

AGREEMENT
(Program)

PROJECT NO. ENH-5266(2) STATE CONTROL NO. 12946
CITY OF LINCOLN
STATE OF NEBRASKA, DEPARTMENT OF ROADS
LINCOLN WEST 'O' HISTORIC HIGHWAY PROJECT

THIS AGREEMENT, made and entered into by and between the City of Lincoln, hereinafter referred to as the "City", and the State of Nebraska, Department of Roads, hereinafter referred to as the "State",

WITNESSETH:

WHEREAS, certain historic areas, in the City have been designated as being eligible for the Enhancement Program portion of the Surface Transportation Program (STP) funds by the Department of Transportation, Federal Highway Administration, hereinafter called FHWA, in compliance with Federal laws pertaining thereto, and

WHEREAS, STP funds have been made available by Title 23 of the United States Code, providing for improvements on eligible historic areas, and

WHEREAS, the Federal share payable will be a maximum of 80 percent of the eligible costs thereof, up to a maximum payment from Federal funds of \$380,036 and

WHEREAS, regulations for implementing the provisions of the above mentioned act provide that the Federal share of the cost of such projects shall be paid only to the State, and

WHEREAS, the City shall supervise the contract letting and shall ensure that the project receives the same degree of supervision and inspection as a project constructed under a contract let and directly supervised by the State, and

WHEREAS, regulations further permit the use of funds other than State funds in matching Federal funds for improvements of those historic areas, and

WHEREAS, the State's responsibility is to provide project oversight to insure that the City or its Contractor is constructing the project in accordance with the approved plans and to further notify the City or its Project Manager when federal funding will be withheld or lost where such construction of the project is not being prosecuted in accordance with the approved plans, and

WHEREAS, the State retains the services of Sinclair Hille Architects whose business address is 700 Q Street, Lincoln, NE 68508 hereinafter referred to as the "Enhancement Program Consultant" to assist the State with administration of the Enhancement Program, and

WHEREAS, the State is willing to cooperate to the end of obtaining Federal approval of the proposed work and Federal funds for the construction of the proposed improvement, with the understanding that no State Funds are to be expended on this project, and

WHEREAS, funding for the project under this agreement, includes pass-through monies from the Federal Highway Administration (FHWA). If a non-federal entity expends \$500,000 or more in total federal awards in a fiscal year, then the A-133 Audit is required

as explained further in the agreement, and

WHEREAS, Federal Regulations provide that the City shall not profit or otherwise gain from local property assessments that exceed the City's share of project costs, and

WHEREAS, it is the desire of the City that the project be constructed under the designation of Project No. ENH-5266(2), as evidenced by the Resolution of the City Council dated the _____ day of _____, 20____, attached and identified as Exhibit "B" and made a part of this agreement, and

WHEREAS, the City has earmarked and will place in its fiscal budget \$95,009, which is estimated to be the City's share of the cost of the Project; however, both parties recognize this is a preliminary estimate only and that the final costs may well be higher or lower than this preliminary estimate, and

WHEREAS, the project indicated on the location map identified as Exhibit "C", is described as follows:

Improvements located on a four-block segment of West O Street between 3rd Street and the Salt Creek Bridge. With a focus on transportation history and entryway enhancement, funding for the project will be directed to three primary components:

1) Creation of a historical interpretive area commemorating the historic Detroit-Lincoln-Denver (DLD) Highway; 2) Streetscape improvements to West 'O' Street that will enhance the entry to Downtown Lincoln; and 3) Construction of a 370-foot Salt Creek Levee Connector Trail.

The DLD interpretive plaza will be located just west of the Harris Overpass, which began replacement in November 2007. The new bridge structure will significantly improve the aesthetic quality of Lincoln's west entryway. Elements planned for the plaza include interpretive panels describing the history of the DLD highway, exposed brick from the original DLD on 3rd street, lighting relative to the time period of the DLD highway, and native landscaping. Signage directing visitors to an existing historic DLD mile marker located at 2nd and West 'P' Street will also be included in the plaza.

WHEREAS, both parties agree all costs of this project will be the sole responsibility of the City if the proposed project improvements are not under construction contract prior to July 31, 2009. This includes repayment to the State of Federal funds reimbursed for preliminary engineering costs and payment of all other expenses incurred as specified in Section 27 of this agreement.

NOW THEREFORE, in consideration of these facts, the parties agree as follows:
SECTION 1. The State agrees to present the above-mentioned project to the FHWA for its approval, if necessary.

SECTION 2. The funding for the project under this agreement includes pass-through federal monies from the FHWA. According to the Single Audit Act Amendments of 1996 and the implementing regulations contained in OMB Circular A-133, the A-133 Audit is required if the non-federal entity expends \$500,000 or more in total federal awards in a fiscal year. Non-federal entity means state and local governments and non-profit organizations.

The City shall have its finance officer or auditor review the situation to determine

what the City must do to comply with this federal mandate. If applicable, the expenditures related to the FHWA should be shown in the Supplementary Schedule of Expenditures of the Federal Awards under U.S. Department of Transportation as a pass through Nebraska Department of Roads, Federal CFDA Number 20.205. If an A-133 Audit is performed, the City shall send the audit report to the Nebraska Department of Roads, Highway Audits Manager, P.O. Box 94759, Lincoln, NE 68509-4759.

SECTION 3. The City, with such assistance as may be required from the State, agrees to perform or cause to be performed a preliminary survey and all necessary plans, specifications and estimates for the proposed work. The City agrees to acquire any or all permits necessary to accomplish the project.

In addition, the City agrees to present the project plans and specifications to the Nebraska State Historical Society for review and to provide the State with copies of all correspondence and communications resulting from such review. The City and State agree to enter into a Supplemental Agreement, if necessary, should the Nebraska State Historical Society's review request or recommend any additional work or changes to this project.

SECTION 4. The project will be designed in compliance with the local governing building code authority; the National Fire Protection Association (NFPA) 101 Life Safety Code 1994; the U.S. Secretary of the Interior's Standards for Rehabilitation (36 CFR 67); and the Americans with Disabilities Act (ADA) Accessibility Guidelines. The project must also be designed according to the following current publications: State of Nebraska Standard Specifications for Highway Construction, and the American Association of State Highway and Transportation Officials Guide for the Development of Bicycle Facilities, and the Designing Sidewalks and Trails for Access Part II of II: Best Practices Design Guide. Any deviations from the above must be approved by the State prior to preparation of plans.

SECTION 5. The State agrees to reimburse the City, using Federal Funds, for 80 percent of the actual eligible cost of the improvement up to a maximum of \$380,036. Progress billings to reimburse the City 95 percent of the eligible 80 percent costs may be submitted no more often than monthly until 95 percent of the maximum Federal share has been reimbursed. The final settlement between the State and the City will be made after final inspection and acceptance, and audit, if deemed necessary, and after final costs have been determined by the State.

SECTION 6. The parties agree that the preliminary engineering, which includes project design and plan development, will be accomplished by the City or a consultant selected by the City according to the "Consultant Selection Procedures for Nebraska Department of Roads Transportation Enhancement Projects." The State agrees to review the Request for Proposals prior to advertising.

In all instances, the State, through the Enhancement Program Consultant, will draft the agreement between the City and the Consultant prior to execution. Preliminary engineering is estimated to be \$38,004, and the State agrees to reimburse 80 percent of the eligible costs thereof.

It is understood by the parties that the State will rely on the professional performance and ability of the City or their consultant. Any examination by the State, or any acceptance or use of the work product of the City or their consultant will not be considered to be a full and comprehensive examination and will not be considered an approval of the work product of the City or their consultant which would relieve the City from any liability or expense that would be connected with the City's sole responsibility for the propriety and integrity of the professional work to be accomplished by the City.

SECTION 7. The parties further agree the City is to advertise and conduct a letting and receive bids for the contemplated improvement. All plans, specifications and bid proposals, permits, and any other contract documents must be submitted to and approved by the State prior to any bid letting by the City. The selection of low bidders and the awarding of a contract or contracts must be submitted to the State, through the Enhancement Program Consultant, for concurrence. The City shall sign the contract. After signing, the City shall send a copy of the signed contract, including all plans and specifications, to the State, through the Enhancement Program Consultant. Prior to advertising for Project Letting, the City shall forward a Right of Way Certificate to the City-County R.O.W. Coordinator, through the Enhancement Program Consultant.

SECTION 8. The parties agree that the construction engineering, an expense eligible for matching Federal funds, which includes construction staking, inspection and field testing, will be accomplished by City forces or a consultant selected by the City with State assistance and review.

The City agrees, if a Consultant is to be selected, that the method of selection and the resulting agreement between the Consultant and the City shall conform to the State's standard practices and will be subject to State review and concurrence prior to agreement execution between the City and the Consultant. Any construction engineering work performed more than 45 days prior to the letting date will be done at the expense of the City.

Any dispute concerning a question of fact in connection with the construction engineering work not disposed of by this agreement shall be referred for determination to the State Engineer or his duly authorized representative whose decision in the matter shall be final and conclusive on the parties to the contract.

The inspection, sampling and testing of all materials must be in accordance with the current State of Nebraska Standard Specifications for Highway Construction, the State Materials Sampling Guide and the State Standard Methods of Tests. The City must send a letter of certification to the State, through the Enhancement Program Consultant, stating that all test results of materials used on the project, manufacturer's certificates of compliance and manufacturer's certified test reports meet specification requirements for sampling and testing. The City will provide quality assurance, as may be required, to include random sampling and testing of material as well as random checks of test method procedures being performed by the inspector. In all cases, the City shall provide a Project Manager on a part-time basis who will be responsible for the prosecution of the project in accordance with the approved plans. The State will provide a Project Representative

whose responsibility is to be available to advise the City's Project Manager where the project is not being built in accordance with the approved plans, and that the City's federal share of the project may be withheld for failure to comply with the plans. The City shall contact the State, through the Enhancement Program Consultant, for State Representative assignment prior to advertising for project letting. It is understood that any construction engineering services furnished by the State will be part of the cost of the project and the State's expenses therein will be included as costs of the project as specified in Section 23 hereof.

The City shall provide a Project Manager to oversee the project and to ensure that the construction engineering performed by the City forces or the City's consultant comply with requirements for Federal funding. The Project Manager's services include, but are not limited to, arranging and presiding over the pre-construction conference, project management as required, and preparing contractor change orders and supplemental agreements.

SECTION 9. The City agrees to locate and reference or have located and referenced all section corners, quarter section corners and sub-division lot corners required for construction of the proposed project in accordance with Section 39-1708 et. seq., R.R.S. 1943 as amended.

SECTION 10. The Federal share of this project must be reduced by any project specific local property assessments that exceed the appropriate local share on this project.

SECTION 11. If Federal participation is to be received for any portion of the work on the proposed project, it is necessary that all phases of work, including but not limited to preliminary engineering, acquisition of right of way and construction be accomplished in accordance with the appropriate Federal requirements.

SECTION 12. If the City performs any part of the work on this project itself, the City agrees to abide by the provisions of the Nebraska Fair Employment Practices Act as provided by Neb. Rev. Stat. 48-1101, through 48-1126 (Reissue 1988), and all regulations relative to nondiscrimination in federally assisted programs of the Department of Transportation, Title 49 CFR, Parts 21 and 27 as set forth in Exhibit "A" attached, and made a part of this agreement. The reference to "Contractor" in this exhibit means the "City."

SECTION 13. The City shall have on file with the State an acceptable drug-free workplace policy.

SECTION 14. DISADVANTAGED BUSINESS ENTERPRISES

A. Policy

The City agrees to ensure that disadvantaged business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds under this agreement. Consequently, the disadvantaged business requirements of 49 CFR Part 23 are hereby made a part of and incorporated by this reference into this agreement.

B. Disadvantaged Business Enterprises Obligation

The City and State agree to ensure that disadvantaged business enterprises as

defined in 49 CFR Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, the City shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that disadvantaged business enterprises have the maximum opportunity to compete for and perform contracts. The City shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of FHWA assisted contracts.

The City, acting as a subrecipient of Federal-aid funds on this project agrees to adopt the disadvantaged business enterprise program of the State for the Federal-aid contracts the City enters into on this project.

Failure of the City to carry out the requirements set forth above will constitute breach of contract and, after the notification of the FHWA, may result in termination of the agreement or contract by the State or such remedy as the State deems appropriate.

SECTION 15. Changes to the project made by the City which affect the function or operation of the historic areas made either during construction or after the project is completed, will require prior approval of the State.

Requests for changes during project construction must be made to the State Representative through the Enhancement Program Consultant.

SECTION 16. Upon project completion and final inspection, the City shall send one set of "as-built" plans to the State, through the Enhancement Program Consultant.

SECTION 17. Upon completion, the City shall maintain this project at its own expense, and agrees to make provisions each year for the maintenance costs involved in properly maintaining this facility.

SECTION 18. Any utility rehabilitations or installations made within the right of way of this project after execution of this agreement will be in accordance with the provisions of Federal-Aid Highway Policy Guide, 23 CFR 645A, "Utility Relocations, Adjustments and Reimbursement", Federal-Aid Policy Guide, 23 CFR 645B, "Accommodation of Utilities" issued by the U.S. Department of Transportation, Federal Highway Administration, or a State approved Utility Accommodation Policy. In order to receive Federal-Aid Funds for this improvement, the City agrees to adopt the current "Policy for Accommodating Utilities on State Highway Right of Way."

All nonbetterment municipally owned and operated utility rehabilitation costs within the corporate limits of the City will become a project cost, but that outside the corporate limits, only the nonbetterment portion of the rehabilitation costs of facilities currently occupying private right of way will be reimbursed. Further, there will be no Federal reimbursement for private or nonmunicipally owned and operated utilities if they are located on public right of way, however, nonbetterment costs of privately owned and operated utilities will be reimbursed if they exist on privately owned right of way and it is necessary to rehabilitate the utilities due to this project. All such reimbursements must be based on items and estimates submitted by the utility and approved by the City and State. Should this project necessitate the nonbetterment rehabilitation of any municipally or privately owned and operated utilities, the parties agree to enter into a Supplemental

Agreement to provide for the nonbetterment utility rehabilitation and the reimbursement to the City for the Federal share of the costs of the nonbetterment utility rehabilitation. The parties agree that should any nonbetterment utility rehabilitation be accomplished before State execution of a Supplement to this Agreement, the rehabilitation work will be at the sole expense of the City.

Should any utilities include work which is eligible for reimbursement, the City shall pay the utility and bill the State for the Federal share. The State, subject to a final audit of the utility costs, will reimburse the City for the approved Federal share of the costs.

SECTION 19. If Federal participation is requested in right of way appraisal or acquisition, the State on behalf of the City, will review appraisals and negotiations for any additional right of way. The City shall be responsible for any eminent domain proceedings required for acquisition of the necessary property. The appropriate procedures as outlined in the current Nebraska Right of Way Manual approved by the FHWA shall be followed. Regardless of whether or not Federal funds are requested for the right of way, the City agrees to contact the State prior to beginning any right of way activity in order that the State may advise the City of the required right of way functions and procedures. It is understood that any right of way services furnished by the State shall be considered as a part of the cost of the project and the State's expenses therein shall be included as costs of the project as specified in Section 23 hereof.

SECTION 20. The City agrees, at no cost to the project, to clear the present right of way of this project of all advertising signs. The City also agrees, at no cost to the project, to clear any other privately owned facility or thing that may interfere with the construction, maintenance and operation of the improvement planned in this project, and to keep the old and new right of way free of future encroachments, except those authorized by permit.

SECTION 21. The City hereby agrees, and shall certify after accomplishment, that any right of way for this improvement not donated in compliance with FHWA guidelines will be acquired in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended, 49 CFR 24, and the State's Right of Way Manual as approved by FHWA.

SECTION 22. Traffic control during project construction shall conform with the Manual on Uniform Traffic Control Devices.

Before final acceptance of the project by the State, all signing and marking will be in conformance with the Manual on Uniform Traffic Control Devices. The edition of the manual which is current at the time of final acceptance shall be used.

SECTION 23. Costs incurred by the State with respect to the entire project will be part of the cost of the project to be paid out of City and Federal funds. Costs incurred by the State attributable to this project will not include any administrative costs or expenses of administrative officials. The State may, at its discretion, initiate progress invoices for costs incurred by the State during the progression of the project and the City agrees to pay such invoices within thirty (30) days of their receipt. The City's share of the total project cost shall be all costs not paid for by Federal funds.

The criteria contained in Part 31 of the Federal Acquisition Regulations System

(48 CFR 31) shall be applied to determine the allowability of costs incurred by the City under this agreement.

The City shall maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and shall make such material available at its office at all reasonable times during the contract period and for three (3) years from the date of final payment under this agreement; such records to be available for inspection by the State and the Federal Highway Administration or any authorized representatives of the Federal government, and copies thereof shall be furnished by the City if requested.

SECTION 24. It is mutually agreed that final approval of the project will be made by the State and that final payment cannot be made to the City until the project has been approved by the State.

SECTION 25. The City understands and agrees that the sole duty of proper prosecution of the project, in accordance with the approved plans, belongs with the City, its Project Manager and Contractors, and that failure to properly prosecute and construct the project in accordance with the approved plans may result in the loss of federal funding.

SECTION 26. The City agrees to acknowledge federal and state funding with proper signage such as recognition plaques on buildings or markers on trails. The funding acknowledgement shall state, "This project made possible through funds provided by the Nebraska Department of Roads Transportation Enhancement Program and the Federal Highway Administration." This statement shall also be incorporated into all press releases, web sites and printed information about the project.

SECTION 27. It is understood by the City that payment for the costs of this project, whether they be services, engineering, right of way, utilities material or otherwise, are the sole responsibility of the City where Federal participation is not allowable or available. Therefore, where the Federal government refuses to participate in the project or any portion thereof the City is responsible for full project payment with no cost or expense to the State in such project or portion thereof. Should the project be abandoned before completion, the City will pay all costs incurred by the State prior to such abandonment.

SECTION 28. The City will release and hold harmless the State and the FHWA and will ensure the continued maintenance and protection of the property after the project is completed. This will include appropriate measures to protect the site and structure against willful damage or vandalism; handling and placement of any recovered data and material as prescribed in the Secretary of the Interior's Standards for Archeology and Historic Preservation; and assumption of costs associated with the continued maintenance and repair of the property to preserve the architectural, historic, and/or archeological integrity of the property.

The City agrees that no visual or structural alterations will be made to the property without prior written permission of the State. The City further agrees that the State shall have the right to inspect the property at all reasonable times in order to ascertain whether or not the conditions of this agreement are being observed.

These provisions shall be incorporated into a separate preservation covenant on the property for a required term of **30** years and the City shall encumber the title of the property with this covenant running with the land, in favor of and legally enforceable by the State. The covenant shall be signed by all signatories prior to project letting.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their proper officials thereunto duly authorized as of the dates below indicated.

EXECUTED by the City this _____ day of _____, 20_____.

WITNESS:

City of Lincoln

City Clerk

Mayor

EXECUTED by the State this _____ day of _____, 20_____.

STATE OF NEBRASKA
DEPARTMENT OF ROADS
R. James Pearson

Transportation Enhancement Administrator

NONDISCRIMINATION CLAUSES

During the performance of this contract, the contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

(1) Compliance with Regulations: The contractor will comply with the Regulations of the Department of Transportation relative to nondiscrimination in federally assisted programs of the Department of Transportation (Title 49, Code of Federal Regulations, Parts 21 and 27, hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

(2) Nondiscrimination: The contractor, with regard to the work performed by it after award and prior to completion of the contract work, will not discriminate on the basis of disability, race, color, sex, religion, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix "A", "B", and "C" of Part 21 of the Regulations.

(3) Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials or equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractor's obligations under this contract and the Regulations relative to nondiscrimination on the basis of disability, race, color, sex, religion, or national origin.

(4) Information and Reports: The contractor will provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the State Highway Department or the Federal Highway Administration to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information, the contractor shall so certify to the State Highway Department, or the Federal Highway Administration as appropriate, and shall set forth what efforts it has made to obtain the information.

(5) Sanctions for Noncompliance: In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, the State Highway Department shall impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including but not limited to,

(a) Withholding of payments to the contractor under the contract until the contractor complies, and/or

(b) Cancellation, termination, or suspension of the contract, in whole or in part.

(6) Incorporation of Provisions: The contractor will include the provisions of paragraph (1) through (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, order, or instructions issued pursuant thereto. The contractor will take such action with respect to any subcontract or procurement as the State Highway Department or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that, in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the contractor may request the State to enter into such litigation to protect the interests of the State, and in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

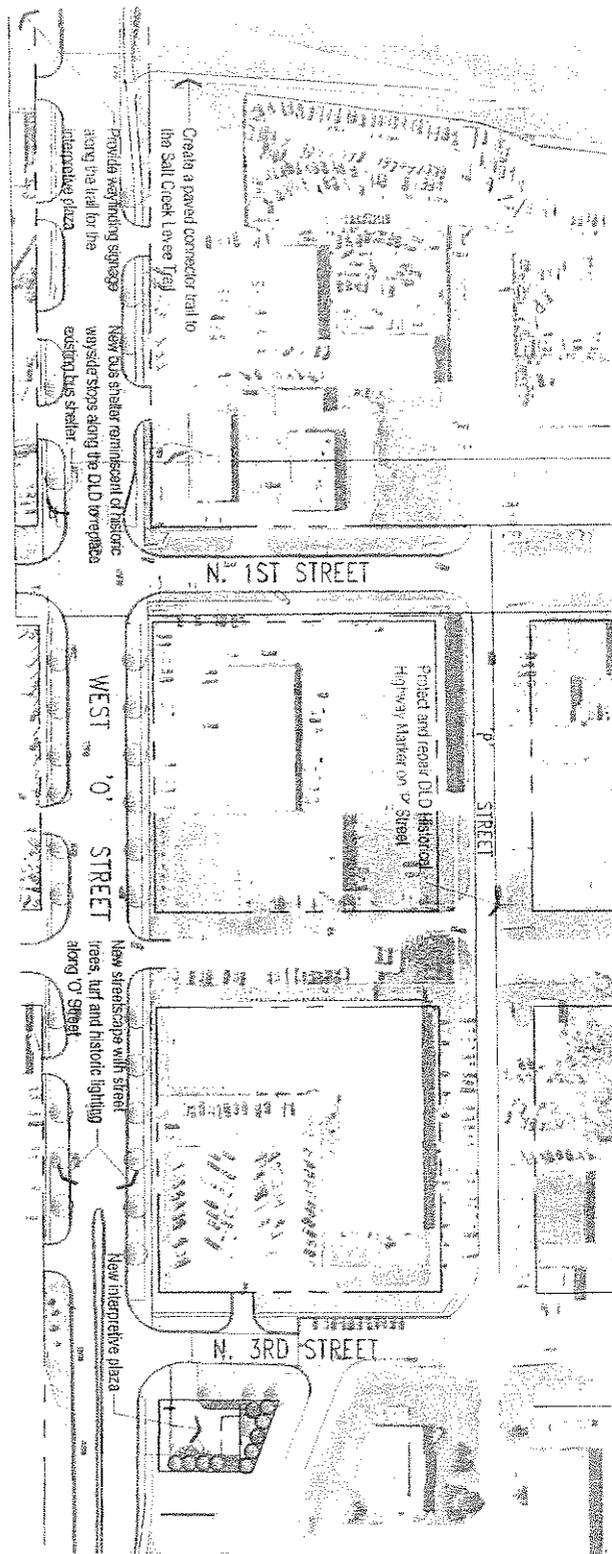


EXHIBIT "C"