

AMENDED AND RESTATED
MANAGEMENT AND MAINTENANCE CONTRACT
FOR WEST HAYMARKET AND DOWNTOWN-
BUSINESS IMPROVEMENT DISTRICTS

THIS AMENDED AND RESTATED MANAGEMENT AND MAINTENANCE CONTRACT is entered into by and between the City of Lincoln, Nebraska, a municipal corporation, hereinafter referred to as "City," and the Downtown Lincoln Association, a nonprofit corporation, hereinafter referred to as "the Association," on this ____ day of _____, 2014.

RECITALS

A.

The City of Lincoln has established various districts under the authority of the Business Improvement District Act (Neb. Rev. Stat. § 19-4015 et seq.). The established districts include the following districts:

- (1) The Downtown Maintenance District and the ~~Downtown Core Overlay and West Haymarket/Downtown Maintenance Business Improvement District~~ created by Ordinance Nos. 17271 and 19981, respectively (collectively "Maintenance Districts").
- (2) The Downtown Management ~~Districts~~ District and the West Haymarket/Downtown Management Business Improvement District created by Ordinance Nos. 18684 and 19982, respectively (collectively "Management Districts").
- (3) The Downtown Core Overlay District and the West Haymarket/Downtown Core Management Business Improvement District created by Ordinance Nos. 18683 and 19983, respectively (collectively "Core Management Districts").

Copies of said ordinances are attached hereto marked as Exhibits A - F respectively.

B.

The work authorized to be performed within said districts ~~in the Downtown Area~~ includes maintenance work involving the improvements and facilities authorized by the Business

Improvement Act; the development of public activities and the promotion of public events, including the management and promotion and advocacy of retail trade activities and other promotional activities in the district; the enhancement of the enforcement of parking regulations and the provision of security within the districts; the improvement of parking availability; the provision of physical improvements for decoration and security purposes; any other projects or undertakings for the benefit of the facilities in the district area; and the employment of or contracting for personnel, including administrators, to provide for any service as may be necessary or proper to carry out the purposes of the Business Improvement District Act.

C.

The many and varied aspects of the work requires vigorous professional management for its successful completion. The Association is willing and able to provide the requisite management and other services as called for in the various districts described above.

D.

The parties to this Amended and Restated Contract recognize that a portion of the cost of the work to be performed in each district under this Contract by the Association shall be assessable against the benefited property owners in accordance with the provisions of Ordinance Nos. 18684 (Downtown), 18683, (Core Overlay), and 17271 (Maintenance) as passed by the City Council of the City of Lincoln, copies of which are attached hereto, marked as Exhibits A, B and C, respectively the ordinance creating the district.

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

I.

**PROVISIONS RELATING SPECIFICALLY TO
THE ~~DOWNTOWN~~ MANAGEMENT DISTRICTS AND CORE-
OVERLAY AND DOWNTOWN MANAGEMENT DISTRICTS**

Section 101. The Association agrees to be responsible for the development and implementation of the activities and work specified in Section 3 of Ordinance No. 18684 ~~and~~ Section 3 of Ordinance No. 18683, Section 5 of Ordinance No. 19982, and Section 5 of Ordinance No. 19983. The Association, after consulting with the City's Urban Development Director, shall annually propose a Program of Work and Budget for the Management and Core Management Districts to the Mayor who shall submit it to the City Council no later than August 1 of each year during which this Contract is in effect. Such budget shall set forth, in specific categories, the past year's expenditures, the amounts proposed to be expended for each of the categories of authorized work within the districts and shall separately specify the amounts to be expended in the Management Districts and ~~Core Overlay and~~ Management Districts. Such budget shall also identify any privately contributed funds available to the Association and the proposed uses of such funds. Once the budget is approved by the City Council, the Association may transfer appropriations between the general categories (i.e. Administration to Programs) upon executive order of the Mayor of the City of Lincoln. Any increase in the total amount of the publicly funded portion of the total approved budget for the districts must receive the approval of the City Council. No money shall be expended by the Association in the performance of this contract in excess of the amounts authorized in the approved budget.

II.

PROVISIONS APPLICABLE TO MAINTENANCE DISTRICT RESPONSIBILITIES

Section 201. The Association agrees to provide day-to-day maintenance as required and as authorized in Ordinance No. 17271 and Ordinance No. 19981, establishing the Downtowntwo Maintenance Districts, including the following specific maintenance items:

Assessable Items

- (a) Litter pickup from sidewalks, planting areas, and beautification areas within the public right-of-way.
- (b) Under the supervision of the Director of Parks and Recreation or his/her designated representative, care and maintenance of all plantings, including ornamental trees and shrubs, but not including major street trees, and all planting areas, which maintenance shall include watering, fertilizing, weeding, pruning, spraying, and removal of dead shrubs; provided, that additional protective maintenance to plantings may from time to time be performed by the City at its own cost and with its own forces.
- (c) As necessary or upon request of the City remove snow to create paths for pedestrian traffic at street intersections and handicapped ramps.
- (d) As necessary or upon request of the City conduct periodic cleaning and sweeping of sidewalks to remove litter, dirt, liquid spills, food residue and stains and bird droppings. Cleaning shall be by wash downs where water is available.

Non-Assessable Items

- (e) General maintenance, including cleaning and painting of all trash receptacles, kiosks, bike racks, and metal parts of benches; and maintenance of display material in kiosks; provided, however, the Association shall not be required to provide maintenance of the above items which, on the date of this contract, are not in a state of good repair. The City and Association will inventory and list those items which will not initially be accepted for maintenance under the contract until such items are brought up to an acceptable state of repair by the City.
- (f) Daily collection of trash from all public trash receptacles located within the business improvement district and immediately adjacent areas, provided

that the City pays costs and expenses related thereto, provides plastic bags for such receptacles, and at least four vehicles.

- (g) To the extent necessary and reasonably available from Public Works, City vehicles may be provided to DLA for the performance of the work contemplated hereunder.

While City general funds may be used to supplement the cost of performance of the assessable items, no special assessment funds may be used to perform the non-assessable items.

Section 202. Standards of Maintenance. It is the intention of the parties to this Contract to provide for a high level of maintenance for the planting areas and improvements which are the subject of this Contract, up to the limit of budgeted funds. Therefore, the following standards shall be followed in the performance of this Contract:

- (a) All work shall be performed in a professional, workmanlike manner using quality equipment, methods, and materials.
- (b) All planting areas shall receive no less than the following:
 - (1) Twice weekly inspection of areas, on Mondays and Fridays, as a minimum requirement.
 - (2) All areas shall be maintained with a clean controlled appearance; i.e. pick up and dispose of all papers and bottles, cigarettes, or other litter on the grounds or in the areas daily or as needed.
 - (3) Weed control as shall be maintained to insure that no obvious weeds are left visible.
 - (4) All grasslike weeds, morning glories, or bindweeds, ragweed, or other underground spreading weeds shall be kept under strictest control. No plant of this type shall remain or be visible for more than one (1) week. No weed shall be allowed to remain that extends more than four inches (4") above the grounds.
 - (5) Weed density shall never exceed more than five (5) weeds per square foot, averaged over the worst half of the given area.
 - (6) An application of balanced, slow-release fertilizer and pre-emergence chemical approved by the City of Lincoln's Parks and Recreation Department shall be applied according to label directions each spring. Pre-emergent shall be applied between April 1 and April 15. Fertilizer shall be applied between April 1 and June 1.

- (7) All areas must be maintained free of persistent erosion. Anti-erosion measures will be taken where potential problems exist. Any erosion that does happen will be cleaned up and cuts will be filled back.
- (8) Other plants or plantings grown by intent in these areas shall be protected and provided with adequate growing care, conditions, and space.
- (9) All dead, diseased, and unsightly branches shall be removed from the shrubs and trees as they develop in accordance with Section 201(b) hereof.
- (10) All areas shall be inspected and watered as needed to maintain the plantings in a healthy condition, provided water is available in or near the bed.
- (11) Pruning and shearing of shrubs shall be done as needed to maintain an attractive uniform appearance and comply with the Lincoln Municipal Code.
- (12) The Director of Parks and Recreation shall be notified immediately of any disease, pests, or unusual conditions that might develop in the plantings. The Association, as directed by the Parks and Recreation Department shall assist with treatment of insects or disease.
- (13) Any maintenance procedures that may affect the major street trees shall be approved by the City Forester. Necessary work on trees requiring special equipment will be done by the City and will be coordinated with the Association to avoid conflicts in scheduled activities.
- (14) The pruning of all ornamental and major street trees shall be done in accordance with National Arborist Association standards and to other established arboricultural pruning standards stipulated by the City Forester.
- (15) Pruning to raise or remove low lateral branches for proper street/sidewalk clearance shall be done conservatively to retain the aesthetic and natural form of all street trees. When "lifting" (raising) the crown of trees, removal of lower limbs shall be done over several years and not in one pruning operation. A ratio of 1/3 clear trunks and 2/3 live tree crown shall be maintained. No more than 1/3 of the total live crown shall ever be removed in a single pruning operation.

- (c) Improvements, other than plantings, shall be cleaned, and maintained as needed to keep such improvements functional and, as near as practicable, in their original condition.

Section 203. Budget. The Association shall annually propose a mbudget for the Maintenance budgetDistricts to the Mayor who shall submit it to the City Council no later than August 1st of each year during which this contract is in effect. Such budget shall set forth, in general categories, the past year's expenditures and the amounts proposed to be expended for each of the categories of authorized work within athe districts. Once the budget is approved by the City Council, the Association may transfer appropriations between the general categories upon executive order of the Mayor. Any increase in the total amount of the approved budget must receive the approval of the City Council. No money shall be expended by the Association in the performance of this contract in excess of the amounts authorized in the approved budget.

III.

GENERAL PROVISIONS

Section 301. Administrator of Agreement. The Director of the City's Urban Development Department shall be the City's representative for the purposes of administering this Contract. The maintenance work contemplated under Article II shall be coordinated with the appropriate City department.

The President of the Association shall be in charge of performance of this Contract on behalf of the Association, and all questions and communications from property owners within the subject business improvement districts shall be directed to the President.

Section 302. Purchases, Expenses, and Payment. (a) In the procurement of materials and services required by or to be used in the performance the services or work contemplated

hereunder, if the same are to be assessed against the property owners within the districts, the Association shall conform with applicable purchasing laws and regulations of the City.

For single purchases of supplies, materials, and equipment which are reasonably expected to cost Twenty-five Thousand Dollars (\$25,000.00) or less, the Association will obtain and record at least three informal bids and such purchases shall be awarded to the lowest responsible bidder. For items which are reasonably expected to cost Twenty-five Thousand Dollars or more, a formal sealed bid process shall be undertaken by the Association's Board of Directors which would involve advertising for sealed bids, opening bids in public and awarding the bid to the lowest responsible bidder. The Association may use the services and resources of the City's Purchasing Agent to conduct a formal sealed bid process.

For the procurement of professional services or unique or non-competitive articles as referenced in Article VII Section 2 of the City Charter of the City of Lincoln involving an expenditure of less than Twenty-five Thousand Dollars (\$25,000.00), the Association will conduct and record an informal request for proposals or qualifications. For such services or purchases involving an expenditure in excess of \$25,000, a formal request for proposals or qualifications shall be undertaken by the Association's Board of Directors which will involve approving a scope of work, advertising for proposals, a determination of qualifications and the award of a contract. The Association may use the services and resources of the City's Purchasing Agent to conduct a formal request for proposals or qualifications process.

The Association shall notify the Urban Development Director when a contract for future services, has been entered into and that such contract is on file and available for inspection at the Association's offices.

(b) The City shall pay monthly in advance one-twelfth (1/12) of ninety-five percent (95%) of the budgeted amount for MANAGEMENT AND ENHANCEMENT activity. The Association will keep an itemized account of all costs and expenses incurred in accordance with the adopted Program of Work and Budget and submit invoices for reimbursement of costs and expenses incurred beyond the amount of advances received. Such invoices for reimbursement will reflect the total costs and expenses incurred to date and subtract the amount of all advance payments received to date through the period of the request. The City shall be responsible for the payment of such invoices within thirty (30) days after acceptance. The Association shall provide quarterly reports of such costs and expenses to the Urban Development Department and in addition shall provide an annual Audited Financial Statement which reflects the costs and expenses incurred for the assessment year. The Urban Development Department shall review and approve all costs and expenses to determine that they comply with: (1) public purchasing procedures; and that (2) they are within the scope and budget of the adopted Program of Work. Records of costs and billings for each district shall be kept separately from each other, where practical; otherwise, such costs shall be prorated equitably among the districts. On or before the sixteenth day of September, total costs and expenses incurred on a modified accrual basis for the preceding assessment year will be tabulated by the Association and forwarded to the City's Urban Development Director who, by September 30, will compute the final adjustments and these total costs shall then be assessed in accordance with the provisions of the ordinances establishing the business improvement districts and the procedures set forth in the Business Improvement District Act.

(c) The City shall pay monthly in advance one-twelfth (1/12) of ninety-five percent (95%) of the budgeted amount for MAINTENANCE activity. The Association will keep an itemized account of all costs and expenses incurred in accordance with the adopted Program of

Work and Budget and shall submit invoices for reimbursement of costs and expenses incurred beyond the amount of advances received. Such invoices for reimbursement will reflect to total costs and expenses incurred to date and subtract the amount of all advance payments received to date through the period of the request. The City shall be responsible for the payment of such invoices within thirty (30) days after acceptance. The Association shall provide quarterly reports of such costs and expenses to the Urban Development Director and in addition shall provide an annual Audited Financial Statement which reflects the costs and expenses incurred for the assessment year. The Urban Development Director shall review and approve all costs and expenses to determine that they comply with: (1) public purchasing procedures; and that (2) they are within the scope and budget of the adopted Program of Work. On or before the sixteenth day of September, total costs and expenses incurred on a modified accrual basis for the preceding assessment year will be tabulated by the Association and forwarded to the City's Urban Development Director who, by September 30, will compute the final adjustments and these total costs shall then be assessed in accordance with the provisions of the ordinances establishing the business improvement districts and the procedures set forth in the Business Improvement District Act.

(d) The "assessment year" for the districts shall begin on September 1 and end on August 31 of each year.

Section 303. Use of City Vehicles. The Association may utilize City vehicles on an "as needed" basis, provided that Association requires and verifies that the driver is at least 21 years of age, has a current Nebraska driver's license, and has had no more than two moving violations and no DUI violations within the last five years.

Section 304. Audit and Inspection. At any time during normal business hours, and as often as the City may deem necessary, the Association shall make available to the City for

examination at reasonable locations all of the Association's books, records, and documents relating to matters covered by this Contract, and the Association shall permit the City to audit, examine, and make excerpts or transcripts of such books, records, and documents, and to audit all invoices, materials, payrolls, records of personnel, and other data relating to all matters covered by this Contract. The Association shall maintain such books, records, and documents in an accessible location and condition for a period of not less than four (4) years, unless City agrees in writing to an earlier disposition. In addition, the Association shall be subject to audit pursuant to Chapter 4.66 of the Lincoln Municipal Code and shall make available to a contract auditor, as defined therein, copies of all financial and performance related records and materials germane to this Agreement, as allowed by law.

Section 305. Activity Report and Evaluation. If requested by the Mayor or City Council, the Association shall submit a detailed report and evaluation of the work performed, its effectiveness in fulfilling the goals and purposes of the districts, and the cost-effectiveness of the work and activities being performed within the districts.

Section 306. Delegation. The Association shall not delegate its duties under this Contract without the prior written consent of the City; provided, that the Association may hire independent contractors, agents, and employees to carry out the Association's duties under this Contract.

Section 307. Independent Contractor. It is agreed that the City is interested only in the results obtained under this Contract. The Association shall perform as an independent contractor with sole control of the manner, means, and method of performing the services required under this Contract. The Association shall be considered, for all purposes arising out of this Contract, an independent contractor, and it shall not be deemed an employee, nor shall any of its employees or

agents be deemed employees, of the City. To the extent that any wages paid pursuant to the provisions of this Contract are subject to state or federal income taxation, or social security taxation, the same shall be the exclusive responsibility of the Association as employer. The City shall not be responsible for directly providing staff salaries or fringe benefits.

Section 308. Equal Employment Opportunity. In connection with the performance of work under this Contract, the Association agrees that it shall not discriminate against employee or applicant for employment because of race, color, religion, sex, disability, national origin, age, or marital status. In the employment of persons, the Association shall fully comply with the provisions of Chapter 11.08 of the Lincoln Municipal Code and shall take affirmative action to insure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex, disability, national origin, age, or marital status. The Association shall submit an Affirmative Action Program information sheet to the City's Equal Opportunity Officer upon a form prescribed by the City.

Section 309. Insurance. In addition to any other insurance which Association may be required to carry, the Association agrees to maintain in effect the following insurance, at Association's sole expense, with insurance companies acceptable to City. All insurance policies of the Association shall name the City as additional insured on a primary and non-contributory basis. The policy shall also contain a waiver of subrogation against City. Association shall furnish City with certificates and attached policy endorsements evidencing such insurance. Such certificates shall show that by a policy endorsement that the City has been named as an additional insured. Association will endeavor to obtain a policy endorsement that the insurer will provide the City of Lincoln as an additional insured with ten days advance notice of non-renewal and thirty days

advance notice of cancellation. Association shall immediately notify the City in the event the Association receives notice from its insurer that the policy will not be renewed or is being cancelled.

Coverage	Limits
Workmen’s Compensation Statutory State	Statutory \$100,000 Per Accident
Employer’s Liability	\$500,000 Disease-Policy Limit \$100,000 Disease-Each Employee
Commercial General Liability	
Bodily Injury	\$2,000,000 General Aggregate
Property Damage	\$2,000,000 Product-Comp Ops Aggregate
Including Premises/Operations, Explosion	\$1,000,000 Personal & Advertising Injury
Collapse and Underground (XCU), Products/ Completed Operations, Contractual Liability, Broad Form Property Damages, Independent Contractors	\$1,000,000 Each Occurrence
Personal Injury Liability	
Business Automobile Liability*	
Bodily Injury	\$1,000,000 Combined Single Limit
Property Damage	with a \$4,000,000 Umbrella
Including Hired and Non-Owned	

The Association and the City expressly waive all rights and claims including claims of subrogation they may have against the other, and the other party’s subsidiaries, affiliates, employees, officials, officers, volunteers, agents or subcontractors (collectively “Affected Parties”), for loss or damage covered by insurance policy (except Workers Compensation) or self insurance required in this section. Any self insurance by the City shall be deemed to include such waiver of subrogation against the Affected Parties.

Section 310. Indemnification. The Association shall protect, indemnify, hold and save harmless and defend the City, its officers, officials, employees, volunteers, and agents against any and all claims, costs, causes, actions and expenses, including but not limited to attorney’s fees

incurred by reason of a lawsuit or claim for compensation arising in favor of any person, including the employees, officials, officers, volunteers, agents, or subcontractors of the Association or City on account of personal injuries or death, or damages to property occurring, growing out of, incident to, or resulting directly or indirectly from the negligent performance of this Agreement by the Association. The City shall protect, indemnify, hold and save harmless and defend the Association, its subsidiaries, affiliates, officers, officials, employees, volunteers, and agents against any and all claims, costs, causes, actions and expenses, including but not limited to attorney's fees incurred by reason of a lawsuit or claim for compensation arising in favor of any person, including the employees, officials, officers, volunteers, agents or subcontractors of the Association or City on account of personal injuries or death, or damages to property occurring, growing out of, incident to, or resulting directly or indirectly from the negligent performance by the City.

The Association shall be responsible for up to \$2,500 of physical damage per year.

Section 311. Term and Termination. This Contract shall be for a term commencing on September 1, 2011, and ending on August 31, 2015; unless terminated earlier as described herein.

The following shall be events of termination of this Contract:

- (a) Failure in the observance or performance of any condition, covenant, or obligation set forth in this Contract for a period of sixty (60) days after written notice to the party failing to observe or perform from the other party specifying the nature thereof;
- (b) The making of any order or the entry of any decree by a court of competent jurisdiction enjoining or prohibiting Association and City, or either of them, from performing or satisfying their respective covenants, obligations, or conditions contained herein, and such order or decree is not vacated within sixty (60) days after the making or granting thereof;
- (c) Association or City becomes insolvent or unable to pay its debts as they mature or makes an assignment for the benefit of creditors;

- (d) ~~FAny of the Downtown~~Maintenance, Management or Core Management District, ~~the Core Business Improvement District Overlay, or the Downtown Maintenance District~~Districts are lawfully disestablished pursuant to the Business Improvement District Act (*Neb. Rev. Stat. § 19-4015 et seq.*); or
- (e) Failure of the City and the Association to agree upon annual budgets as required by Article I of this Contract by August 1 of each year.

If any of the events of termination set forth above shall occur and the party fails to cure the same within the express time period (if any) herein provided, then either party shall have the right to terminate this Contract by giving written notice to the other party of such termination and specifying the effective date thereof at least seven (7) days before the effective date of such termination. In addition to the right of termination, either party may exercise any right or remedies at law or in equity.

Section 312. Increases in Maintenance Responsibilities. In the event that the City redevelops or reconstructs existing streetscapes or parks within the bounds of the ~~b~~Maintenance ~~Business~~ ~~i~~Improvement ~~d~~Districts which are the subject of this contract, or develop new streetscapes or add new areas within said districts, and such reconstruction, redevelopment, or additions result in material increases in the maintenance responsibilities of the Association, then the Association shall so notify the City in writing and the parties shall either agree to such increased maintenance responsibility or this Contract may be terminated in accordance with the procedures set forth in Section 310 above.

Section 313. Exclusions. Notwithstanding any contrary provision herein, the following items shall not be the responsibility of the Association; provided that, the Association, at its election, may perform the following items:

- (a) Maintenance and replacement of major street trees; and replacement of ornamental trees and shrubs;

- (b) Maintenance (except painting and cleaning), repair, and replacement of water fountains, water sprinkling equipment, and other water systems;
- (c) Except as provided in § 201(c), maintenance, repair, routine snow and ice clearance, cleaning and replacement of public streets, sidewalks, and alley ways;
- (d) Maintenance, landscaping, and replacement of the Lincoln Mall and 15th Street Mall;
- (e) Installation, maintenance, repair, and replacement of public parking garages, skywalks, public utilities, and street and traffic lights;
- (f) Maintenance, repair, and replacement of electrical systems; and
- (g) Repair or replacement of kiosks, trash receptacles, benches, poles, signs, pavers, or bike racks.

The exclusion of the above items from the responsibility of the Association under this contract is not intended in any way to contractually obligate the City to the Association to perform such excluded work. The City may perform such work at its option, in accordance with its own means and methods, and at all times subject to the availability of funds to perform such work.

Section 314. Living Wage. If the compensation for services provided pursuant to this Agreement is equal to or exceeds \$25,000, this Agreement is subject to the Living Wage Ordinance of the Lincoln Municipal Code Chapter 2.81. The ordinance requires that, unless specific exemptions apply or a waiver is granted, Association shall provide payment of a minimum living wage to employees providing services pursuant to this Agreement. Under the provisions of the Lincoln Living Wage Ordinance, the City shall have authority to terminate this Agreement and to seek other remedies for violations of this Ordinance.

Section 315. Federal Immigration Verification. In accordance with *Neb. Rev. Stat. §§ 4-108 through 4-114*, the Association agrees to register with and use a federal immigration verification system, to determine the work eligibility status of new employees performing services

within the State of Nebraska. A federal immigration verification system means the electronic verification of the work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 USC 1324 a, otherwise known as the E-Verify Program, or an equivalent federal program designated by the United States Department of Homeland Security or other federal agency authorized. The Association shall not discriminate against any employee or applicant for employment to be employed in the performance of this section pursuant to the requirements of state law and 8 U.S.C.A. 1324b. The Association shall require any subcontractor to comply with the provisions of this section.

IN WITNESS WHEREOF, the City and the Association have executed this Contract on the day and year first written above.

ATTEST:

THE CITY OF LINCOLN, NEBRASKA
A Municipal Corporation

City Clerk

By: _____
Chris Beutler, Mayor

DOWNTOWN LINCOLN ASSOCIATION
A Nonprofit Corporation

Witness

By: _____
Terry Uland, President