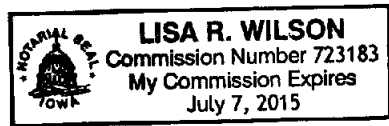
BY: [Signature]
ROBERT J CALUZZI
ITS: Manager

STATE OF IOWA)
) ss.
COUNTY OF POLK)

This instrument was acknowledged before me on November 7, 2012, by Robert J. Caluzzi, as President of Ingersoll Square Condominium Association, Inc..

[Signature]
Notary Public in and for the State of Iowa

STATE OF IOWA)
) ss.
COUNTY OF POLK)



This instrument was acknowledged before me on November 7, 2012, by Robert J. Caluzzi, as Manager of Ingersoll Square II Investments, L.L.C.

[Signature]
Notary Public in and for the State of Iowa

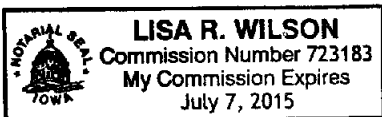


EXHIBIT "A"

Condominium Property

All of Lots 1 through 8 and the East 51 feet of Lot 9 in Block B in West and Burton's Addition, an Official Plat, and the 16.0 foot wide vacated East/West Alley Right-of-Way lying South of and adjoining Lots 1 through 8, and lying South of and adjoining the East 51.0 feet of Lot 9, in Block B, West and Burton's Addition, an Official Plat; and which lies North of and adjoining Lots 1 through 9, Harding Road Place, an Official Plat, all now included in and forming a part of the City of Des Moines, Polk County, Iowa, except the portion of Lots 8 and 9 of Block B, West and Burton's Addition, and the portions of Lots 1 through 9 of Harding Road Place that were condemned by the City of Des Moines, Iowa, in those condemnation proceedings filed for record in the Office of the Polk County Recorder on June 21, 2002, at Book 9197, commencing at Page 1, together with all easements and servient estates appurtenant thereto.

EXCEPT

A tract of land being a part of Parcel 'A' of the Plat of Survey of a part of Lots 1 – 8 of West and Burton's Addition, recorded at Book 12613 Page 296 in the office of the Polk County Recorder. Said tract of land being more particularly described as follows:

Beginning at the Northwest Corner of said Parcel 'A'; thence N89°33'09"E, 268.15 feet along the North Line of said Parcel 'A' and along the South Right-of-Way Line of High Street as it is presently established; thence S00°26'31"E, 19.44 feet; thence S89°33'29"W, 26.00 feet; thence S00°26'31"E, 57.00 feet; thence S89°33'29"W, 9.00 feet; thence S00°26'31"E, 145.88 feet to a non-tangent 100.38 feet radius curve concave to the Southwest; thence Northwesterly, 31.50 feet along said curve, said curve having a chord length of 31.37 feet and a chord bearing of N81°40'35"W; thence S89°32'24"W, 201.97 feet to the West Line of said Parcel 'A' and to the East Right-of-Way Line of Martin Luther King Jr. Parkway as it is presently established; thence N00°29'14"W, 217.58 feet along said West Line and East Right-of-Way Line, to the Northwest Corner of said Parcel 'A' and to the Point of Beginning.

Said tract of land subject to all easements of record.

Said tract of land contains 1.193 acres more or less.

EXHIBIT "B"

Apartment Property

A tract of land being a part of Parcel 'A' of the Plat of Survey of a part of Lots 1 – 8 of West and Burton's Addition, recorded at Book 12613 Page 296 in the office of the Polk County Recorder. Said tract of land being more particularly described as follows:

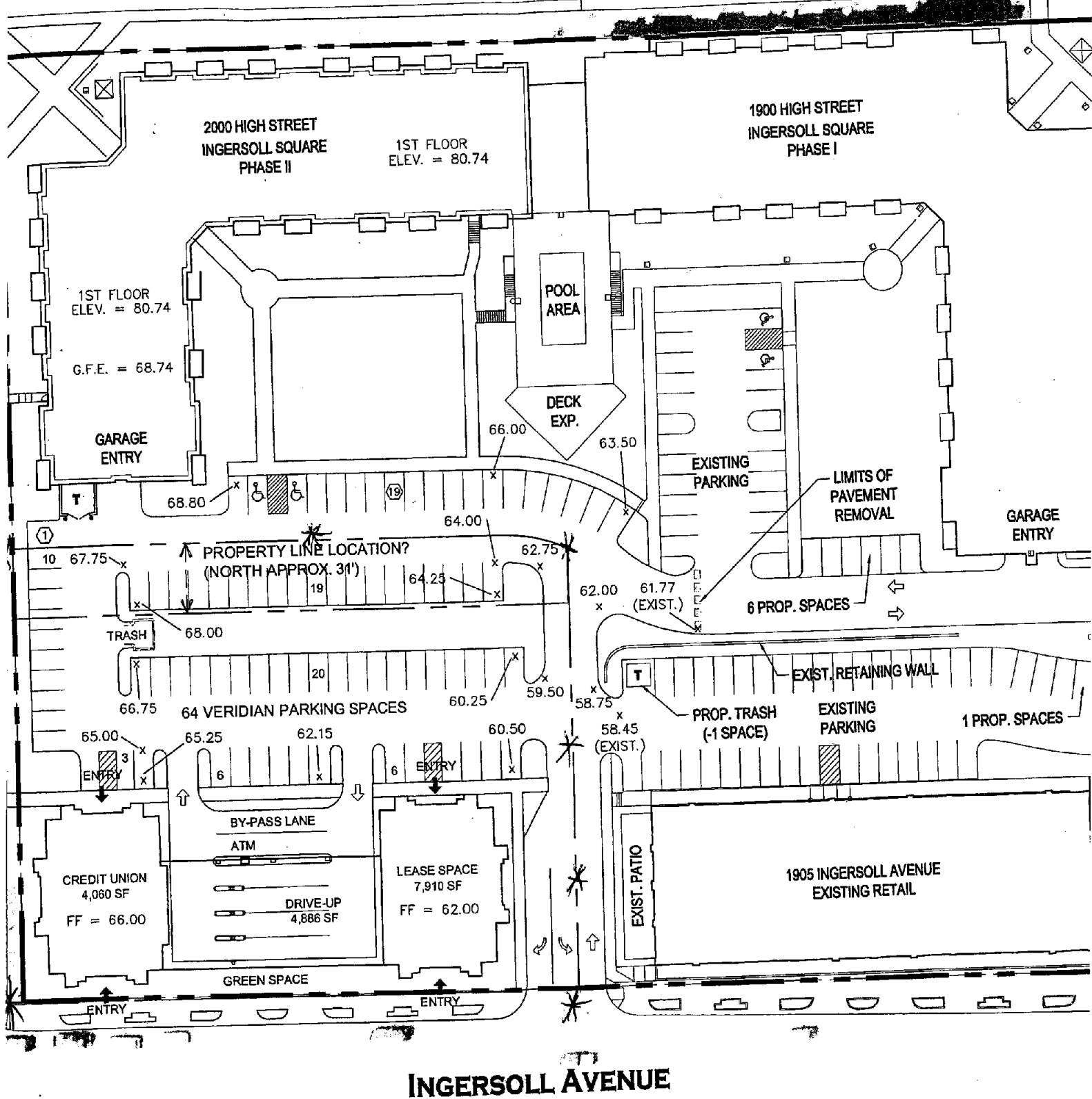
Beginning at the Northwest Corner of said Parcel 'A'; thence N89°33'09"E, 268.15 feet along the North Line of said Parcel 'A' and along the South Right-of-Way Line of High Street as it is presently established; thence S00°26'31"E, 19.44 feet; thence S89°33'29"W, 26.00 feet; thence S00°26'31"E, 57.00 feet; thence S89°33'29"W, 9.00 feet; thence S00°26'31"E, 145.88 feet to a non-tangent 100.38 feet radius curve concave to the Southwest; thence Northwesterly, 31.50 feet along said curve, said curve having a chord length of 31.37 feet and a chord bearing of N81°40'35"W; thence S89°32'24"W, 201.97 feet to the West Line of said Parcel 'A' and to the East Right-of-Way Line of Martin Luther King Jr. Parkway as it is presently established; thence N00°29'14"W, 217.58 feet along said West Line and East Right-of-Way Line, to the Northwest Corner of said Parcel 'A' and to the Point of Beginning.

Said tract of land subject to all easements of record.

Said tract of land contains 1.193 acres more or less.

EXHIBIT "C"

Site Plan
(attached hereto)



INGERSOLL AVENUE

INGERSOLL SQUARE PHASE II

SIMONSON PLAN

DES MOINES, IOWA