



MISC 2010058052



JUL 01 2010 10:56 P 14

Fee amount: 72.00  
FB: 16-23316  
COMP: MB

Received - DIANE L. BATTIATO  
Register of Deeds, Douglas County, NE  
07/01/2010 10:56:01.00



2010058052

[The Space Above is for Recording Data]

### ACCESS EASEMENT

This ACCESS EASEMENT ("Easement") is made and entered into as of the 30<sup>th</sup> day of June, 2010 ("Effective Date"), by and among The Lutheran Home Foundation, a Nebraska nonprofit corporation ("TLHF"), and Behavioral Health Support Foundation, a Nebraska nonprofit corporation ("BHSF").

### RECITALS

WHEREAS, TLHF is the owner of record of the property described on Exhibit "A" attached hereto ("TLHF Parcel") and is also the owner of record of the property described on Exhibit "B-1" attached hereto ("Plant Parcel"), including the utility plant structure ("Plant") located on said Plant Parcel; and

WHEREAS, BHSF is the owner of record of the property described on Exhibit "C-1" attached hereto (the "BHSF Parcel") and is also the owner of record of the property described on Exhibit "C-2" attached hereto (the "Vacated Parcel"), which Vacated Parcel has been conveyed to BHSF by TLHF by Quitclaim Deed dated June 30, 2010 in consideration for the granting of the easements created herein; and

WHEREAS, certain equipment and associated pipes and fixtures owned by BHSF (the "BHSF Equipment") are located on the Plant Parcel and within the Plant; and

WHEREAS, an underground pipeline and associated fixtures related thereto serving the cooling tower and related equipment situated on the Plant Parcel, as generally described on Exhibit "D" attached hereto (the "Pipeline"), is situated, in part, in, upon or adjacent to the Vacated Parcel; and

WHEREAS, the Vacated Parcel provides means of ingress and egress to the TLHF Parcel and the Plant Parcel; and

WHEREAS, the parties by this instrument intend to create (1) a permanent easement for ingress and egress over and upon the Vacated Parcel, for the benefit of TLHF, and its successors and assigns, (2) a permanent easement for access to and under a portion of the Vacated Parcel, for the benefit of TLHF, and its successors and assigns, in order to maintain,

service, repair, replace or remove the Pipeline, and (3) a permanent easement for access to and under the Plant Parcel, including the Plant, for the benefit of BHSF, and its successors and assigns, in order to operate and maintain the BHSF Equipment.

NOW, THEREFORE, in consideration of the mutual grants, covenants and promises contained herein, and of the mutual benefits accruing to each of the parties hereto, their respective successors and assigns, the receipt and adequacy of which are hereby acknowledged, the parties hereto hereby declare and agree as follows:

1. **Recitals.** The foregoing recitals are hereby incorporated herein as a material part of this Easement.

2. **Vacated Parcel Easement.** BHSF hereby grants and conveys unto TLHF as the owner of the TLHF Parcel and the Plant Parcel, and its successors and assigns, a perpetual non-exclusive access easement ("Vacated Parcel Easement") for purposes of ingress and egress over, across and upon the Vacated Parcel, to, from and between the public thoroughfare commonly known as 25th Avenue, the TLHF Parcel and the Plant Parcel. The Vacated Parcel Easement is a non-exclusive easement subject to use by others, including, but not limited to, BHSF, its successors and assigns, and representatives, members, employees, agents, tenants, business invitees and licensees of each of the parties hereto.

3. **Pipe Access Easement.** BHSF hereby grants and conveys unto TLHF, and its successors and assigns, a perpetual non-exclusive access easement ("Pipe Access Easement") for purposes of maintaining, servicing, repairing, replacing and removing the Pipeline.

4. **Plant Access Easement.** TLHF hereby grants and conveys unto BHSF as the owner of the BHSF Parcel, and its successors and assigns, a perpetual non-exclusive access easement (the "Plant Access Easement") over, across and upon that portion of the Plant Parcel more particularly described in Exhibit "B-2," attached hereto and by this reference incorporated herein (the "Plant Parcel Easement Area") for purposes of ingress and egress and monitoring, operating, maintaining, servicing, repairing and replacing the BHSF Equipment related to the provision of utility services from the Plant Parcel. BHSF agrees to monitor, or cause to be monitored, the BHSF Equipment in accordance with prudent operating practices applicable to such equipment generally, and in light of the type and condition of the BHSF Equipment specifically. The Plant Access Easement granted hereby is not intended and shall not be deemed to create an affirmative obligation upon BHSF to monitor, operate, maintain, service, repair or replace the Pipeline, the Plant or the equipment of TLHF within the Plant or upon the Plant Parcel.

5. **Nature of Easements.** The provisions of the Easements granted hereunder are not intended and shall not be deemed to constitute a dedication for public use, and the rights and easements granted herein are private and for the benefit only of the parties set forth herein and their respective successors and assigns.

6. **Use of Plant Access Easement.** The parties acknowledge that ingress and egress over, across and upon the Plant Parcel is necessary for TLHF to operate and maintain the Plant and for BHSF to operate and maintain the BHSF Equipment. As such, in the event a party is required to conduct activities on the Plant Parcel, either as the owner thereof or as contemplated by the Plant Access Easement, in such a manner as may impact ingress and egress over, across or upon the Plant Parcel, said party agrees to (a) provide not less than seven (7) days notice of such event to the other parties (except in the event of emergency

threatening loss of life or property, in which case said party may act immediately to address said threat and shall provide notice to the other parties as soon as practicable and in any event within 24 hours), (b) work with the other parties to schedule such activities so as to minimize, to the extent possible, the impact of same on the Plant and the Plant Access Easement, and (c) cooperate with the other parties in a prompt and reasonable manner.

7. **Use of Pipe Access Easement.** The parties acknowledge that ingress and egress over, across and upon the Vacated Parcel is necessary for all parties hereto. As such, in the event TLHF requires access to the Pipe Access Easement in such a manner as may impact ingress and egress over, across or upon the Vacated Parcel, TLHF agrees to (a) provide not less than seven (7) days notice of such event to the other parties (except in the event of emergency threatening loss of life or property, in which case TLHF may act immediately to address said threat and shall provide notice to the other parties as soon as practicable and in any event within 24 hours), (b) work with the other parties to schedule such access, including any necessary maintenance or repair to the underground pipeline, so as to minimize, to the extent possible, the impact of same on the Vacated Parcel, and (c) cooperate with the other parties in a prompt and reasonable manner.

8. **Maintenance.**

8.a. BHSF, its successors and assigns, as the owner of the Vacated Parcel, shall, at its sole cost and expense, be solely responsible and obligated to keep and maintain the Vacated Parcel in a condition not less than substantially the condition of the same as of the Effective Date, ordinary wear and tear excluded, including, without limitation, all roadways, sidewalks, landscaping, drainage systems, lighting, striping and traffic control devices within the Vacated Parcel. Subject to the obligations of TLHF herein, the maintenance obligations of BHSF with respect to the Vacated Parcel shall include all mowing, weed control and removal of snow, trash, rubbish or other refuse, if any. Notwithstanding the foregoing, any repaving or resurfacing of the Vacated Parcel shall be within the sole discretion of BHSF and, if undertaken, shall be at the sole cost and expense of BHSF. TLHF, its successors and assigns, shall, at its sole cost and expense, be solely responsible for repair of any and all damage to the Vacated Parcel caused by TLHF, its representatives, members, employees, contractors, agents, business invitees and licensees.

8.b. After any exercise of its rights pursuant to the Pipe Access Easement is completed, TLHF, its successors and assigns, shall be solely responsible for returning, as soon as practicable thereafter, all portions of the Vacated Parcel affected or damaged as a result of such utilization to a condition not less than substantially the condition of the same immediately prior to such exercise. TLHF acknowledges and agrees that continuous, uninterrupted access by BHSF over the Vacated Parcel is critical to the business conducted and services provided by BHSF and its agents, contractors, and designees on the BHSF Parcel. As such, TLHF will use all reasonable efforts to minimize the extent and duration of any interruptions of such access to the BHSF Parcel.

8.c. TLHF, its successors and assigns, as the owner of the Plant Parcel, shall, at its sole cost and expense, be solely responsible and obligated to keep and maintain the Plant Parcel Easement Area, including removal of snow, trash, rubbish or other refuse, if any. TLHF shall maintain the Plant structure in good condition, ordinary wear and tear excluded, but shall not be required to retain any of the equipment currently

owned by TLHF in or about the Plant. Notwithstanding the foregoing, any repaving or resurfacing of the Plant Parcel Easement Area shall be within the sole discretion of TLHF and, if undertaken, shall be at the sole cost and expense of TLHF. BHSF, its successors and assigns, shall, at its sole cost and expense, be solely responsible for repair of any and all damage to the Plant Parcel Easement Area caused by BHSF, its representatives, members, employees, contractors, agents, business invitees and licensees.

9. **Restrictions.** Except as provided herein, no party hereto, nor any successor or assign, agent, servant, contractor or employee thereof, shall create, permit or suffer at any time any obstruction to or interference with ingress and egress over, across and upon the Vacated Parcel for any purpose, nor shall any such party at any time endanger, interfere with, or otherwise obstruct the maintenance, repair, operation or use of the Vacated Parcel for ingress and egress.

10. **Taxes.** BHSF shall be solely responsible for payment of all real estate taxes and assessments, if any, on the Vacated Parcel. TLHF shall be solely responsible for payment of all real estate taxes and assessments, if any, on the Plant Parcel.

11. **Effect of Covenants.** Each party hereto, and its successors and assigns, by the acceptance of a deed of conveyance for one or more of the TLHF Parcel, Plant Parcel, BHSF Parcel or Vacated Parcel, accepts same subject to all restrictions, conditions, covenants, reservations, options, liens and charges, and the jurisdiction, rights and powers granted or reserved by these Easements granted hereunder, or to which these Easements are subject, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared and all impositions and obligations hereby imposed shall be deemed and taken to be covenants running with the land and shall be binding upon the parties hereto and upon their successors and assigns, and shall inure to the benefit thereof in like manner as though the provisions, terms and restrictions of these Easements were received and stipulated at length in each and every deed of conveyance.

12. **Termination of Easement.**

12.a. Notwithstanding the perpetual nature thereof as set forth in Section 2 above, the then record owners of the TLHF Parcel and the Plant Parcel, or their respective successors and assigns, may terminate the Vacated Parcel Easement as it applies to such terminating party at any time by recording a release in the office of the Register of Deeds of Douglas County, Nebraska, whereupon all rights, duties and liabilities of BHSF, or its successors and assigns, and the then record owner of the TLHF Parcel or the then record owner of the Plant Parcel, as applicable, shall terminate as to the party terminating its rights under the Vacated Parcel Easement, except such liabilities arising prior to the date of termination.

12.b. Notwithstanding the perpetual nature thereof as set forth in Section 3 above, TLHF, or its successors and assigns, may terminate the Pipe Access Easement at any time by recording a release in the office of the Register of Deeds of Douglas County, Nebraska, whereupon all rights, duties and liabilities of BHSF, or its successors and assigns, and the then record owner of the Plant Parcel, as applicable, shall terminate, except such liabilities arising prior to the date of termination.

12.c. Notwithstanding the perpetual nature thereof as set forth in Section 4

above, BHSF, or its successors and assigns, may terminate the Plant Access Easement as it applies to such terminating party at any time by recording a release in the office of the Register of Deeds of Douglas County, Nebraska, whereupon all rights, duties and liabilities of TLHF, or its successors and assigns, and the then record owner of the BHSF Parcel, as applicable, shall terminate as to the party terminating its rights under the Plant Access Easement, except such liabilities arising prior to the date of termination.

13. **Waiver.** No covenant, restriction, condition or provision of this Easement shall be deemed to have been abrogated or waived by reason of any failure by the applicable party to enforce the same at any time, irrespective of the number of violations or breaches which may occur.

14. **Indemnification.** Each party (Indemnifying Party) for itself and its successors and assigns hereby agrees to defend, indemnify and hold harmless the other parties (Indemnified Party), its successors and assigns and their respective directors, officers, members, employees, invitees, agents, representatives and affiliates from and against any and all claims, obligations, liabilities, losses, damages (excluding punitive damages), causes of action, suits, demands, claims for indemnity or contribution, penalties, judgments, costs and expenses (including reasonable attorneys' fees and expenses) arising from and out of any liability for bodily injury (including death), property damage, automobile accident liability or environmental liability, at any time existing or asserted, to the extent such arise out of, are caused or alleged to have been caused by any action or inaction of the Indemnifying Party, its successors and assigns or their respective directors, officers, members, employees, invitees, agents, representatives and affiliates in connection with or related to the use of the Vacated Parcel Easement, Pipe Access Easement or the Plant Access Easement (collectively, "Easement Areas") pursuant to this Easement, unless such claims, obligations, liabilities, losses, damages (excluding punitive damages), causes of action, suits, demands, claims for indemnity or contribution, penalties, judgments, costs and expenses of every kind and nature whatsoever, without regard to the form of action, are hereinafter suffered or incurred by the Indemnified Party or its directors, officers, members, employees, invitees, agents, representatives and affiliates, and such arise out of, directly or indirectly, (i) the negligence or willful misconduct of the Indemnified Party, its successors and assigns or their respective directors, officers, members, employees, invitees, agents, representatives and affiliates, or (ii) the Indemnified Party's operation or use of real property located adjacent to the Easement Areas that is owned by the Indemnified Party, its successors and assigns, in which case such Indemnified Party, its successors and assigns shall indemnify, defend, save and hold harmless the Indemnifying Party and its directors, officers, members, employees, invitees, agents, representatives and affiliates. The provisions of this subsection shall survive termination of any easement granted hereunder, but only to the extent that the cause giving rise thereto occurred prior to such termination.

15. **Savings Clause.** The invalidity of any covenant, restriction, condition, limitation or any other provision of this Easement herein contained, as the case may be, shall not render the remainder of this Easement invalid, nor any other part therein contained.

16. **Amendment, Modification, Notices.**

16.a. Subject to the rights of BHSF and TLHF under Section 12 above, this Easement may only be amended or modified by the written consent and agreement of all parties hereto, or their respective successors and assigns; provided, however, that

BHSF and the then record owner of the Plant Parcel may, at their discretion, amend or modify the terms of the Pipe Access Easement or the Plant Access Easement, respectively, without any joinder by the then record owner of the TLHF Parcel with respect to the Pipe Access Easement and the Plant Access Easement. Any such modification or amendment shall be effective when duly recorded in the office of the Register of Deeds of Douglas County, Nebraska.

16.b. Wherever in this Easement the consent or approval of a party is required, unless otherwise expressly provided herein, such consent or approval shall not be unreasonably withheld or delayed. Any request for consent or approval shall: (i) be in writing; (ii) specify the section hereof which requires that such notice be given or that such consent or approval be obtained; and (iii) be accompanied by such background data as is reasonably necessary to make an informed decision thereon. The consent of a party under this Easement, to be effective, must be given, denied or conditioned expressly and in writing.

16.c. Notices or other communication hereunder shall be in writing and shall be sent certified or registered mail, return receipt requested, by other national overnight courier company, or by personal delivery. Notice shall be deemed given upon receipt or refusal to accept delivery. Each party may change from time to time their respective address for notice hereunder by like notice to the other party. The notice addresses of TLHF and BHSF are as follows:

TLHF:	Kermit A. Brashear The Lutheran Home Foundation 711 North 108th Court Omaha, Nebraska 68154
with a copy to:	Kurth A. Brashear, Esq. BRASHEAR LLP North Old Mill 711 North 108th Court Omaha, Nebraska 68154-1714
BHSF:	Behavioral Health Support Foundation Attn: Kenneth E. Stinson Peter Kiewit Sons, Inc. 1000 Kiewit Plaza 3555 Farnam Street, 10th Floor Omaha, Nebraska 68131-3374
	and
	Rhonda A. Hawks The Hawks Foundation 1044 N. 115th Street, Suite 400 Omaha, Nebraska 68154-4446

with a copy to:

Max J. Burbach, Esq.  
Kendra J. Ringenberg, Esq.  
Koley Jessen, P.C.  
One Pacific Place, Suite 800  
1125 South 103rd Street  
Omaha, Nebraska 68124

17. **Insurance.** Each party to this Easement agrees that it shall, at all times during the duration of the Easement, maintain at its sole expense (a) commercial general liability insurance protecting against any and all claims for injury to persons or property, with a minimum limit of \$1,000,000 coverage per occurrence and with an aggregate limit of at least \$2,000,000, (b) automobile liability insurance with \$1,000,000 combined single limit, and (c) workers' compensation insurance as required by law.

18. **Authority.** Each individual signing this Easement represents and warrants that such individual has been duly authorized to sign this Easement on behalf of the party for whom such individual signs.

19. **Waiver of Subrogation.** Anything in this Easement to the contrary notwithstanding, each party hereby releases the other party (and their respective agents, contractors, officers, members, managers and employees) from any liability, right of recovery, claim, action or cause of action the other party may have on account of loss, cost damage or expense which arises from any peril (a) that is or would be covered by any policy of insurance required to be carried by the releasing party under this Easement (regardless of whether such insurance is actually being carried); or (b) that is covered by any other insurance actually being carried by the releasing party at the time of such accident or occurrence, regardless of the negligence of the party being released or its agents, contractors, officers or employees, and waives any right of subrogation which might otherwise exist in or accrue to any person on account thereof, including that of the insurance carriers of the other party. TLHF and BHSF shall give their respective insurance carriers written notice of the terms of the above mutual waivers and the parties' respective insurance policies shall be properly endorsed, if necessary, to prevent the invalidation of said policies by reason of such waivers.

20. **Entire Agreement.** This Easement, including, without limitation, any Exhibits referred to herein and attached hereto, constitutes the entire agreement between the parties with respect to the subject matter hereof. There are no agreements, representations, warranties, promises, covenants, commitments or undertakings between the parties hereto other than those expressly set forth herein. This Easement supersedes all prior agreements, representations, warranties, promises, covenants, commitments or undertaking between the parties hereto, whether written or oral, with respect to the subject matter contained in this Easement.

21. **Governing Law.** This Easement shall be construed and governed in accordance with the laws of the State of Nebraska.

[ Signature pages follow ]

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Easement as of the day and year first above written.

THE LUTHERAN HOME FOUNDATION, a  
Nebraska nonprofit corporation

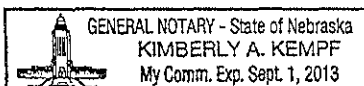
By: \_\_\_\_\_

Kermit A. Brashear, President

STATE OF NEBRASKA     )  
                                      ) ss.  
COUNTY OF DOUGLAS    )

Before me, a Notary Public, qualified in and for said County, personally came Kermit A. Brashear, President of The Lutheran Home Foundation, a Nebraska nonprofit corporation, known to me to be the identical person who signed the foregoing instrument, and acknowledged the execution thereof to be his voluntary act and deed, and the voluntary act and deed of said corporation.

WITNESS my hand and notarial seal on this 29<sup>th</sup> day of June, 2010.



\_\_\_\_\_  
Notary Public

BEHAVIORAL HEALTH SUPPORT FOUNDATION,  
a Nebraska nonprofit corporation

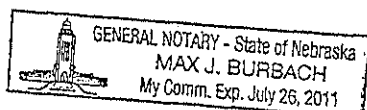
By: \_\_\_\_\_

Rhonda A. Hawks, Vice-President

STATE OF NEBRASKA     )  
                                      ) ss.  
COUNTY OF DOUGLAS    )

Before me, a Notary Public, qualified in and for said County, personally came Rhonda A. Hawks, Vice-President of Behavioral Health Support Foundation, a Nebraska nonprofit corporation, known to me to be the identical person who signed the foregoing instrument, and acknowledged the execution thereof to be her voluntary act and deed, and the voluntary act and deed of said corporation.

WITNESS my hand and notarial seal on this 28 day of June, 2010.



\_\_\_\_\_  
Notary Public



**Exhibit "A"**

**TLHF PARCEL**

Lot 1, Lutheran Place, a subdivision as surveyed, platted and recorded in  
Douglas County, Nebraska

Exhibit "B-1"

16-23317

PLANT PARCEL

Lot 1, Lutheran Place Replat 1, a subdivision as surveyed, platted and recorded in Douglas County, Nebraska.

**Exhibit "B-2"**

**PLANT PARCEL EASEMENT AREA**

Lot 1, Lutheran Place Replat 1, a subdivision as surveyed, platted and recorded in Douglas County, Nebraska, EXCEPT that portion of said Lot 1 described as follows:

That part of Lot 1, Lutheran Place Replat 1, a subdivision in Douglas County, Nebraska described as follows, beginning at the SE corner of said Lot 1; thence N89°49'33"W (assumed bearing) 116.92 feet on the South line of said Lot 1 to the SW corner thereof; thence N00°10'21"E 144.47 feet on the West line of said Lot 1 and its northerly extension; thence S89°49'33"E 117.98 feet on a line 144.47 feet North of and parallel with the South line of said Lot 1 to the East line thereof; thence S00°35'29"W 144.47 feet on the East line of said Lot 1 to the point of beginning.

Exhibit "C-1"

BHSF PARCEL

16-23316

Lot 10, Lutheran Place, a subdivision as surveyed, platted and recorded in  
Douglas County, Nebraska

Exhibit "C-2"

16-23317

VACATED PARCEL

Lot 2, Lutheran Place Replat 1, a subdivision as surveyed, platted and recorded  
in Douglas County, Nebraska

**Exhibit "D"**

**PIPE ACCESS EASEMENT DESCRIPTION**

The underground cooling tower line that starts at the Western portion of the North wall of the Plant going North, turns 180 degrees and runs South parallel to the West wall of the Plant, at a distance of approximately five (5) feet from such West wall, all the way to the Southern wall of the Plant, where it then connects to the cooling tower.