



MISC 2005140850



NOV 07 2005 13:02 P 10

RE: Lots 1 and 2
West Village Pointe Replat 2

Received - DIANE L. BATTIATO
Register of Deeds, Douglas County, NE
11/7/2005 13:02:48.88



2005140850

ACCESS DRIVE EASEMENT

Village West LLC, a Nebraska Limited Liability Company, hereby establishes the following easements.

PRELIMINARY STATEMENT

Village West LLC, a Nebraska Limited Liability Company, ("Declarant"), is the record owner of Lots 1 and 2, West Village Pointe Replat 2, a subdivision in Douglas County, Nebraska, as surveyed, platted and recorded (collectively the "Parcels").

Declarant desires to establish a permanent nonexclusive easement over a certain portion of Lot 2, West Village Pointe Replat 2, a subdivision in Douglas County, Nebraska, as surveyed, platted and recorded ("Lot 2"), for the purpose of providing vehicular access, ingress, egress, passage and traffic to and from the Parcels, and both Chicago Street and Burke Street.

TERMS AND CONDITIONS

In consideration of the foregoing Preliminary Statement, which by this reference is repeated and incorporated in this portion of this Easement in its entirety, and other consideration, the receipt and sufficiency of which are hereby acknowledged, the Declarant hereby establishes the following easements and covenants.

1. **Definitions.** The terms in this Section 1 shall have the following meanings:

1.1 **Access Drive.** Access Drive shall mean the drive or roadway depicted and legally described on Exhibit A attached hereto and incorporated herein, including alterations, modifications or adjustments thereof consistent with the terms of this Easement.

1.2 **Owner.** The term "Owner" shall mean any individual, partnership, joint venture, limited liability company, corporation, trust, unincorporated association, governmental agency or other business entity now or hereafter holding of record an ownership interest in fee in a portion or all of a Parcel.

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1.3 Parcel. The term "Parcel" shall mean or refer to any of the following platted lots: Lots 1 and 2, West Village Pointe Replat 2, a subdivision in Douglas County, Nebraska, as surveyed, platted and recorded and any subsequent administrative subdivision, replat, revision or amendment thereof. The term "Parcels" shall mean both of the platted lots identified in this subsection 1.3. From time to time reference to one or more of such Parcels may be made in this Easement by their respective lot numbers.

1.4 Permittees. The term "Permittees" shall mean (i) the Owners of the Parcels and their respective successors, assigns, heirs, and personal representatives, (ii) such Owners' agents, customers, invitees, licensees, employees, servants, and contractors, (iii) such Owners' tenants and subtenants and their respective customers, invitees, employees, servants, licensees, contractors, and agents, and (iv) such Owners' land contract purchasers, mortgagees and beneficiaries under deeds of trust. Persons engaged in political activities or labor disputes shall not be considered Permittees.

2. Easements and Covenants. The Declarant hereby grants and establishes the following easements and covenants:

2.1 Easement Grant.

- A. The Declarant hereby grants to the Permittees of the Parcels (a) a nonexclusive permanent easement over and upon the Access Drive for vehicular access, egress, ingress, passage and traffic over and upon the Access Drive for the purpose of furnishing vehicular access, ingress, egress, passage and traffic to and from the Parcels and both Chicago Street and Burke Street, which easement rights shall be exercised only in connection with the use of the Parcels.
- B. On or prior to August 1, 2006, Declarant, at its expense, shall construct a temporary Access Drive using asphalt or other suitable materials selected by Declarant. Such temporary construction will be of a quality as will minimally enable the Permittees to traverse the temporary Access Drive pending completion of the Access Drive which will be installed concurrently with and at such times as those portions of Lot 2 which adjoin the Access Drive are developed. The Declarant shall construct the Access Drive adjoining such developed portions of Lot 2 using heavy duty asphalt or concrete as selected by Declarant. Notwithstanding the foregoing, Declarant shall construct the portion of the Access Drive from Chicago Street to the south boundary of Lot 1 on a permanent basis, with the remainder of the Access Drive constructed on a temporary basis as described herein.

If the Owner of Lot 1 determines in its reasonable judgment and in good faith that the construction of the Access Drive is not proceeding so as to be completed prior to August 1, 2006 (it being understood that time is of the essence), the Owner of Lot 1 may give written notice of such fact to

the Declarant. If the Declarant does not present to the Owner of Lot 1 reasonable evidence, within ten (10) days of receipt of such written notice, either that the work will be completed as required or that an extension of a completion date is permitted under the terms of Section 9.9 below, the Owner of Lot 1 shall have the right, but not the obligation, to assume control of the construction of all or any designated portion of the Access Drive, and upon such election, the Owner of Lot 1 agrees to proceed to complete the same with all reasonable dispatch. Declarant hereby grants to the Owner of Lot 1, its contractors, agents and employees a temporary license to enter upon that portion of Lot 2 adjacent to the Access Drive for the purpose of performing all or any part of the work to construct the Access Drive. The Declarant shall remain liable for Declarant's costs (which for purposes hereof shall mean Declarant's contracted costs Declarant would have incurred in the construction of the Access Drive) and agrees to periodically pay the Declarant's costs to the Owner of Lot 1. If the Declarant fails to pay the costs of completing the Access Drive, the amounts owed to the Owner of Lot 1 shall bear interest at the rate of twelve percent (12%) per annum from the date the Owner of Lot 1 incurs such costs to the date of repayment by the Declarant. If a portion of the Declarant's costs are reimbursable by third parties, Declarant hereby assigns to the Owner of Lot 1 its rights to collect such reimbursement if Declarant fails to pay the Declarant's costs when due under this Section. Declarant agrees to execute and deliver to the Owner of Lot 1 any documents required to evidence further such assignment. Upon such assignment, Declarant consents to the Owner of Lot 1 seeking and obtaining, at the option of the Owner of Lot 1, recovery of such reimbursements provided any funds actually obtained by the Owner of Lot 1, net of the Owner of Lot 1's reasonable costs in obtaining the funds, shall be applied to Declarant's costs.

- C. Declarant, may, from time to time, at its sole expense, during the term of this Easement, move, enlarge or adjust the location, contour, width, and grade of one or more portions or all of the Access Drive, at its expense, provided that (i) access, ingress and egress to and from the Parcels and both Burke Street and Chicago Street is maintained at all times, and (ii) that the grade of the Access Drive adjoining Lot 1 at its westerly boundary is not materially altered. In the event Declarant or its successors and assigns exercises the rights provided in this Subsection C., temporary access to and from both Chicago and Burke Streets shall be provided to the Owner of Lot 1 during the exercise of such rights.
- D. In no event shall this Easement be construed as creating parking or other easements benefiting the Permittees except as specifically granted in this Easement.

2.2 Use of Access Drive. The Permittees (i) shall use the Access Drive with due regard to the rights of other Permittees; (ii) shall not use the Access Drive in any manner which will impair or impede the rights of other Permittees; (iii) shall not obstruct passage on the Access Drive; and (iv) shall not construct or place any obstacles other type of barrier or obstruction on the Access Drive. Declarant and the Owner of any portion of Lot 2 on which the Access Drive is located shall have the right to temporarily close, not to exceed twenty-four (24) hours in any calendar year, excluding the months of May, June, July, October, November and December, the portion of the Access Drive so owned but only if legally necessary to preclude the creation of a prescriptive easement or public dedication of the Access Drive or any portion thereof.

Subject to Section 3 of this Easement, in no event shall the Owner of the Access Drive, either alone or collectively, impose a charge or toll for the use of the Access Drive or any portion thereof.

2.3 Maintenance of Access Drive. Except as otherwise specifically provided in this Easement, the Owner of the Access Drive shall operate, maintain and replace all of the areas of the Access Drive in a good condition and repair at the sole expense of the Owner of the Access Drive. Such repairs, replacements and maintenance shall include, but shall not be limited to:

- (a) maintenance, repair and replacement of the surface and subsurface of the Access Drive so as to maintain a level, smooth and evenly covered drive with the type of material originally installed or used thereon or such substitutes as will in all material respects be equal to or better than such materials in quality and durability; and
- (b) removal from the Access Drive of papers, debris, objects, hazards, ice, and snow as required to keep the Access Drive in a clean and orderly condition; and
- (c) installation, maintenance, replacement of speed bumps and traffic and directional signs or controls as determined by the Declarant or its designee in its sole discretion.

3. Access Drive Contribution. During the Term of this Easement, the Owner of Lot 1 shall pay the Owner of the Access Drive Two Thousand Five Hundred and no/100 Dollars (\$2,500.00) annually ("Maintenance Contribution") as its contribution toward the maintenance of the Access Drive. The Maintenance Contribution shall be paid to the Owner of the Access Drive on or before February 15th of each year beginning with the year 2007. The Maintenance Contribution shall increase each fifth anniversary of the Initial Payment Date beginning in year 2012 by the percentage of increase, if any, in the United States Department of Labor, Bureau of Labor Statistics Consumer Price Index for All Items - All Wage Earners and Clerical Workers ("CPI") (base year 1982-84 = 100) ("Index"). If the Index has changed so that the base year differs from that used in this Section, the Index shall be converted according to the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics, to the 1982-84 base. If the Index is discontinued or revised, such other government index or

computation with which it is replaced shall be used to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

The Index published nearest to February 15, 2007 shall be the "Beginning Index". The Index published nearest to the date four (4) months prior to each applicable Adjustment Date, as set forth herein, shall be the "Adjustment Index".

The Maintenance Contribution shall be adjusted as follows:

The first Adjustment Date shall be the first day of the month following the fifth anniversary of this Easement. Commencing with the first Adjustment Date, and every five (5) years thereafter, during the term of this Easement, the Maintenance Contribution shall be adjusted by multiplying the initial Maintenance Contribution under this Easement by a fraction, the numerator of which fraction is the applicable Adjustment Index and the denominator of which fraction is the Beginning Index. The amount so determined shall be the "Adjusted Maintenance Contribution" payable under this Section for the year beginning on the applicable Adjustment Date and continuing until the next Adjustment Date. In no event shall any such adjustment result in the Owner paying a Maintenance Contribution during any five (5) year period which is less than the Maintenance Contribution during the preceding five (5) year period.

4. **Eminent Domain.** Nothing herein shall be construed to give an Owner any interest in any award or payment made to any other Owner in connection with any exercise of eminent domain or transfer in lieu thereof affecting another Owner's Parcel or grant to the public or any governmental entity any rights in such Parcel. In the event of any exercise of eminent domain or transfer in lieu thereof of any part of an easement area, the award attributable to such easement area shall be payable only to the Owner thereof, and no claim thereon shall be made by the Owner or Permittees of any other Parcel.

5. **Breach.** The breach of this Easement will not entitle any Owner of a Parcel to cancel, rescind or otherwise terminate this Easement.

6. **Legal Effect.** Except as provided in Section 2 of this Easement, each of the easements and rights created by this Easement are appurtenant to each of the Parcels and may not be transferred, assigned or encumbered except as an appurtenance to a Parcel. For the purpose of each such easement and right, the Benefited Parcel will constitute the dominant estate and the Burdened Parcel will constitute the servient estate. Each easement or covenant contained in this Easement: (a) is made for the direct, mutual and reciprocal benefit of the Parcels to which easements have been granted in this Easement; (b) creates an equitable servitude on the Access Drive upon which easements have been granted in favor of the Parcels; (c) constitutes a covenant running with the land; (d) binds every Owner now having or hereafter acquiring an interest in a Parcel; and (e) will inure to the benefit of and be binding upon the Owners of the Parcels and their respective successors, assigns, mortgagees and beneficiaries under deeds of trust.

Upon the conveyance of all or any part of a Parcel, the grantee, by accepting such conveyance, as evidenced by the recordation of the deed of conveyance to such Parcel, will thereby become a new party to and be bound by this Easement and will be deemed to have

assumed and agreed to perform each of the obligations of the conveying Owner under this Easement with respect to the Parcel or portion thereof conveyed to such grantee. Upon recordation of such conveyance with the Register of Deeds of Douglas County, Nebraska, the conveying owner will be released from any obligation under this Easement arising thereafter with respect to the portion of the Parcel so conveyed but will remain responsible for any liability which has accrued prior to such recordation, if any.

7. **No Dedication.** Nothing contained in this Easement will be deemed to constitute a gift, grant or dedication of any portion of a Parcel to the general public or for any public purpose whatsoever, it being the intention of the Declarant that this Easement will be strictly limited, in accordance with the terms hereof, to the private use of the Permittees of each Parcel to whom easements have been granted in this Easement. Except as otherwise specifically provided herein, this Easement is intended to benefit the Owners and their respective successors, assigns, mortgagees and beneficiaries under deeds of trust, and is not intended to cause any persons or entities which are not Permittees of Parcels to whom easements or other rights have been granted in this Easement to be a third party beneficiary hereunder or to give any such person or entity any rights hereunder.

8. **Duration; Amendment; Termination.**

8.1 **Duration.** Unless otherwise modified, terminated or extended as permitted in this Section 8 or in this Easement, the easements, rights, obligations and covenants contained in this Easement shall continue in perpetuity unless terminated by the Owners of the Parcels.

8.2 **Amendment and Termination.** Except as otherwise provided in this Easement, this Easement and any provision herein contained may be terminated, extended or amended only with the express written consent of the Owner of Lot 1, the Owner of the Access Drive and the Declarant. No tenant, licensee or other person having only a possessory interest in a Parcel is required to join in the execution of or consent to any action of the Owner of any Parcel taken pursuant to this Easement.

9. **Miscellaneous.**

9.1 **Notices.** All notices, statements, demands, approvals and other communications given pursuant to this Easement will be in writing and will be delivered in person, by certified or registered mail, postage prepaid, or by a national courier service to the Owners of the Parcels affected at the addresses on file with the office of the Douglas County Assessor for delivery of ad valorem property tax statements relating to their respective Parcels. All such notices which are mailed shall be deemed delivered on the third day after postmark. All such notices delivered by a national courier service shall be deemed delivered the next regular business day following the date of deposit with such service.

9.2 **Waiver of Default.** No waiver of any default by any Owner will be implied from the failure by any other Owner to take any action in respect of such default. No express waiver or any default will affect any default or extend any period of time for performance other than as specified in such express waiver. One or more waivers of any default in the performance of any

provision of this Easement will not be deemed a waiver of any subsequent default in the performance of the same provision or any other provisions. The consent to or approval of any act or request by an Owner will not be deemed to waive or render unnecessary the consent to or approval of any subsequent similar act or request. The rights and remedies provided by this Easement are cumulative and no right or remedy will be exclusive of any other, or of any other right to remedy at law or in equity which any Owner might otherwise have by virtue of a default under this Easement; and the exercise of any right or remedy by any Owner will not impair such Owner's standing to exercise any other right or remedy.

9.3 No Partnership. Nothing contained in this Easement and no action by the Owner of a Parcel will be deemed or construed by an Owner or any third person to create the relationship of principal and agent, or a partnership, or a joint venture, or any association between or among any of the Owners of any of the Parcels.

9.4 Severability. If any provision of this Easement is, to any extent, declared by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Easement (or the application of such provision to persons or circumstances other than those in respect of which the determination of invalidity or unenforceability was made) will be valid and enforceable to the fullest extent permitted by law.

9.5 Governing Law. This Easement will be construed in accordance with the laws of the State of Nebraska.

9.6 Captions. The captions of the sections of this Easement are for convenience only and are not intended to affect or limit the interpretation or construction of the provisions herein contained.

9.7 Estoppel Certificates. The Owner of any Parcel shall, from time to time upon not less than twenty (20) days written notice from any other Owner, execute and deliver to such other Owner a certificate in recordable form stating that this Easement is unmodified and in full force and effect or, if modified, indicating the modifications, and stating whether or not, to the best of its knowledge, any Owner is in default under the Easement and if so, specifying such default.

9.8 Merger. This Easement and the easements and rights created herein shall not be subject to the doctrine of merger.

9.9 Force Majeure. Whenever performance is required under this Easement, the person or entity required to perform shall use all due diligence to perform and take all necessary measures in good faith to perform; provided, however, that if completion of performance shall be delayed at any time by reason of acts of God, war, civil commotion, riots, strikes, picketing or other labor disputes, unavailability of labor or materials, damage to work in progress by reason of fire or other casualty, or any cause beyond the reasonable control of such person, then the time for performance as herein specified shall be appropriately extended by the amount of the delay actually so caused. The provisions of this Section shall not operate to excuse any person or

entity from the prompt payment of any monies required by this Easement and lack of funds shall not be deemed to be a cause beyond the control of such person or entity.

Dated as of November 1, 2005

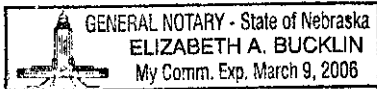
Village West LLC, a Nebraska Limited Liability Company

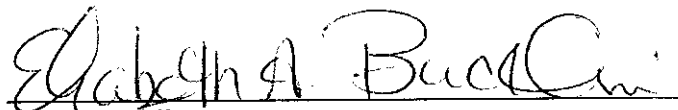
By: 
Jay R. Lerner, Manager

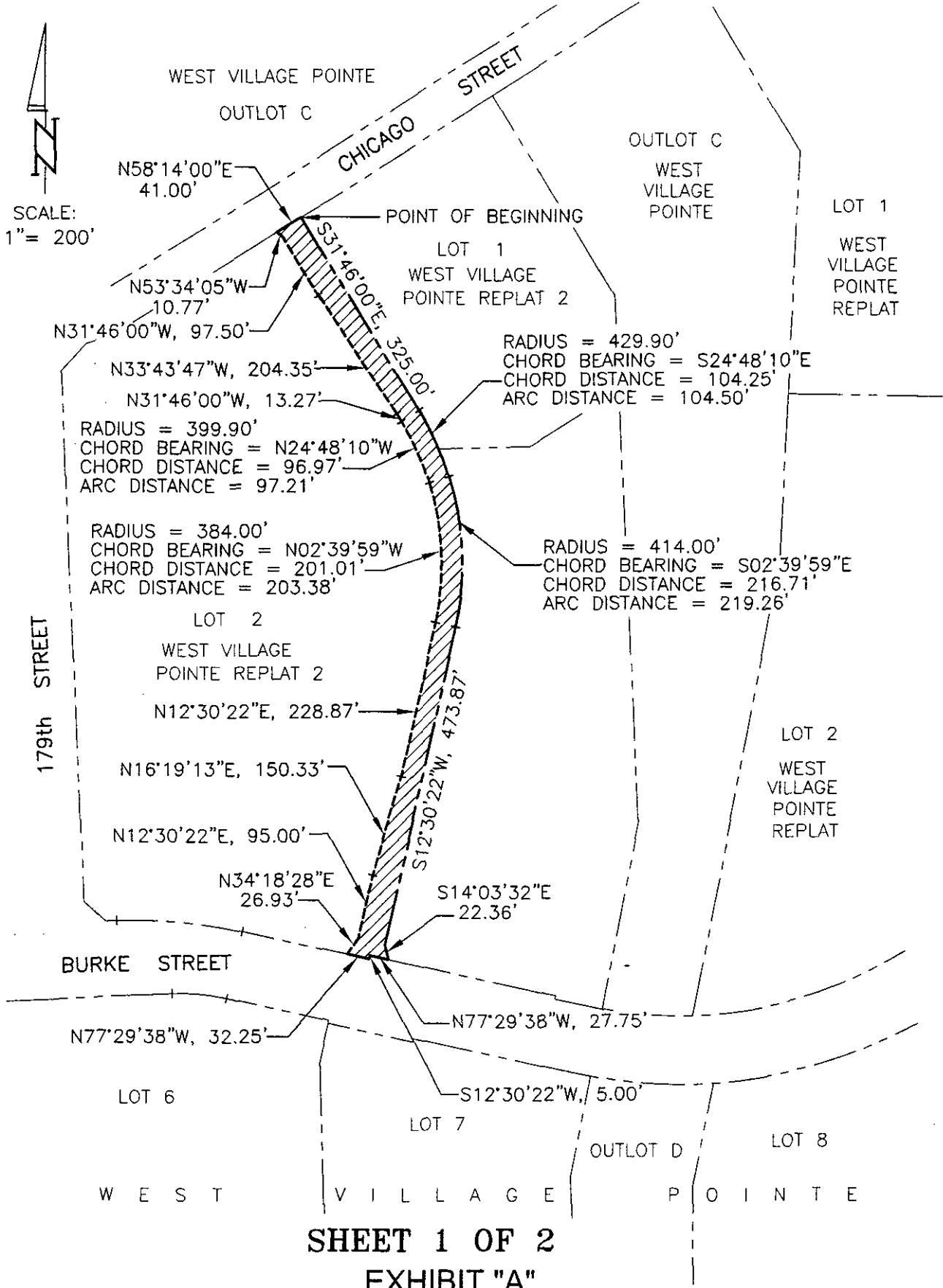
ACKNOWLEDGMENT

STATE OF NEBRASKA)
) SS.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 1st day of November, 2005, by Jay R. Lerner, Manager of Village West LLC, a Nebraska Limited Liability Company, on behalf of such limited liability company.




Notary Public



SHEET 1 OF 2
EXHIBIT "A"

LEGAL DESCRIPTION

THAT PART OF LOT 2, WEST VILLAGE POINTE REPLAT 2, A SUBDIVISION IN DOUGLAS COUNTY, NEBRASKA, DESCRIBED AS FOLLOWS, BEGINNING AT THE NE CORNER OF SAID LOT 2;

THENCE S31°46'00"E (ASSUMED BEARING) 325.00 FEET ON THE EAST LINE OF SAID LOT 2;

THENCE SOUTHEASTERLY ON THE EAST LINE OF SAID LOT 2 AND ITS SOUTHEASTERLY EXTENSION ON A 429.90 FOOT RADIUS CURVE TO THE RIGHT, CHORD BEARING S24°48'10"E, CHORD DISTANCE 104.25 FEET, AN ARC DISTANCE OF 104.50 FEET;

THENCE SOUTHEASTERLY ON A 414.00 FOOT RADIUS CURVE TO THE RIGHT, CHORD BEARING S02°39'59"E; CHORD DISTANCE 216.71 FEET, AN ARC DISTANCE OF 219.26 FEET;

THENCE S12°30'22"W 473.87 FEET;

THENCE S14°03'32"E 22.36 FEET TO THE SOUTH LINE OF SAID LOT 2;

THENCE N77°29'38"W 27.75 FEET ON THE SOUTH LINE OF SAID LOT 2;

THENCE S12°30'22"W 5.00 FEET ON THE SOUTH LINE OF SAID LOT 2;

THENCE N77°29'38"W 32.25 FEET ON THE SOUTH LINE OF SAID LOT 2;

THENCE N34°18'28"E 26.93 FEET;

THENCE N12°30'22"E 95.00 FEET;

THENCE N16°19'13"E 150.33 FEET;

THENCE N12°30'22"E 228.87 FEET;

THENCE NORTHWESTERLY ON A 384.00 FOOT RADIUS CURVE TO THE LEFT, CHORD BEARING N02°39'59"W, CHORD DISTANCE 201.01 FEET, AN ARC DISTANCE OF 203.38 FEET;

THENCE NORTHWESTERLY ON A 399.90 FOOT RADIUS CURVE TO THE LEFT, CHORD BEARING N24°48'10"W, CHORD DISTANCE 96.97 FEET, AN ARC DISTANCE OF 97.21 FEET;

THENCE N31°46'00"W 13.27 FEET;

THENCE N33°43'47"W 204.35 FEET;

THENCE N31°46'00"W 97.50 FEET;

THENCE N53°34'05"W 10.77 FEET TO THE NORTH LINE OF SAID LOT 2;

THENCE N58°14'00"E 41.00 FEET ON THE NORTH LINE OF SAID LOT 2 TO THE POINT OF BEGINNING.

SHEET 2 OF 2