

FACTSHEET

TITLE: **USE PERMIT NO. 82C**, requested by Bob Bennie Properties, LLC, to add Medical Office as a permitted land use to an existing Use Permit, on property generally located at South 15th Street and Old Cheney Road.

SPONSOR: Planning Department

BOARD/COMMITTEE: Planning Commission
Public Hearing: 03/21/12
Administrative Action: 03/21/12

STAFF RECOMMENDATION: Conditional approval, as corrected on April 2, 2012.

RECOMMENDATION: Conditional Approval (8-0: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust and Francis voting 'yes'; Cornelius declared a conflict of interest).

Resolution No. PC-01271

FINDINGS OF FACT:

1. This is a request for authority to add "medical office" as a permitted land use to the existing Design Data Corporate Office use permit that specifically disallowed medical offices when it was approved in 1995. The applicant is proposing to use the existing 7,800 sq. ft. building on Lot 2 for a medical office use, i.e. dental office. The property is zoned O-3, which is a use permit district where "medical office" is a permitted use.
2. The staff recommendation of conditional approval is based upon the "Analysis" as set forth on p.7-8, concluding that the proposed 7,800 square feet of medical office is a permitted use in the O-3 Office Park District and should not impact the surrounding neighborhood. Medical office was specifically excluded from the existing use permit in 1995 due to limited parking. The proposed plan for medical office use provides the required parking and is therefore in conformance with the zoning ordinance and the 2040 Comprehensive Plan. The staff presentation is found on p.10.
3. The applicant's testimony is found on p.10 and 13, stating that the original restrictions were put in place on medical facilities because of parking and the traffic issues at 14th Street and Old Cheney Road, both of which have been dealt with and the five parking stalls will be added.
4. Testimony in opposition on behalf of Design Data is found on p.10-13, based upon restrictive covenants dated April 2, 1996, which do not allow "medical, dental or other health care professional offices" (See p.15-22). The opposition also expressed concern for the impact upon the aesthetics, i.e. landscaping and green space.
5. Testimony by Rick Peo, on behalf of the City Law Department, is found on p.11-12, indicating that restrictive covenants are beyond the scope of the role of the Planning Commission in determining appropriate land use; that restrictive covenants are a private agreement between the property owners. The City is not typically a party to restrictive covenants except to approve transfer of maintenance responsibility from the developer to an owners association.
6. The applicant's response to the opposition is found on p.13, wherein it was stated that three trees will be relocated, or if the three trees cannot be moved, new trees would be planted. Analysis #6 in the staff report on page 8 has been corrected accordingly.
7. On March 21, 2012, the Planning Commission voted 8-0 to agree with the staff recommendation of conditional approval and adopted Resolution No. PC-01271 (p.3-5) approving the amendment to the use permit, with conditions (Cornelius declared a conflict of interest). (See Minutes, p.13-14).
8. On March 29, 2012, a letter of appeal was filed by Bill Morris, Attorney for Design Data Corp. (p.2).

FACTSHEET PREPARED BY: Jean L. Preister

REVIEWED BY: _____

REFERENCE NUMBER: FS\CC\2012\UP82C Appeal

DATE: April 2, 2012

DATE: April 2, 2012

APPEAL
of Planning Commission action
to City Council

Today's Date March 26, 2012

(this form must be received by the City Clerk within 14 days of the action by the Planning Commission)

To: City Clerk
Joan Ross
555 S. 10th St., Ste. 103
Lincoln NE 68508
402-441-7436
jross@lincoln.ne.gov

FILED
CITY CLERK'S OFFICE
2012 MAR 29 PM 1 52
CITY OF LINCOLN
NEBRASKA

Dear Clerk:

I am submitting this letter of appeal to Resolution No. PC-01271, adopted by the Lincoln-Lancaster County Planning Commission on (Date) March 21, 2012, approving Special Permit No. 82C on property generally located at South 14th Street & Old Cheney Road

Please advise me of the hearing date before the City Council.

Signature of person requesting appeal: _____

Bill Morris

Printed Name Bill Morris - Attorney for Design Data Corp.

Address 4645 Normal Blvd., Suite 272, Lincoln, NE, 68506

Street City State ZIP

Phone Number (402) 434-5200

Email bmorris@morristituslaw.com

cc: Planning Department
Jean Preister
555 S. 10th St., Ste. 213
Lincoln NE 68508
402-441-6365
jpreister@lincoln.ne.gov

RESOLUTION NO. PC- 01271

USE PERMIT NO. 82C

1 WHEREAS, Bob Bennie Properties, LLC has submitted an application in
2 accordance with Section 27.27.080 of the Lincoln Municipal Code designated as Use Permit No.
3 82C to add Medical Office as a permitted land use to an existing Use Permit that specifically
4 disallowed medical offices, on property generally located at South 14th Street and Old Cheney
5 Road, and legally described as:

6 Lot 2, Design Data Corporate Office Park, located in the Northwest
7 Quarter of Section 13, Township 9 North, Range 6 East of the 6th
8 P.M., Lancaster County, Nebraska;

9 WHEREAS, the real property adjacent to the area included within the site plan for
10 this modification of the Use Permit will not be adversely affected; and

11 WHEREAS, said site plan together with the terms and conditions hereinafter set
12 forth are consistent with the intent and purpose of Title 27 of the Lincoln Municipal Code to
13 promote the public health, safety, and general welfare.

14 NOW, THEREFORE, BE IT RESOLVED by the Lincoln City - Lancaster County
15 Planning Commission of Lincoln, Nebraska:

16 That the application of Bob Bennie Properties, LLC, hereinafter referred to as
17 "Permittee", to add Medical Office as a permitted land use to the existing Use Permit 82B, be
18 and the same is hereby granted under the provisions of Section 27.27.080 of the Lincoln
19 Municipal Code upon condition that the development of said Use Permit be in substantial

1 compliance with said application, the site plan, and the following additional express terms,
2 conditions, and requirements:

3 1. This approval amends Use Permit 82B to allow medical office use in the O-3
4 Office District zoning.

5 2. Before occupying buildings all development and construction must substantially
6 comply with the approved plans.

7 3. All privately-owned improvements, including landscaping and recreational
8 facilities, shall be permanently maintained by the Permittee or an appropriately established
9 owners association approved by the City.

10 4. The physical location of all setbacks and yards, buildings, parking and circulation
11 elements, and similar matters shall be in substantial compliance with the location of said items
12 as shown on the approved site plan.

13 5. The terms, conditions, and requirements of this resolution shall run with the land
14 and be binding upon the Permittee and Permittee's successors and assigns.

15 6. The Permittee shall sign and return the letter of acceptance to the City Clerk
16 within 60 days following the approval of the use permit, provided, however, said 60-day period
17 may be extended up to six months by administrative amendment. The City Clerk shall file a
18 copy of the resolution approving the use permit and the letter of acceptance with the Register of
19 Deeds against the Property, filling fees therefor to be paid in advance by the Permittee.

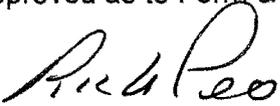
20 7. The site plan as approved by this resolution voids and supersedes all previously
21 approved site plans, however all resolutions approving previous permits shall remain in full force
22 and effect except as specifically amended by this resolution.

DATED this 21st day of March, 2012.

ATTEST:


Chair

Approved as to Form & Legality:



Chief Assistant City Attorney

LINCOLN CITY/LANCASTER COUNTY PLANNING STAFF REPORT

for March 21, 2012 PLANNING COMMISSION MEETING

****Analysis #6 Corrected Subsequent to Planning Commission Action****
April 2, 2012

PROJECT #: Use Permit No. 82C Design Data Corporate Center

PROPOSAL: To add Medical Office as a permitted land use to an existing Use Permit that specifically disallowed medical offices.

LOCATION: S. 14th Street and Old Cheney Road

LAND AREA: 9.58 acres, more or less.

EXISTING ZONING: O-3, Office Park District

CONCLUSION: The proposed 7,800 square feet of medical office should not impact the surrounding neighborhood. Medical office is a permitted use in the O-3, Office Park zoning district and was specifically excluded from this Use Permit due to limited parking. The proposed plan provides the required parking and therefore is in conformance with the Municipal Code and the Comprehensive Plan.

RECOMMENDATION:	Conditional Approval
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GENERAL INFORMATION:

LEGAL DESCRIPTION: Lot 2, Design Data Corporate Office Park, located in NW 1/4 section of 13-9-6, Lancaster County, Nebraska.

EXISTING LAND USE: There are two existing office buildings, one on Lot 1 used by Design Data Corporate Office and one on Lot 2, which is proposed to be converted from general office to medical office use.

SURROUNDING LAND USE AND ZONING:

North:	B-2, Neighborhood Business District	Restaurant, gas station in Kensington Plaza commercial area
South:	R-1, Residential	Single Family Residential
East:	R-1, Residential	Single Family Residential
West:	O-3, Office Park District	Office buildings

HISTORY:

- December 4, 1995: Use Permit 82 was approved to allow 70,000 square feet of office at S.14th Street and Old Cheney Road. The building on Lot 1 was 48,000 square feet and all future building expansions requiring new parking were to be reviewed administratively. Note#29 on the site plan prohibited medical office uses in the use permit.
- September 14, 1998: Use Permit 82A was approved to increase the height limit from 45 feet to 51 feet for the office building on Lot 1.
- December 20, 1999: Use Permit 82B was approved to reduce the required parking for the office use on Lot 1 from 127 stalls to 82 stalls.

COMPREHENSIVE PLAN SPECIFICATIONS:

Focus primarily on retention and expansion of existing businesses; attracting new businesses should also be encouraged (Pg 5.1)

Seek to efficiently utilize investments in existing and future public infrastructure to advance economic development opportunities. Encourage commercial centers to encompass a broad range of land uses with the integration of compatible land use types. (Pg 5.2)

It is the policy that Commercial and Industrial Centers in Lancaster County be located: Where urban services and infrastructure are available or planned for in the near term; in sites supported by adequate road capacity — commercial development should be linked to the implementation of the transportation plan; in areas compatible with existing or planned residential uses; in areas accessible by various modes of transportation (i.e. automobile, bicycle, transit, and pedestrian). (Pg 5.5)

Discourage single use centers. Office parks should include supporting retail and residential components, while shopping centers should include supporting office and residential uses (Pg 5.7)

The future land use map designates this area as commercial (Pg 1.8)

TRAFFIC ANALYSIS: Both S. 14th Street and Old Cheney Road are arterial streets.

ANALYSIS:

1. This is an application to add medical office as a permitted use to the existing Use Permit 82B for Data Design Corporate Office, and use the existing 7,800 square feet building on Lot 2 for said medical office.
2. The O-3 district is a use permit district and medical office is a permitted use. The district is intended to provide a developing or redeveloping area primarily consisting of a mixture of office and other complementary commercial and residential uses. The proposed medical office use on the property should not have any negative impact on the neighborhood. The neighborhood to the east is approximately 125 feet away from the edge of the office building with a buffer provided by landscaping as well as a bike trail.
3. At the time of the original Use Permit 82 in 1995, the applicants specifically excluded medical offices as a permitted use on the premises. The traffic study and site plans submitted at the

time were based on general office use. They did not include the possibility of a medical office on the premise, which characteristically has a higher trip generation and a higher parking requirement.

4. In the subsequent amendment to the Use Permit in 1999, the applicant asked for reduced parking on the premises such that existing trees on the property could be maintained and additional landscaping could be provided on the site, both to provide a buffer to the arterial street and the neighborhood and to improve site aesthetics. Therefore, providing sufficient parking for a medical office with a higher parking requirement would have been difficult.
5. Since 1995, both S.14th Street and Old Cheney Road have been significantly improved and the additional trips generated by a medical office will not have a significant impact on the transportation system. The evening peak hour trips for 7,800 square feet of general office is approximately 12 trips. It is 27 trips for a medical/dental office.
6. The revised site plan adds 5 parking stalls to the existing parking area to the south of the building on Lot 2 to provide the required 35 parking stalls for 7,800 square feet of medical office, ~~without removing or relocating existing trees and landscaping~~ The expansion of the parking lot will necessitate removal of 3 trees (Corrected April 2, 2012).

This approval amends Use Permit 82 to allow medical office use on the premises in the O-3 Office District zoning.

CONDITIONS OF APPROVAL:

Standard Conditions:

1. The following conditions are applicable to all requests:
 - 1.1 Before occupying buildings, all development and construction is to substantially comply with the approved plans.
 - 1.2 All privately-owned improvements, including landscaping and recreational facilities, are to be permanently maintained by the owner or an appropriately established homeowners association approved by the City.
 - 1.3 The physical location of all setbacks and yards, buildings, parking and circulation elements, and similar matters must be in substantial compliance with the location of said items as shown on the approved site plan.
 - 1.4 This resolution's terms, conditions, and requirements bind and obligate the permittee, its successors and assigns.
 - 1.5 The applicant shall sign and return the letter of acceptance to the City Clerk. This step should be completed within 60 days following the approval of the special permit. The City Clerk shall file a copy of the resolution approving the special permit and the letter of acceptance with the Register of Deeds, filing fees therefore to be paid in advance by the applicant. Building permits will not be issued unless the letter of acceptance has been filed.

- 1.6 The site plan as approved with this resolution voids and supersedes all previously approved site plans, however all resolutions/ordinances approving previous permits remain in force unless specifically amended by this resolution.

Prepared by

Rashi Jain
Planner
402-441-6372
Email: rjain@lincoln.ne.gov

DATE: March 6, 2012 Corrected: April 2, 2012

APPLICANT: Dr. Dustin Bailey
Optimal Dental
1919 S. 40th Street, Suite 218
Lincoln, NE 68506

OWNER: Bob Bennie Properties, LLC
1601 Old Cheney Road
Lincoln, NE 68506

CONTACT: Mark Palmer
Olson Associates
1111 Lincoln Mall
Lincoln, NE 68508

USE PERMIT NO. 82C

PUBLIC HEARING BEFORE PLANNING COMMISSION:

March 21, 2012

Members present: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust and Francis; Cornelius declared a conflict of interest.

This application was removed from the Consent Agenda for testimony in opposition.

There were no ex parte communications disclosed.

Staff recommendation: Conditional approval.

Staff presentation: **Rashi Jain of Planning staff** stated that this is an application to amend the existing use permit to add medical office use, which was specifically excluded as a permitted use in 1994, due to parking and traffic issues. The applicant for this proposed medical office use (dental office) has proven that they will have enough parking spaces without removing any of the landscaping on the site. Old Cheney Road at 14th Street has been improved to take care of the traffic issues. Thus the staff is recommending conditional approval.

Proponents

1. **Mark Palmer of Olsson Associates** and the applicant, **Dr. Dustin Bailey**, the dentist proposing to use this office building, appeared to answer any questions.

Support

1. **David Barga, Rembolt Ludtke Law Firm**, appeared on behalf of the proposed seller in this transaction in support of the change in the use permit. The use permit is consistent with the Comprehensive Plan and the Lincoln Municipal Code. The original restrictions were put in place on medical facilities because of parking and the traffic issues at 14th Street and Old Cheney Road. Those issues have been dealt with and the five parking stalls will be added.

Opposition

1. **Tom Duden**, 4700 Happy Hollow Lane, appeared on behalf of **Design Data**, in opposition. The use restrictions were made some 14-15 years ago. In addition, there are restrictive covenants in place, to which the City agreed, that barred the use of medical, dental or other health care professional offices within the office park. The purchaser of this 12 acres has spent a lot of money investing in the landscaping and the design of the office park. It is aesthetically pleasing with the park-like setting, the ponds and stream that are available and makes a tremendous work environment for the staff. Design Data is opposed based on these issues and based on the fact that this change only came to Design Data's attention recently and they have not had a lot of time to prepare. Any changes that would be done to parking would also affect the roadway, the parking lot drainage and the irrigation system that is in place. The fire hydrant system within the office park is private and there would also be a cost to change that. A lot of money has been invested in the landscaping. The proposed parking will be right in the front yard at 1601 Old Cheney Road, changing the appearance of that building and the aesthetics of the front of that facility, and that is

just not what was planned when Design Data built their facility on this property. The parking lots all drain into the ponds rather than the roadway. Design Data has done a lot to protect the office park from the neighborhood. Design Data is opposed to making any significant changes to the front yard of any existing structure.

Duden submitted copies of the restrictive covenants, dated April 2, 1996, pointing out that #23 states:

All lots within the Properties shall be used for commercial office purposes; however, no Lot shall be used for medical, dental or other health care professional offices. Only one (1) building may be constructed on each Lot within the Properties.

Design Data is contesting this application for amendment based on the existing restrictive covenants.

Gaylor Baird inquired whether there were other reasons for restricting medical offices besides the parking. Duden recalled that there were concerns about having an x-ray machine in the area that might affect the housing to the south, but he is not sure that those same concerns exist now since technology has changed.

Esseks inquired whether there is a provision in the covenants for modification. Duden answered in the affirmative, stating that it takes the agreement of the two lot owners. Design Data owns two lots and Bob Bennie owns one.

Rick Peo of the City Law Department approached and advised that he does not see a signature by the City on the restrictive covenants. Typically, the city only executes restrictive covenants to approve the transfer of maintenance responsibility from the developer to an owners association. The City does not typically sign restrictions on the buildings and uses, but only to make sure that developed improvements are maintained and assumed by an owners association.

Peo went on to state that enforcement of covenants is by the property owner and court of law by bringing an injunction.

Sunderman confirmed that the covenants are considered a private agreement between the property owners. Peo agreed that to be the typical case. If the city does sign, it is normally just for a minor provision for maintenance of the common area. He does not see the city's signature on these covenants.

Sunderman then confirmed that if the owners disagree, they could appeal the Planning Commission action to the City Council, but could also bring action in court of law on restrictive covenants if the use is actually commenced. Peo agreed.

Lust asked Peo to respond to #26 of the covenants:

City Requirements: All buildings and improvements within the Properties shall be constructed in conformity with the applicable building codes of the City of Lincoln, Nebraska, and Use Permit #82, Resolution No. PC-00253 adopted by the Lincoln-Lancaster County Planning Commission on November 8, 1995 ("Use Permit"). No amendment to the Use Permit other than a minor increase in permissible floor area not to exceed 5 percent (5%)

and any ancillary amendments to the Use Permit site plan may be applied for without the consent of the Members of the Association other than the Member(s) seeking such amendment.

Peo stated that would not be a city requirement that the city imposes, but just a statement of what the city had done.

Lust then confirmed that the Planning Commission decision is whether the use permit is appropriate. The restrictive covenants is a decision between the property owners. Peo agreed.

2. Bill Morris, Morris and Titus Law Firm, appeared on behalf of **Design Data**, said law firm being involved in the covenants issue. When this office park was originally created, the other tenant was Landscapes Unlimited, and they worked carefully with Design Data to create a magnificent office park. Landscapes Unlimited had a great interest because they sold landscapes. Design Data and Landscapes Unlimited lived happily together in a covenant situation. It is unfortunate that the way the covenants were written at the time because as long as Design Data owns both of those lots, it only has one vote. Landscapes Unlimited sold to Mr. Bennie, and at that time there were differences in vision with respect to the maintenance of the office park which resulted in some litigation where Mr. Bennie prevailed. Now, we are at a point where Design Data has a great difference of opinion and view and vision with respect to the future of the office park. Bennie wants to sell to a dentist and the dentist wants to build parking which will change the vision of this park. We don't know what the other affects might be.

Morris advised that Design Data was not approached or asked to review these plans in advance. Since receiving notice, they have engaged in negotiations with respect to this application and those negotiations have broken down. Design Data's view is that the status quo should be maintained because Bennie knew what the covenants were when he purchased the property. "Now we're being asked to change the game." This is a private office park, developed at huge cost by Design Data Corporation, which one person is now asking to change to suit his particular needs.

Lust sought confirmation of the voting issue. Does one vote win under the current covenants? Morris stated that if it is a tie, the status quo remains. It takes both tenants to change the status quo and to change the restrictive covenants.

Butcher asked whether the prior litigation being referred to was in regard to the restrictive covenants. Morris answered in the affirmative. Design Data's interpretation will allow Design Data to unilaterally change the restrictive covenants from one vote per owner to one vote per lot. Since Design Data had two lots, they would have two votes. Bennie opposed that and prevailed in the district court, leaving the status quo. We have before us the original covenants, for which Bennie advocated in court when Design Data tried to change them.

Esseks asked for clarification of the Planning Commission's role. Jain explained that this is a use permit in O-3 Office District where medical office is allowed by right. In 1995, medical office was disallowed in this use permit because of parking and transportation issues, which are no longer issues. The conditions of approval require that the applicant not disturb the existing landscaping. From what she perceives, this application complies with the Comprehensive Plan and the Lincoln Municipal Code. It is an allowed use, and there is no reason why we would oppose it.

Response by the Applicant

Palmer reiterated that this is five parking stalls with curb and gutter roads. Drainage will not be an issue. There are three trees that would be relocated. If they cannot be moved, new trees would be planted. The future site plan for this development does show an additional building with a parking lot about the same distance from the road. We are doing this to meet the requirements for a dentist office and meeting the medical office requirements for parking, and will work with staff to meet the city's requirements.

Bargen pointed out that the court of appeals actually struck down Design Data's attempt to unilaterally amend the covenants without input from Bennie. That is a private matter between the parties and the applicant will deal with that. The role today is on the use permit. The restrictive covenants were created with the original use permit because of the parking issues and traffic concerns. Doctors offices are located throughout towns near residential districts and the use of the x-rays is not be an issue.

Again, with regard to aesthetics, Bargen pointed out that it is five parking stalls. The staff does not believe it is going to impact the aesthetics. It is not going to ruin the pond or the acres of green grass. The issues of the covenants are between the parties. It is a private issue and irrelevant to the Planning Commission decision today. The covenants were based on the original use permit.

Gaylor Baird asked for confirmation from the City Attorney that the issue of the covenants is irrelevant to the Planning Commission decision and outside the scope of the Planning Commission decision. Peo stated that it is outside the scope of the Planning Commission. The city codes and city design standards are the city's voice. The restrictive covenants are private between the parties. The Planning Commission action does not eliminate them from having protective covenants.

ACTION BY PLANNING COMMISSION:

March 21, 2012

Esseks made a motion to approve the staff recommendation of conditional approval, seconded by Sunderman.

Lust commented that she wishes the Planning Commission could order the parties to get along, "but that's not our role, nor is it appropriate to be our role." The decision before us is whether a use permit is appropriate. We have to make that decision based on the boundaries of the role of the Planning Commission, so she will vote in favor even though she would like the neighborhood to be in harmony.

If there were evidence that the proposed land use change would substantially hurt the interests of the neighbors, including those in the office park and adjacent, Esseks would have to take a stand and say this is not in the public interest. But, the arguments presented so far show that the public interest, including the interests of the neighboring property owner, are not in substantial jeopardy.

Weber reiterated that the Planning Commission action approving this use permit does not preclude any legal activity on either side.

Although sympathetic to the restrictive covenants, Francis agreed that to be beyond the scope of the Planning Commission, and she does not believe five parking spaces is going to make a big impact to this business park.

Motion for conditional approval carried 8-0: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust and Francis voting 'yes'; Cornelius declared a conflict of interest. This is final action unless appealed to the City Council within 14 days.

SUBMITTED AT PUBLIC HEARING
BEFORE PLANNING COMMISSION: 3/21/12
IN OPPOSITION

USE PERMIT 82C

LANCASTER COUNTY, NEB
APR 11 4 16 PM '96

#42 00

Reiron Fitchett
530 S 13th St.
Ste B Box 95109
(08)

INST. NO 96
013687

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RESTRICTIVE COVENANTS

Design Data Corporation, a Nebraska corporation (Owner), is the owner of the following described real estate:

- Lots 1, 2, and 3, Design Data Corporate Office Park, Lincoln, Lancaster County, Nebraska (Properties); and
- Outlot A, Design Data Corporate Office Park, Lincoln, Lancaster County, Nebraska (Commons).

These Restrictive Covenants are established upon the Properties and Commons.

ASSOCIATION MEMBERSHIP AND VOTING

- MEMBERSHIP:** Design Data Corporate Office Park Association (Association), an unincorporated association, is hereby created. The titleholder of each Lot within the Properties shall be a Member of the Association. The titleholder of Outlot A shall not be a member of the Association.
- PURPOSES:** The Association is established for the following purposes: enforcing these Restrictive Covenants; administering and maintaining the Commons; establishing and collecting assessments for maintenance and other costs provided to be assessed by the Restrictive Covenants; and performing any and all other acts and duties permissible or required for the purposes enumerated in these Restrictive Covenants.
- CONDOMINIUM REGIME:** Any Lot within the Properties may be subject to a condominium regime.
- VOTING:** The titleholder of each Lot within the Properties shall have one vote in the Association. Titleholders of condominium units shall have fractional votes equal to the allocated interest in the common elements assigned to their respective units by the condominium declaration.
- TEMPORARY VOTING:** As of the date of these Restrictive Covenants, Owner is the titleholder of all Lots within the Properties. During the period of time from the closing of the sale of any Lot within the Properties to an unrelated third party until such time as Owner closes the sale of one of the remaining two Lots within the Properties to an unrelated third party, Owner and the titleholder of the first Lot to be sold shall each have one vote in the Association.

COMMONS

- USE OF COMMONS:** Each Member of the Association shall have the right to use and enjoy the Commons and shall have an easement upon the Commons for the use thereof, which shall be appurtenant to the interest requisite for membership. No buildings may be constructed on the Commons.
- COSTS OF ADMINISTRATION, MAINTENANCE OR IMPROVEMENT OF COMMONS:** Costs of administration, maintenance or improvement of the Commons shall mean

the total cost and expense incurred by the Association in operating, maintaining, repairing, and replacing any facility or improvements within the Commons. Such costs may include, without limitation, the cost of mowing, gardening and landscaping, irrigation, line painting, lighting, maintenance of sanitary control, removal of snow, ice, drainage, rubbish and other refuse, public liability and property damage insurance premiums, repairs, reserves for capital replacements, depreciation on equipment and machinery used in such maintenance, cost of postage, photocopies, telephone and fax charges, or other expenses and personnel required to provide such services and management, together with a reasonable charge for overhead not to exceed 10 percent (10%) of the foregoing, or amounts paid to independent contractors for any or all of such services.

The Association shall keep accurate records of the costs associated with the administration, maintenance and improvement of the Commons for the purpose of making assessments as provided by these Restrictive Covenants.

8. CONTROL OF COMMONS BY ASSOCIATION: All Commons shall be subject to the control and management of the Association. The Association shall have the right from time to time to establish, revoke, modify and enforce reasonable rules and regulations with respect to all or any part of the Commons.

9. MAINTENANCE OF COMMONS: The Association covenants and each Member of the Association, by the acceptance of a deed by which the interest requisite for membership is acquired, shall be deemed to covenant to maintain the Commons, including all driveways, private roadways, sidewalks, open areas, and landscaping, advertising, signs or devices, exterior lighting and utility lines located within the Commons. Such covenants by the Members shall be satisfied by the payment of annual and special assessments for the administration, maintenance or improvement of the Commons. The Covenants to maintain the Commons shall include insuring the Commons against public liability and property damage, including the addition of the titleholder of any Lot upon which a portion of the Commons may be located as an additional insured. Such insurance shall be in commercially reasonable amounts. The Association shall not be responsible for any of the initial development and site work, including but not limited to all grading, fill, building and parking lot pads, drainage, utilities, sewers, paving, curb cuts, landscaping, ponds and waterways, street lighting, retaining walls, wells, and irrigation, required or envisioned by the Use Permit, which shall be the sole responsibility of the Owner.

EXTERIOR PROJECTS

10. EXTERIOR CONTROL: The Association shall exercise control over all buildings and improvements located upon any Lot within the Properties for the purpose of maintaining the existing standards and values for the Properties. The Association may adopt, from time to time, minimum exterior maintenance standards to establish the minimum acceptable standards for this covenant to maintain.

11. APPROVAL OF PLANS: Plans for any building or other temporary or permanent exterior improvement, including advertising devices, fences, exterior remodeling, reconstruction or additions shall be submitted to the Association and shall show the design, size and exterior material for the building or improvement and the plot plan and landscape plan for the Lot. One set of the approved plans ("Plans") shall be left on permanent file with the Association.

Construction of the building or improvement shall not be commenced unless written approval of the Plans has been secured from the Association. Written approval or disapproval of the Plans shall be given by the Association within thirty (30) days from and after receipt thereof. The Association shall have the exclusive right to disapprove the Plans, if in the Association's discretion, the Plans do not conform to the general standard of development in the Properties. Upon disapproval, a written statement of the grounds for disapproval shall be provided.

12. **BUILDING EXTERIOR MAINTENANCE:** Each Member shall be deemed to covenant to maintain the exterior of any building, including any attached or free standing signs, upon any such Lot in a manner consistent with the original quality and appearance of such building and other buildings within the Properties. No exterior alteration of any building upon any Lot within the Properties shall be made without the prior written approval of the plans for such alteration having been secured from Association as provided in paragraph 11 of these Restrictive Covenants.

13. **LOT MAINTENANCE AREA:** The Association covenants and each Member of the Association, by the acceptance of a deed by which the interest requisite for membership is acquired, shall be deemed to covenant to maintain the area within the Properties exclusive of the buildings ("Lot Maintenance Area"), including lawn care and maintenance, gardening, landscaping, irrigation, tree and shrub trimming, removal of snow, ice, drainage, rubbish and other refuse, and shall maintain, repair and replace capital improvements on the Properties which are aesthetic enhancements to the Office Park such as ponds, fountains, pedestrian pathways, flower gardens, and lighting of pedestrian pathways. The Association shall not be responsible for surfacing, resurfacing or repairing parking areas within the Properties.

14. **EXTERIOR MAINTENANCE ASSESSMENT:** In the event a Member fails to maintain the exterior of any building on its Lot according to the maintenance standards, the Association may, upon ten (10) days written notice to the Member, maintain the Lot and the exterior of any improvements and shall have the right to enter upon any Lot, at reasonable times, to perform such maintenance. The written notice shall specify the required maintenance and the time in which it must be completed. The actual cost of the maintenance, plus a 10 percent (10%) administrative fee, shall be paid by the Member within ten (10) days of billing. Upon failure of the Member to remit payment, the cost of the maintenance and administrative fee shall be specifically assessed against the Lot, shall bear interest at the rate provided for unpaid assessments and, when shown of record, shall be a lien upon the Lot assessed.

15. **MAINTENANCE EASEMENT:** The Association shall have an easement upon the Properties for the purposes of satisfying its maintenance obligations. The Association shall have a duty to repair at its sole cost and expense any portion of the Properties as may be damaged by its agents and independent contractors in the course of satisfying its maintenance obligations.

ASSESSMENTS

16. **ASSESSMENT UNITS:** Annual and special assessments shall be based upon the Assessment Units allocated to each Lot within the Properties. The Assessment Units are allocated to the Lots within the Properties pro rata based on the percentage that the planned or

as-built square footage of each building bears to the total planned or as-built square footage of all buildings located on the Properties.

17. **ASSESSMENTS:** The Members shall pay assessments to the Association as billed. Each Member's assessment shall be determined on an annual basis for each calendar twelve (12) month period ending on December 31, prorating fractional years and changes in Assessment Units which may occur by final approvals or issuance of occupancy certificates. An estimate of the Association's costs for administration, maintenance and improvement of the Commons and Lot Maintenance Area shall be made annually and each Member shall pay one-twelfth of the estimated assessment per month on the first day of each month in advance. At the end of each year, a statement of the operating costs of the Commons and Lot Maintenance Areas for the total year shall be presented to the Members of the Association and the Members shall pay any excess charge to the Association within thirty (30) days of the statement.

18. **COMPUTATION OF ASSESSMENTS:** It shall be the duty of the Association before the beginning of each fiscal year, to prepare a budget covering the estimated Commons and Lot Maintenance Area expenses of the Association during the coming year. The Assessment to be levied for the coming year against each Lot subject to the assessment shall be computed by dividing the budgeted Commons and Lot Maintenance Area expenses and the costs for services provided to the Members by the total number of Assessment Units calculated for the Properties (and any additional Properties which may be subject to these Covenants), multiplied by the number of Assessment Units assigned to each Lot. If the Association fails to determine the budget for any year, then until such time as a budget is approved, the budget in effect for the immediately preceding year shall continue for the current year. Each assessment shall be the personal obligation of the Member who is, or was, the titleholder of the Lot assessed at the time of the assessment, and when shown of record, shall be a lien upon the Lot assessed.

19. **ASSESSMENT BUDGETS:** Each year the Association shall prepare, approve and make available to each Member a pro forma operating statement (budget) containing:

- a. estimated revenue and expenses on an accrual basis;
- b. the amount of the total cash reserves of the Association currently available for replacement or major repair of the Commons, Lot Maintenance Areas and for contingencies;
- c. an itemized estimate of the remaining life of, and the methods of funding to defray repair, replacement or additions to, major components of the Commons and Lot Maintenance Areas; and
- d. a general statement setting forth the procedures used by the Association in the calculation and establishment of reserves to defray the costs of repair, replacement or additions to major components of the Commons and Lot Maintenance Areas.

The total amount shall be charged against the Lots according to the allocation of Assessment Units. The Association shall annually prepare and approve the budget and distribute a copy to each Member, together with written notice of the amount of the Assessment to be

levied against the Member's Lot not less than ten (10) days prior to the beginning of the fiscal year.

20. ADDITIONAL CHARGES: In addition to any amounts due or any other relief or remedy obtained against a Member who is delinquent in the payment of any assessment, each Member agrees to pay such additional costs, fees, charges and expenditures ("Additional Charges") as the Association may incur or levy in the process of collecting from that Member monies due and delinquent. All Additional Charges shall be included in any judgment in any action brought to enforce collection of delinquent assessments. Additional Charges shall include, but not be limited to, the following:

- a. Attorney's Fees: Reasonable attorney's fees and costs incurred in the event an attorney is employed to collect any assessment or sum due, whether by suit or otherwise.
- b. Late Charges: A late charge in an amount to be fixed by the Association to compensate the Association for additional collection costs incurred in the event any assessment or other sum is not paid when due or within any "grace" period. The late charge shall not exceed ten percent (10%) of the delinquent assessment or ten dollars (\$10.00), whichever is greater.
- c. Costs of Suit: Costs of suit and court costs incurred as allowed by the court.
- d. Filing Fees: Costs of filing notice of lien in the Office of the Register of Deeds.
- e. Interest: Interest on all assessments at the rate of 16 percent (16%) per annum, commencing thirty (30) days after the assessment becomes due.
- f. Other: Any other costs that the Association may incur in the process of collecting delinquent assessments.

21. ANNUAL AND SPECIAL ASSESSMENTS: Annual and special assessments for the administration, maintenance or improvement of the Commons and Lot Maintenance Areas and other special assessments specifically provided for in these Restrictive Covenants shall be levied by the Association. Annual and special assessments, other than for capital improvements, may be levied by the Association. Any special assessment for capital improvements shall be approved by the affirmative vote of two-thirds of the Members affected, at a regular meeting of the Members or at a special meeting of the Members, if notice of a special assessment is contained in the notice of the special meeting.

22. LIEN OF ASSESSMENTS: Upon failure of a Member to remit payment in accordance with these Restrictive Covenants for any assessment of the Association, the unpaid amount shall be specifically assessed against the Lot, shall bear interest at the rate provided for unpaid assessments and, may be filed of record by the Association against the Lot as a lien upon the Lot assessed. The lien of any annual or special assessment shall, until shown of record, be subordinate to the lien of any mortgage placed upon the Lot against which the assessment is levied.

GENERAL PROVISIONS

23. USE: All Lots within the Properties shall be used for commercial office purposes; however, no Lot shall be used for medical, dental or other health care professional offices. Only one (1) building may be constructed on each Lot within the Properties.

24. COMPLETION OF CONSTRUCTION: Any building or other improvement placed or constructed upon any Lot within the Properties shall be completed within two (2) years after the commencement of construction. In the event construction does not occur within three (3) years from the date title to a Lot is transferred by the Owner, the Owner, its successors and assigns shall have the option to repurchase the Lot for the amount paid to Owner for the Lot. The Owner may exercise the option by sending written notice to the titleholder of the Lot.

25. GRADING: The Owner, its successors and assigns, shall have the exclusive right to establish grades and slopes for all Lots within the Properties and to fix the grade at which any building or other improvement shall be placed or constructed upon any Lot, in conformity with the general plan for the development of the Properties.

26. CITY REQUIREMENTS: All buildings and improvements within the Properties shall be constructed in conformity with the applicable building codes of the City of Lincoln, Nebraska and Use Permit # 82, Resolution No. PC-00253 adopted by the Lincoln-Lancaster County Planning Commission on November 8, 1995 ("Use Permit"). No amendment to the Use Permit other than a minor increase in permissible floor area not to exceed 5 percent (5%) and any ancillary amendments to the Use Permit site plan may be applied for without the consent of the Members of the Association other than the Member(s) seeking such amendment.

27. SIGNS: No advertising signs, billboards, or any other advertising devices shall be permitted upon any Lot within the Properties, unless written approval thereof has first been secured from the Association. The Association may erect temporary signs advertising the development or multiple Lots for sale within the Properties.

28. SERVICES: The Association shall provide lawn care and maintenance (including water) for the Members. The Association may, in its discretion, contract for and provide other services for the Members. The costs of such services shall be satisfied by the payment of annual assessments. The Association may adjust the amount of the annual assessments to cover the costs of the services provided. The Association shall also provide snow and ice removal on the vehicular and pedestrian easement area within the Properties, the parking areas within the Properties, and pedestrian easement areas within the Commons and the Properties.

29. NUISANCE: No noxious or offensive activity shall be conducted or permitted upon any Lot within the Properties, nor anything which is or may become an annoyance or nuisance to neighbors or which endangers the health or unreasonably disturbs the quiet of the occupants of the adjoining Lots.

30. VEHICULAR AND PEDESTRIAN EASEMENTS: Each titleholder of a Lot within the Properties shall have an easement over and across those portions of the Properties as are designated as public access and pedestrian way easement areas on the Use Permit Site Plan, to provide unobstructed pedestrian and vehicular passage over and across the Properties to and

from South 14th Street and Old Cheney Road, in connection with pedestrian and vehicular ingress and egress from South 14th Street, Old Cheney Road and the parking areas on the Properties. The pedestrian easement established by these Restrictive Covenants shall be subject to the terms and provisions of the Restrictive Covenants and may be modified or terminated at any time by the Restrictive Covenants. A pedestrian easement is also reserved over and across that portion of the Properties not occupied by a building. This easement is for the purpose of permitting pedestrian access for Members of the Association to landscaped areas surrounding all buildings on the Properties. This easement shall terminate as to any portion of a Lot within the Properties upon which a building is constructed.

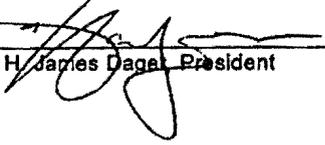
31. **AMENDMENTS:** These Restrictive Covenants shall run with the land and shall be binding upon and enforceable by the Association, and all persons claiming under the Association. These Restrictive Covenants may be terminated or modified, in writing, by the Owners of two-thirds of the Lots available for the uses permitted by these Restrictive Covenants, at any time. However, the provisions of these Restrictive Covenants governing membership in the Association and the maintenance of the Commons shall not be terminated or modified without the consent of the City of Lincoln, Nebraska. These Restrictive Covenants shall not be amended without the Owner's written consent for as long as the Owner is the titleholder of any Lot within the Properties. In addition, during the period of time in which Landscapes Unlimited, Inc., is the titleholder of Lot 2 of the Properties, these Restrictive Covenants may not be amended without its written consent.

32. **ENFORCEMENT:** The enforcement of these Restrictive Covenants may be by proceedings at law or in equity against any person violating or attempting to violate any provision hereof. The proceedings may be to restrain the violation, or to recover damages and, by the Association, may be to enforce any lien or obligation created by these Restrictive Covenants.

33. **SEVERABILITY:** The invalidation of any one of these Restrictive Covenants shall not affect the validity of any of the remaining provisions.

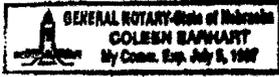
Dated APRIL 2, 1996.

DESIGN DATA CORPORATION, a Nebraska corporation

By: 
H. James Dager, President

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing Restrictive Covenants were acknowledged before me this 3rd day of April, 1996, by H. James Dager, President of Design Data Corporation, a Nebraska corporation, on behalf of the corporation.



Coleen Sawhart
Notary Public

(C:WPB/JMR10-24-SF.R4)