

## O STREET & NORTH 84<sup>TH</sup> STREET AGREEMENT

This O Street & North 84<sup>th</sup> Street Agreement (“Agreement”) is made and entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2015, by and between the **State of Nebraska Department of Roads** (“State”), **City of Lincoln, Nebraska**, a municipal corporation (“City”), **Cornhusker Bank**, a Nebraska corporation (“Bank”), and **Brehm Enterprises, Inc.**, a Nebraska corporation (“Owner”). The parties may hereinafter jointly be referred to as the “Parties” or individually as a “Party”.

### RECITALS

A. Owner is the owner of approximately 4.89 acres located north of O Street (sometimes referred to herein as “Highway 34”) and west of North 84<sup>th</sup> Street, which is legally described as Lot 1 and Outlot A, Russwood Park 4<sup>th</sup> Addition, Lincoln, Lancaster County, Nebraska (the “Property”).

B. Owner has leased that portion of the Property legally described as Outlot A, Russwood Park 4<sup>th</sup> Addition, Lincoln, Lancaster County, Nebraska (“Bank Property”), to Bank pursuant to the First Amendment and Restatement of Ground Lease dated December 3, 2014.

C. Bank has plans to develop the Bank Property which will require the completion of various infrastructure improvements, both public and private, to and adjacent to the Property, hereinafter referred to as “Bank Improvements.”

D. Owner and Bank have applied for and the City is concurrently processing an amendment to Use Permit No. 13011 which outlines the Bank Improvements necessary to serve the Property and to promote the general health and welfare of the public (“Use Permit Amendment”).

E. The Use Permit Amendment identifies the arterial street improvements necessary to serve the full development of the Property, including improvements to O Street and North 84<sup>th</sup> Street which are described in paragraphs 1, 2, 3, and 4 below and conceptually shown on Exhibit “1” attached hereto and incorporated herein by this reference (“Street Improvements”).

F. The State currently owns the right-of-way for O Street adjacent to the Property and has access control along said street.

G. The Parties wish to set forth a plan for the construction of the Street Improvements and to clarify certain rights, duties and responsibilities among the parties relating to the construction of the Street Improvements.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties do agree as follows:

The Parties agree that the following Street Improvements are necessary to serve the full development of the Property and to promote the general health and welfare of the State and the City.

1. **North 84<sup>th</sup> Street Right Turn Lane.** Bank shall, on behalf of the City, design, competitively bid, construct and fund a southbound to westbound right turn lane and sidewalk in North 84<sup>th</sup> Street at O Street as shown on Exhibit “2” attached hereto and incorporated herein by this reference, through the City’s Executive Order process (“North 84<sup>th</sup> Street Right Turn Lane”). The parties acknowledge that the North 84<sup>th</sup> Street Right Turn Lane is an Arterial Street Impact Fee Facility Improvement. The City agrees to reimburse Bank for all costs associated with the North 84<sup>th</sup> Street Right Turn Lane, including, but not limited to, the design, state permits, grading, construction, utility relocation and traffic signal improvements (collectively “Turn Lane Costs”) within thirty (30) days of receipt of an invoice and supporting documentation for the invoiced Turn Lane Costs. The City agrees that the Bank may send monthly invoices for the Turn Lane Costs incurred.

2. **Shared Access Right Turn Lane.** Bank shall, at its sole cost and expense, design and construct a westbound to northbound right turn lane and sidewalk in O Street to permit access at the shared north-south driveway located on Lot 1, Russwood Park 4<sup>th</sup> Addition, including any necessary reconfiguration of the existing shared north-south driveway, as shown on Exhibit “3” attached hereto and incorporated herein by this reference, through the City’s Executive Order process (“Shared Access Right Turn Lane”).

3. **Russwood Turn Lane.** Bank shall, at its sole cost and expense, design and construct a westbound to northbound right turn lane and sidewalk in O Street at Russwood Parkway, as shown on Exhibit “3”, through the City’s Executive Order process (“Russwood Turn Lane”).

4. **Access Road Removal.** The parties agree Bank shall, at its sole cost and expense, design and remove the current access road improvements and relocate any utilities that parallel the O Street right-of-way south of the Property, as shown on Exhibit “3” (“Access Road Removal”). Bank shall also be responsible for reseeding those areas not used for the Shared Access Right Turn Lane and Russwood Turn Lane.

5. **Design, Construction and Permitting.** Bank shall coordinate the design of and the construction plans for the Street Improvements with the State and the City. Subject to the provisions of paragraph 1 above, the Bank shall be solely and separately liable for all costs of such design and plans. The City, Bank and Owner agree to use their best efforts to cooperate and work together to obtain all necessary permits from the State of Nebraska needed for the construction of the Street Improvements prior to beginning work on the State's right-of-way. The Exhibits attached to this Agreement shall be further refined and detailed as may be necessary for the review and approval of the required permits.

The professional roadway design services for work to be constructed on the State right-of-way under this Agreement shall be performed by a professional civil engineer registered to practice in the State of Nebraska. The review and approval by State of the plans and specifications, and authorization of the Street Improvements in accordance with such plans and specifications shall not constitute a waiver of liability for any professional negligence in the development of such plans and specifications.

Professional construction engineering services for work constructed on the State property under this Agreement will be conducted by a professional civil engineer registered to practice in the State of Nebraska. Review and approval by State of the work so constructed shall not constitute a waiver of liability for any professional negligence related to such construction services.

State will rely on the professional performance and ability of the Bank or its design or construction engineering professional. Acceptance or approval of any of the work by State will not constitute a waiver of any rights of State to recover damages caused by any error, omission or negligence in the design or construction of the work. Further, if due to error, omission, or negligence of the engineering professional, the plans, specifications, or estimates are found to be in error, or there are omissions therein revealed during the construction of the project, and revision or reworking of the plans is necessary, such revisions or reworking shall be made at the sole cost and expense of the Bank.

6. **Completion of Construction.** The Street Improvements shall be constructed to the satisfaction of the State and City prior to the City's approval of any occupancy permit on the Bank Property.

7. **Responsibility for Claims, Liability and Insurance.** Bank agrees to indemnify and hold harmless, to the fullest extent allowed by law, the State, the Owner and the City, and their

respective agents, employees and representatives from all claims, demands, suits, actions, payments, liability, judgments and expenses (including court-ordered attorney's fees), arising out of or resulting from the performance of this Agreement that results in bodily injury, sickness, disease, death, civil rights liability, or damage to or destruction of tangible property, including the loss of use resulting there from, that are caused in whole or in part by the Bank, the Bank's contractor for the Street Improvements, any subcontractor, or any agents or representatives, either directly or indirectly employed by them. In this connection, the Bank, or the Bank contractor shall for the life of this Agreement, carry (i) the insurance required by the State as described on Exhibit "4" attached hereto and incorporated herein by this reference, and (ii) the insurance required by the City through the City's Executive Order Construction process. In addition, Bank agrees to include the following clause in its contractor and subcontractor agreements: "The contractor shall not commence work under this Agreement until it has obtained all insurance meeting the State's and the City's insurance requirements and has provided the State, City, and Owner with a Certificate of Insurance showing the State, City, and Owner as additional insureds."

8. **Excess O Street Right-of-Way.** The parties acknowledge that with the completion of the Street Improvements, the State will have approximately 4,394 square feet of real property adjacent to the south side of the Property that will no longer be needed as O Street right-of-way to provide access to the Property from O Street, as shown on Exhibit "5" attached hereto and incorporated herein by this reference ("Excess O Street ROW"). Owner owns limited rights of access to O Street. Owner's project will require a revision to those access rights. Owner will deed to State Owner's existing rights of access to O Street, using a deed prepared by State. In exchange, State will deed to Owner the necessary access rights, using a deed prepared by State, to provide Owner the right to construct, operate and maintain a standard driveway to westbound O Street with the centerline of such driveway to be located at or near 306.59 feet west of the centerline of 84<sup>th</sup> Street (or the Section or Quarter Section line.) The approximate location of Owner's driveway is shown on the attached Exhibit "5". Then, State agrees to promptly declare as excess the area, presently estimated to be 4,394 square feet in size, determined by State to not be necessary for State's present and future use of O Street. State will obtain an appraisal to determine the fair market value of the Excess O Street ROW ("Appraisal"). State, City, and Owner agree that following the State's review of the completed Appraisal, State shall sell and Owner shall purchase the Excess O Street ROW for the fair market value set forth in the reviewed Appraisal report. State shall transfer

the Excess O Street ROW to Owner via a quit claim deed. Owner shall accept the Excess O Street ROW “as is” with no representations or warranties from the State. The Parties understand that the Excess O Street ROW is conveyed subject to easements for occupation by existing utilities. The parties further agree that the City shall immediately vacate, at no additional cost to Owner, any part of the Excess O Street ROW that was previously platted or dedicated city street upon condition that said vacation shall not go into effect until and unless the State conveys the Excess O Street ROW.

9. **Easements.** Owner shall dedicate and convey from the Property all temporary nonexclusive construction easements to the City and/or State necessary for the construction of the Street Improvements, without additional cost or consideration, in conjunction with the construction of such Street Improvements.

10. **Amendments.** This Agreement may only be amended or modified in writing signed by the parties to this Agreement.

11. **Further Assurances.** Each party will use its best and reasonable efforts to successfully carry out and complete each task, covenant, and obligation as stated herein. Each of the parties shall cooperate in good faith with the other and shall do any and all acts and execute, acknowledge, and deliver any and all documents so requested in order to satisfy the conditions set forth herein and carry out the intent and purposes of this Agreement.

12. **Governing Law.** All aspects of this Agreement shall be governed by the laws of the State of Nebraska. The invalidity of any portion of this Agreement shall not invalidate the remaining provisions.

13. **Interpretations.** Any uncertainty or ambiguity existing herein shall not be interpreted against either party because such party prepared any portion of this Agreement, but shall be interpreted according to the application of rules of interpretation of contracts generally.

14. **Construction.** Whenever used herein, including acknowledgments, the singular shall be construed to include the plural, the plural the singular, and the use of any gender shall be construed to include and be applicable to all genders as the context shall warrant.

15. **Relationship of Parties.** Neither the method of computation of funding or any other provisions contained in this Agreement or any acts of any party shall be deemed or construed by the City, Parties in Interest, or by any third person to create the relationship of partnership or of joint venture or of any association between the parties other than the contractual relationship stated in this Agreement.

16. **Assignment.** In the case of the assignment of this Agreement by any of the parties, prompt written notice shall be given to the other parties who shall at the time of such notice be furnished with a duplicate of such assignment by such assignor. Any such assignment shall not terminate the liability of the assignor to perform its obligations hereunder, unless a specific release in writing is given and signed by the other parties to this Agreement or unless otherwise stated herein.

17. **Default.** In the event of a default by a party hereunder in fulfilling any of its covenants and responsibilities as set forth in this Agreement, then the remaining party or parties may take such remedies, legal or equitable, to enforce this Agreement or to obtain damages for its breach.. In the event of a default by Owner or Bank, the City, in its legislative authority, or NDOR, in exercising its authority, may also rescind their respective approvals or permits

18. **Definitions.** For purposes of this Agreement, the words and phrases "cost" or "entire cost" of a type of improvement shall be deemed to include all design and engineering fees, testing expenses, acquisition of right-of-way from a third party, permitting costs, construction costs, utility relocation costs, traffic signal improvement costs, publication costs, financing costs, and related miscellaneous costs. For the purposes of this Agreement, the words and phrases "building permit," "development," "Impact Fee Facility," "Impact Fee Facility Improvement," and "site-related improvements" shall have the same meaning as provided for said words and phrases in the Impact Fee Ordinance.

19. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, devisees, personal representatives, successors and assigns and shall inure to and run with the Property.

20. **Contingency.** This Agreement is contingent upon the City's approval of the Use Permit Amendment with terms and conditions acceptable to Owner and Bank. Satisfaction of this contingency shall be evidenced by the Lincoln-Lancaster County Planning Commission's or City Council's approval of a Resolution approving the Use Permit Amendment ("Use Permit Resolution") as provided for in Chapter 27.64 of the Lincoln Municipal Code and Owner's execution and delivery to the City Clerk of a Letter of Acceptance accepting and agreeing to comply with the conditions of the Use Permit Resolution. The construction of the Street Improvements contemplated by this Agreement is also contingent upon the prior written approval by Aldi Inc. (Kansas), a Kansas corporation as the Tenant of Lot 1, Russwood Park 4<sup>th</sup> Addition, Lincoln, Lancaster County, Nebraska of the Street Improvements.



“CITY”

**CITY OF LINCOLN, NEBRASKA,**  
a municipal corporation

ATTEST:

\_\_\_\_\_  
City Clerk

By: \_\_\_\_\_  
Chris Beutler, Mayor

STATE OF NEBRASKA            )  
                                          ) ss.  
COUNTY OF LANCASTER        )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
2015, by Chris Beutler, Mayor of the **City of Lincoln, Nebraska**, a municipal corporation.

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

“OWNER”

**BREHM ENTERPRISES, INC.**, a Nebraska corporation

By: \_\_\_\_\_  
Mary Jo Livingston  
Chief Executive Officer

STATE OF NEBRASKA    )  
                                          ) ss.  
COUNTY OF LANCASTER )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2015 by Mary Jo Livingston, as Chief Executive Officer of **BREHM ENTERPRISES, INC.**, a Nebraska corporation, on behalf of the corporation.

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

“BANK”

**CORNHUSKER BANK**, a Nebraska  
corporation

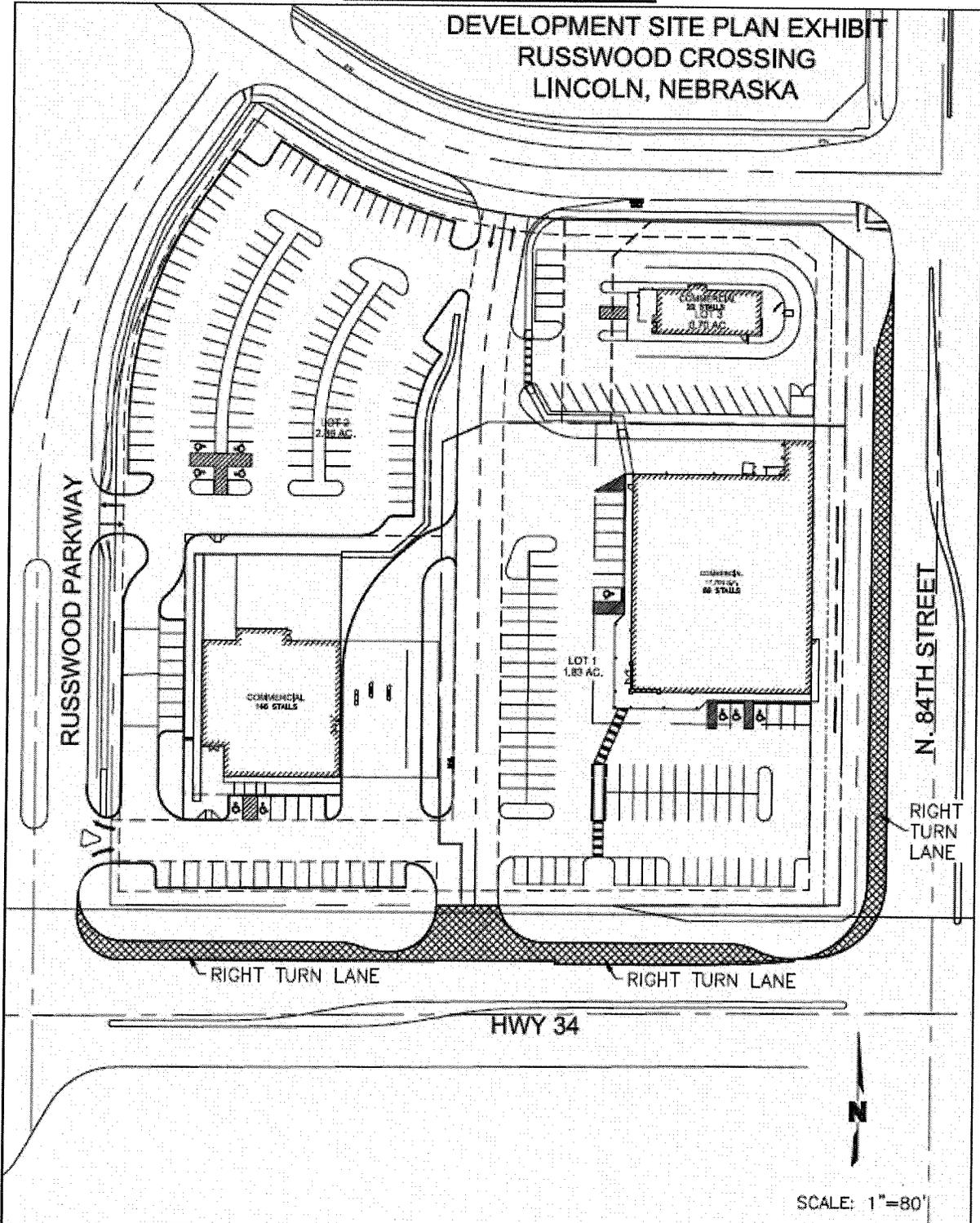
By: \_\_\_\_\_  
Barry Lockard, President

STATE OF NEBRASKA    )  
                                  ) ss.  
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2015 by Barry Lockard, President, President of **CORNHUSKER BANK**, a Nebraska corporation, on behalf of the corporation.

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

**EXHIBIT "1"**  
**STREET IMPROVEMENTS**



PROJECT NO: 014-2541  
DRAWN BY: MCL  
DATE: 11/04/2014

**DEVELOPMENT SITE  
PLAN EXHIBIT**

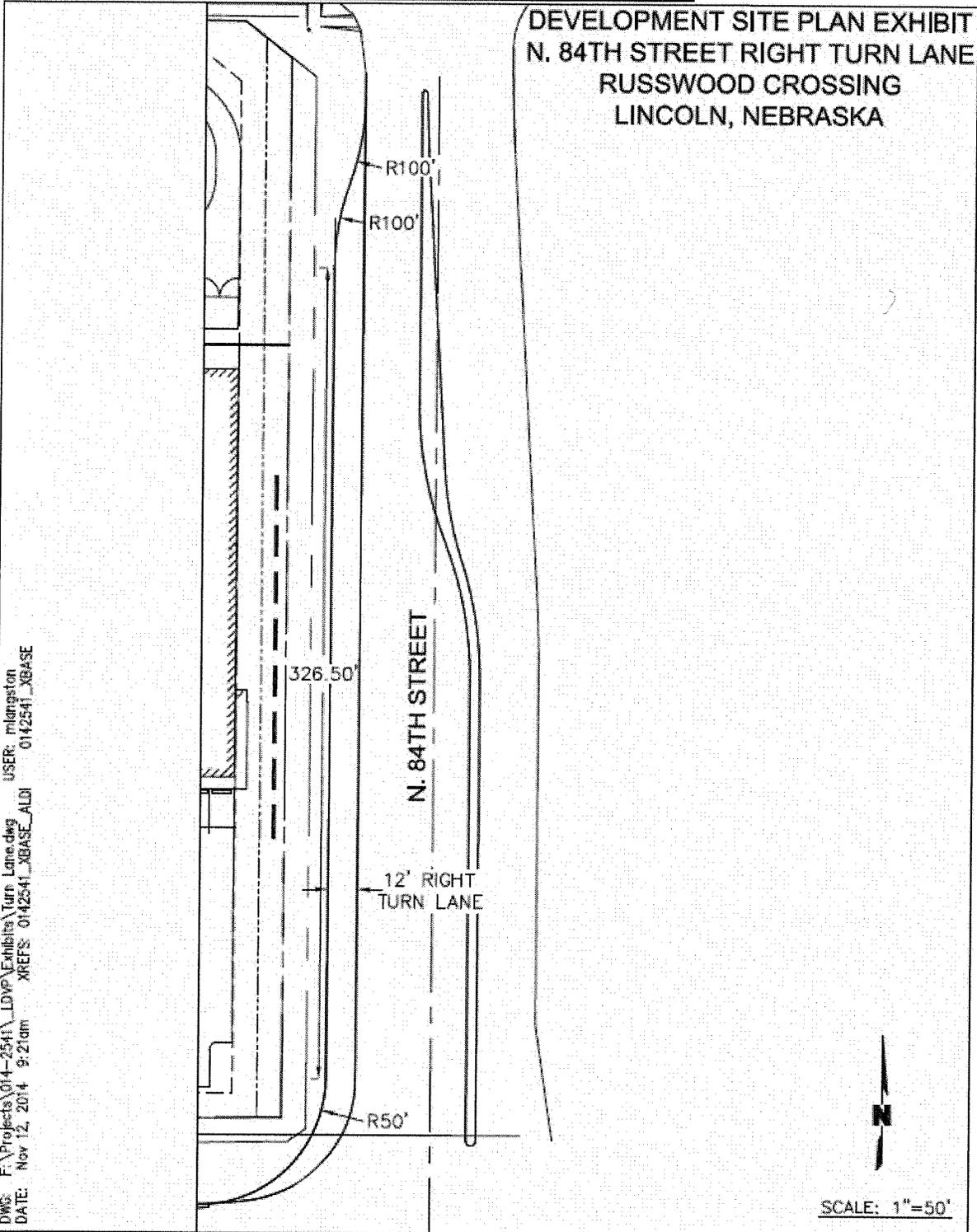
**MOLSSON**  
ASSOCIATES

801 P Street, Suite 200  
P.O. Box 84808  
Lincoln, NE 68508  
TEL: 402.474.6311  
FAX: 402.474.6160

EXHIBIT  
**1**

**EXHIBIT "2"**  
**NORTH 84<sup>TH</sup> STREET TURN LANE**

DEVELOPMENT SITE PLAN EXHIBIT  
 N. 84TH STREET RIGHT TURN LANE  
 RUSSWOOD CROSSING  
 LINCOLN, NEBRASKA



DWG: F:\Projects\014-2541\LDVP\Exhibits\Turn Lane.dwg  
 DATE: Nov 12, 2014 9:21am  
 USER: mlangston  
 XREFS: 0142541\_XBASE\_ALDI 0142541\_XBASE

PROJECT NO: 014-2541  
 DRAWN BY: MCL  
 DATE: 11/04/2014

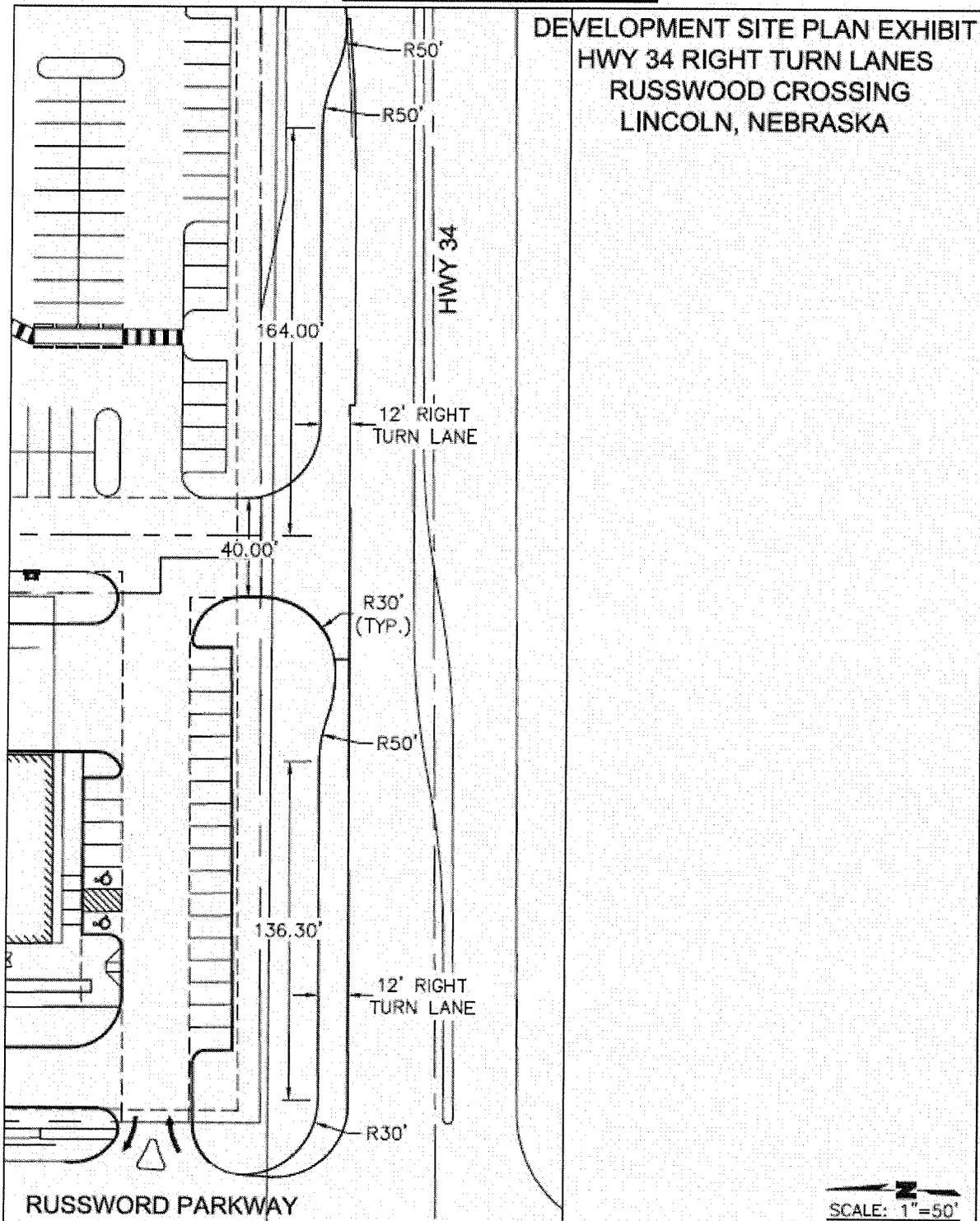
**DEVELOPMENT SITE  
 PLAN EXHIBIT**

**MOLSSON**  
 ASSOCIATES

801 P Street, Suite 200  
 P.O. Box 84808  
 Lincoln, NE 68508  
 TEL 402.474.6311  
 FAX 402.474.6160

EXHIBIT  
**2**

**EXHIBIT "3"**  
**SHARED ACCESS RIGHT TURN LANE, RUSSWOOD RIGHT TURN LANE AND**  
**ACCESS ROAD REMOVAL**



PROJECT NO: 014-2541	<b>DEVELOPMENT SITE PLAN EXHIBIT</b>		801 F Street, Suite 200 P.O. Box 84608 Lincoln, NE 68608 TEL 402.474.6311 FAX 402.474.5169	EXHIBIT
DRAWN BY: MCL				3
DATE: 11/04/2014				

**EXHIBIT "4"**

**INSURANCE REQUIREMENTS FOR BANK'S CONTRACTOR  
PERFORMING WORK ON STATE HIGHWAY PROPERTY**

The Bank shall require and the contractor shall make a detailed review of its existing insurance coverage, compare that coverage with the expected scope of the work under this contract, obtain sufficient insurance coverage to fully protect it from loss associated with the work, and have at a minimum the insurance described below, prior to execution of the contract:

1. General Liability:

Limits of at least:

\$ 1,000,000 per Occurrence

\$ 2,000,000 General Aggregate

\$ 2,000,000 Completed Operations Aggregate

\$ 1,000,000 Personal and Advertising Injury

a. Contractor shall be responsible for the payment of any deductibles.

b. Coverage shall be provided by a standard form Commercial General Liability Policy (CG0001 or equivalent) covering bodily injury, property damage including loss of use, and personal injury.

c. The General Aggregate to apply on a Per Project Basis.

d. The State of Nebraska, Department of Roads ("State") and Brehm Enterprises, Inc. ("Owner") shall be named as Additional Insureds on a primary and non-contributory basis including completed operations for three (3) years after final acceptance and payment.

e. Contractor agrees to waive its rights of recovery against the State and Owner.

Waiver of Subrogation in favor of the State and Owner shall be added to the policy.

f. Contractual liability coverage shall be on a broad form basis and shall not be amended by any limiting endorsements.

g. If work is being performed near a railroad track, the 50' railroad right-of-way exclusion must be deleted.

h. Products and completed operations coverage in the amount provided above shall be maintained for the duration of the work, and shall be further maintained for a minimum period of three years after final acceptance and payment.

i. Coverage shall be included for demolition of any building or structure, collapse, explosion, blasting, excavation and damage to property below surface of ground (XCU coverage).

j. Policy shall not contain a total or absolute pollution exclusion. Coverage shall be provided for pollution exposures arising from products and completed operations as per standard CG0001 Pollution Exclusion or equivalent. If the standard pollution exclusion as provided by CG0001 has been amended, coverage must be substituted with a separate Pollution Liability policy of \$1.0 million per occurrence and \$2.0 million aggregate. If coverage is provided by a “claims made” form, coverage will be maintained for three years after project completion. Any applicable deductible is the responsibility of the contractor.

2. Automobile Liability:

Limits of at least:

\$ 1,000,000 CSL per Accident

- a. Coverage shall apply to all Owned, Hired, and Non-Owned Autos.
- b. If work is being performed near a railroad track, the 50-foot railroad right of way exclusion must be deleted.
- c. Contractor agrees to waive its rights of recovery against the State and Owner. Waiver of Subrogation in favor of the State and Owner, shall be added to the policy.
- d. Automobile liability coverage shall be obtained from an insurance carrier who is licensed with the Nebraska Department of Insurance.

3. Workers’ Compensation:

Limit: Statutory coverage for the State where the project is located.

Employer’s Liability limits: \$500,000 Each Accident

\$500,000 Disease – Per Person

\$500,000 Disease – Policy Limit

- a. Contractor agrees to waive its rights of recovery against the State and Owner. Waiver of Subrogation in favor of the State and Owner shall be added to the policy
- b. Workers’ compensation coverage shall be obtained from an insurance carrier who is licensed with the Nebraska Department of Insurance.
- c. Where applicable, the Longshore and Harborworkers Compensation Act endorsement shall be attached to the policy.

4. Umbrella/Excess:

Limits of at least:

\$1,000,000 per Occurrence

- a. Policy shall provide liability coverage in excess of the specified Employers Liability, Commercial General Liability and Automobile Liability.
- b. The State and Owner shall each be an “Additional Insured.”
- c. Contractor agrees to waive its rights of recovery against the State and Owner. Waiver of subrogation in favor of the State and Owner shall be provided.

5. Pollution Liability:

- a. When “hazardous wastes” or contaminated or polluted materials must be handled and/or moved, the contractor shall obtain Pollution Liability Coverage with minimum limits of \$1,000,000 per occurrence and \$2,000,000 aggregate.

b. If, during the course of construction, hazardous wastes, contaminated or polluted material are discovered on the project, the contractor shall immediately cease any operation that may disturb these materials, and shall immediately notify the Engineer of all facts related to the discovery of these materials.

c. Unforeseen work related to the discovery of hazardous, contaminated or polluted materials on the project, and the extra cost, if any, of pollution liability coverage will be handled as "extra work."

6. Additional Requirements:

a. The contractor shall provide and carry any additional insurance required by the Special Provision, the Bank and the City.

b. Except as otherwise provided herein, all insurance shall be kept in full force and effect until after the State releases the Bank and contractor from all obligations under the contract.

c. (1) If any of the work is sublet, equivalent insurance shall be provided by or in behalf of the subcontractor or subcontractors (at any tier) to cover all operations.

(2) Approved trucking subcontractors (at any tier) who are being utilized only for the purpose of hauling materials shall be exempt from the requirements of Paragraphs 1, 4, and 5.

(3) (i) When a contractor or subcontractor chooses to employ a trucker by carrying the driver on his or her payroll and entering into a lease agreement for the truck, the owner-operator of the truck shall be required to comply with the Automobile Liability provisions of Paragraph 2.

(ii) Furthermore, it shall be the duty of the prime contractor to ensure that the owner-operator of the truck has such insurance in effect. The prime contractor shall maintain evidence that any truckers so utilized (at any tier) are insured to the minimum limits specified and be able to furnish documentation of the same on demand.

(iii) Failure to ensure that insurance coverage exists and failure to maintain evidence thereof shall be considered a breach of the contract.

d. Any insurance policy shall be written by an insurance company with a Best's Insurance Guide Rating of A – VII or better.

e. Prior to execution of the contract, contractor shall provide the Bank, State and Owner evidence of contractor's insurance coverage in effect in the form of an Accord (or equivalent) certificate of insurance executed by a licensed representative of the participating insurer(s). Certificates of insurance shall show the State and Owner as the certificate holders.

f. For so long as insurance coverage is required under this Agreement, the Bank shall require its contractor have a duty to notify the Bank, Owner and State when the contractor knows, or has reason to believe, that any insurance coverage required under this Agreement will lapse, or may be cancelled or terminated. The contractor must forward any pertinent notice of cancellation or termination to the State and Owner at the address listed below by mail (return receipt requested), hand-delivery, or facsimile

transmission within 2 business days of receipt by contractor of any such notice from an insurance carrier. Notice shall be sent to:

Nebraska Department of Roads  
Construction Division --- Insurance Section  
1500 Highway 2, P.O. Box 94759  
Lincoln, NE 68509-4759  
Facsimile No. 402-479-4854

Brehm Enterprises, Inc.  
213 North 13<sup>th</sup> Street  
Lincoln, NE 68508  
Phone No. 402-323-6800

g. Failure of the State, Owner or any other party to review, approve, and/or reject a certificate of insurance in whole or in part does not waive the requirements of this Agreement.

h. The limits of coverage set forth in this document are suggested minimum limits of coverage. The suggested limits of coverage shall not be construed to be a limitation of the liability on the part of the Bank or its contractor or any of its subcontractors/tier subcontractors. The carrying of insurance described shall in no way be interpreted as relieving the contractor, subcontractor, or tier subcontractors of any responsibility or liability under the contract.

i. If there is a discrepancy of coverage between this document and any other insurance specification for Bank's project, the greater limit or coverage requirement shall prevail.

**EXHIBIT "5"**  
**EXCESS O STREET RIGHT-OF-WAY**

