

INTERGOVERNMENTAL RELATIONS COMMITTEE

12-041-O

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE AUTHORIZING AN AGREEMENT AUTHORIZING SALE OF SKYWALK EASEMENTS IN THE HOLIDAY MALL TO JMM LIMITED PARTNERSHIP.

BY COUNCILOR GARDNER:

The city of Duluth does ordain:

Section 1. That pursuant to the requirements of Section 2-176 of the Duluth City Code, 1959, as amended, the city council finds that:

(a) The planning division has determined that the proposed sale of the skywalk easements described in that agreement on file in the office of the city clerk as Public Document No. \_\_\_\_\_ to JMM Limited Partnership conforms to the city's comprehensive plan; and

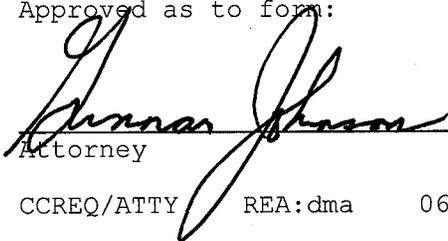
(b) The city assessor has provided an estimate of value for said property in the commercial real estate market indicating that, given the limitations of use contained in the agreement, the value of the easements in the market is negligible; and

(c) The city council finds that the sale of the property described in Public Document No. \_\_\_\_\_ to JMM Limited Partnership will further the important city interest of preserving and promoting property values in the downtown area while providing for pedestrian needs in the property.

Section 2. That, pursuant to the provisions of Section 2-177.4 of the Duluth city Code, 1959, as amended, the proper city officials are hereby authorized to enter into an agreement substantially in the form of that on file in the office of the city clerk as Public Document No. \_\_\_\_\_ authorizing the sale by quit claim deed of the property therein described to JMM Limited Partnership, subject to the terms and conditions therein contained.

Section 3. That this ordinance shall take effect 30 days after its passage and publication.

Approved as to form:

  
\_\_\_\_\_  
Attorney

CCREQ/ATTY REA:dma 06/14/2012

STATEMENT OF PURPOSE: The purpose of this ordinance is to authorize the sale of the portions of the Holiday Center in downtown Duluth occupied by the Skywalk System to the owner of that property.

When the Holiday was originally developed in the middle 1970's substantial portions of the property on the first and second floors were reserved for skywalk purposes. Over the years it has been determined on several occasions that portions of the original easement, area were unnecessary to the public and were eliminated. The owner has not indicated that the areas of the mall currently occupied by the skywalk can be better operated and maintained by the owner without all of the limitations attendant upon the existence of public easements. This agreement authorizes conveyance of the easements to the owner.

The agreement will continue to require that the areas presently occupied by the skywalk be open to the public in general during the same hours as is currently the case. The skywalk space will continue to be operated substantially as it is currently and the City's consent will be required for any modifications to it. In addition, should the City determine at some point in the future that there is a need to re-institute the formal easements, the owner agrees that it will re-dedicate them and impose a formal skywalk agreement of the standard form on them.

a need to re-institute the formal easements, the owner agrees that it will re-dedicate them and impose a formal skywalk agreement of the standard form on them.

## AGREEMENT

### JMM Limited Partnership City of Duluth

**THIS AGREEMENT** entered into as of the date of attestation by the Duluth City Clerk as set forth below, by and between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota, hereinafter referred to as “City”, and JMM LIMITED PARTNERSHIP, a Minnesota limited partnership, hereinafter referred to as “Owner”.

WHEREAS, Owner owns the hereinafter-described Property in Downtown Duluth upon which is located the Holiday Mall, the Holiday Inn Hotel and a parking ramp used for public parking; and

WHEREAS, the City and Owner and its predecessors entered into a “Contract for the Sale of Land for Private Redevelopment” dated April 30, 1976 pursuant to which Owner conveyed easements to the City for the construction, use and operation of a Public Pedestrian Passageway system or “Skywalk System”, which easements have been modified from time to time and which easements the parties hereto hereby agree, as of the date of this Agreement, are those hereinafter described as the “Easements”; and

WHEREAS, Owner has requested that City convey said Easements to Owner so that Owner may better control the use and maintenance of the area within the Property occupied by the Easements and City is willing to do so under the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and conditions hereinafter contained, the parties hereto hereby agree as follows:

1. Definitions:

For the purposes of this Agreement the following terms shall have the meanings

hereinafter ascribed to them:

- A. CAO: shall mean the City's Chief Administrative Officer or his or her designee and any person holding a position with the City which is a successor to the position presently designated as the CAO as shall be determined by the City's Mayor.
- B. Consent of the CAO: shall mean the approval in writing by the CAO which shall be obtained prior to event or occurrence for which such approval is sought.
- C. Easements: Shall mean easements for Skywalk purposes as presently existing and located on the Property as more fully described on Exhibit A attached hereto and made a part hereof. "Easements" shall not include Skywalk structures connected to the Property which are over any public street right-of-way including Skywalk bridges located over Superior Street, First Street, Third Avenue West and Fourth Avenue West or any of the obligations of Owner with regard thereto.
- D. Existing Documents: Shall mean the documents listed on Exhibit B attached hereto and made a part hereof.
- E. Major Modification or Alteration: Shall mean any change to the Easements or to any portion of the Property which directly impacts on the Easements which will have an impact on the utility or convenience of use of the Easements for pedestrian travel.
- F. Property: Shall mean the following-described real property located in St. Louis County Minnesota:

Tract A (Certificate of Title No. 265265)

Lot numbered thirty eight (38) EXCEPT the Northeasterly Twenty (20) feet, front and rear, on WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, according to the plat thereof, on file and of record in the office of the Register of Deeds in and for St. Louis County, Minnesota.

Tract B (Certificate of Title No. 265265)

That certain tract of land on WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION and CENTRAL DIVISION OF DULUTH, according to the respective recorded plats thereof, on file and of record in the office of the County Recorder, St. Louis County, Minnesota, described as follows: Commencing at the intersection of the centerline of West

Superior Street and dividing line between Lots 45 and 43, WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, as extended, as the place of beginning; thence along said dividing line to a point where said line intersects the centerline of the alley in the rear of said lots; thence left along the centerline of said alley to a point where said centerline intersects the centerline of Third Avenue West; thence left along the centerline of said Third Avenue West to a point where said line intersects the centerline of West Superior Street; thence left along said centerline of said West Superior Street to the place of beginning

Tract C (Abstract)

Lots 40 and 42, WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, according to the recorded plat thereof; and

Lots 33, 35, 37, 39, 41 and 43, WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, according to the recorded plat thereof; and

That portion of the Alley lying between Lots 38, 40 and 42, WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, and Lots 37, 39 and 41, WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, according to the respective recorded plats thereof, and lying over elevation of 63.49 City Datum.

- G. Skywalk: Shall mean the public pedestrian passageway system interconnecting various buildings in Downtown Duluth.
- H. Skywalk Agreement: Shall mean that agreement attached hereto and made a part hereof as Exhibit C which will remain executory and of no current effect unless and until City requires the reconveyance of the Easements to the City as provided for in Paragraph 4 below, in which case the Skywalk Agreement shall thereafter become of full force and effect and will control the operation, control and maintenance of the Easements as therein provided for.

2. Sale of Easements:

Subject to the terms and conditions of this Agreement, City hereby sells and quitclaims to Owner all right, title and interest of the City in the Easements, which conveyance shall include all rights of City to operation and control of the Easements and all rights, title and interest of the City in the Property, excluding the public street rights of way for Superior Street, First Street, 2<sup>nd</sup> Avenue West and 3<sup>rd</sup> Avenue West, pursuant to the Existing Documents subject to the provisions of Paragraph 4 below but only for as long as this Agreement shall continue to be in effect. As part of said sale but subject to the terms and conditions of this Agreement, City

suspends all of the controls and requirements pertaining to the Easements as they exist as of the time of the signing of this Agreement as they affect Owner and the Property.

3. Operation of Easements:

As part of the consideration to City for the sale of the Easements to Owner, Owner hereby agrees that it shall:

A. Maintenance Services

Provide full maintenance, replacement and repair as necessary and to the Easements and to all equipment and systems located thereon and therein and to the Property to the extent that such maintenance is reasonably necessary to the maintenance, use and operation of the Easements. Owner shall be responsible for all such general maintenance of the Easements and the Property including routine repair of electrical and mechanical systems, floors, walls, ceilings, minor roof repair and glass replacement. Owner further agrees to be responsible for major, non-reoccurring maintenance of the Easements and of the Property to the extent that such maintenance is reasonably necessary to the maintenance, use and operation of the Easements such as foundation repair, major roof repair or replacement, and major repair or replacement of mechanical, plumbing and electrical systems. In the event that Owner fails to so maintain the Easements or the Property, City may, after notice and opportunity to cure as provided for in Section 10.A.1. a, itself maintain or cause to be maintained repaired or replaced, as the CAO shall determine in the exercise of his or her reasonable discretion, those portions of the Easements or of the Property or both not so kept, and Owner agrees to reimburse City for the direct and indirect costs incurred by City for the performance of said work immediately on being billed therefore by City.

B. Taxes

Promptly pay or cause to be paid all lawful taxes and governmental charges, including real estate taxes and fees or taxes in lieu of real estate taxes at any time levied upon or against it or the Easements and the Property; provided that nothing shall prevent Owner from contesting in good faith, any such payment requirement except as such contest would negatively affect the City's rights under this Agreement or result in a lien being placed on the Easements, the Property or both.

C. Assessment Fees and Charges

Pay or cause to be paid when due or payable all special assessments levied upon or with respect to the Easements and the Property; and to pay all fees, charges and rentals for utilities, service or extensions for the Easements and the Property and all other charges lawfully made by any governmental body for public improvements; provided that nothing shall prevent Owner from contesting in

good faith, any such payment requirement except as such contest would negatively affect the City's rights under this Agreement or result in a lien being placed on the Easements, the Property or both. Owner shall also be entitled to avail itself of the most advantageous terms of payment, in Owner's judgment, made available by the assessing authority to pay any such assessment.

D. Other Costs of Easements or of the Property

Promptly pay, on or before the date due, all other costs, fees and charges of any kind whatsoever, arising out of the occupancy of the Easements and the Property; provided that nothing shall prevent Owner from contesting in good faith, any such payment requirement except as such contest would negatively affect the City's rights under this Agreement.

E. Payment by City

Should Owner fail to pay any such costs, fees or charges set forth above or otherwise necessary to the preservation and use of the Easements or of the Property, City may, at its sole discretion and upon ten (10) days prior, written notice to Owner, pay such costs, fees and charges and thereupon, Owner shall promptly reimburse City for the same and City may collect the same as it deems appropriate including exercising the remedies authorized under Paragraph 10 of this Agreement.

F. Payment Obligations Unconditional

The obligations of Owner to pay any amounts due to City under this Agreement in accordance with the terms hereof shall be absolute and unconditional, irrespective of any defense or rights of set off, recoupment or counterclaim which may at any time be available against City. Such payments shall be due without notice or demand therefore except as specifically provided for herein.

4. Re-dedication and Reinstatement

A. Rededication of Easements

Upon the request of the City as evidenced by a resolution approved by its City Council as provided for in this Section and by a written request signed by the City's Mayor, which resolution and request are collectively hereinafter referred to in this Paragraph as a "Request", Owner hereby agrees to re-convey and re-dedicate the Easements to the City in trust for the general public the Easements, subject to any modifications thereto approved as provided for in Section 6.G. of this Agreement. The re-conveyance and re-dedication will be effectuated as provided for in Subparagraph D below. City shall have the right to exercise its rights under this Paragraph without the need to have or show cause for such exercise.

B. Prior Notice Require

No Request shall be approved or given unless prior written notice shall have been sent to Owner as provided for in Paragraph 15 below at least Thirty (30) days prior to such approval or giving. Such notice shall be deemed to have been given by deposit thereof in the United States Mail, postage prepaid, addressed to Owner as provided for in said Paragraph.

C. Meet and Confer

During the Thirty (30) day period provided for in Subparagraph B above, Owner may request an opportunity to meet and confer with City in an effort to address any reasons City has for seeking the re-dedication of the Easements. If Owner makes such a request, then Owner and City agree so meet and confer in an effort to address the City's issues; provided that nothing herein shall be interpreted to require City to have or show cause of any kind in order to exercise its rights under this Paragraph or confer any rights upon Owner other than those specifically granted herein. Provided further that, in the event that Owner makes such a request, the Thirty (30) day period provided for in Subparagraph B above shall be deemed to have commence to run as of the date of the making such request.

D. Re-dedication

Upon such Request and the recording of the same in the Office of the County Recorder for St. Louis County, Minnesota along with the legal description of the Property, the Easements shall be deemed to have been re-dedicated and re-conveyed to the City as provided for in Subparagraph E.

E. Skywalk Agreement Effective

Upon such Request and the recording of the same in the Office of the County Recorder and the Registrar of Titles for St. Louis County, Minnesota along with the legal description of the Property, the Skywalk Agreement attached hereto as Exhibit C shall be deemed to take effect and to be thereafter effective and shall thereafter control the operation, maintenance and use of the Easements as set forth therein.

5. Term

The Term of this Agreement shall be deemed to run from the date of recording thereof in the Office of the County Recorder and the Registrar of Titles for St. Louis County, Minnesota and shall continue to be effective thereafter in perpetuity, subject to the re-dedication of the Easements pursuant to Paragraph 4 above and the Skywalk Agreement becoming effective as provided for in said Paragraph 4. Upon such re-dedication and reinstatement, this Agreement shall terminate and be of no further force and effect.

6. Construction or Alteration

Owner shall not make, construct or cause to be made or constructed any Major Modification or Alteration to the Easements or otherwise to the Property which will affect the Easements without the prior written consent of the CAO.. The process for requesting and receiving such consent is that set forth in this Paragraph.

A. Plans, Specifications and Elevations

1. Initial Plans:

No less than thirty (30) days prior to the commencement of construction of any such proposed Major Modification or Alteration, Owner shall submit working drawings, specifications and elevations for the modification or alteration as the CAO reasonably deems necessary, to the CAO for approval. All such plans, specifications and elevations shall be in conformity with this Agreement, and with all applicable laws, ordinances, rules, regulations and requirements of the City, State of Minnesota and United States of America authorities. The CAO shall accept or reject said plans within thirty (30) days of receipt thereof. If the CAO rejects such plans, specifications and elevation in whole or in part as not being in compliance with the foregoing requirements, and upon notification to Owner of said rejection together with the reason or reasons therefore, Owner may submit new or corrected plans, specifications and elevations meeting said objections within thirty (30) days of said notice. The provisions of this Sub-subparagraph relating to approval, rejection and resubmission of corrected plans hereinabove provided for with respect to the originally submitted plans, specifications and elevations shall continue to apply until said plans, specifications and elevations have been approved by the CAO. The CAO's acceptance of Owner's plans, specifications and elevations shall not constitute a waiver of building code or ordinance or other developmental duties imposed in the future upon Owner by law. Owner expressly agrees to be solely responsible for all costs, including architectural fees connected with said plans, specification and elevations and any revisions thereto.

2. Changes After Initial Approval

Any material changes made to plans by Owner after initial approval of the CAO reasonably deemed to him or her to be material or substantial shall be submitted to him or her for acceptance in the same manner provided for in Sub-subparagraph 1. above.

B. Construction Documents

Prior to the commencement of any construction under this Paragraph, Owner shall furnish to the CAO a construction contract with one or more contractors competent to construct the work shown in the Plans approved pursuant to Paragraph A above, which plans shall be for the construction of all of the

improvements or modifications shown in said Plans. With regard to projects having a construction cost in aggregate of Fifty Thousand Dollars (\$50,000) or more, Owner shall also furnish to the CAO fully executed bonds guarantying the payment of all laborers and materialmen performing such construction work. All such contracts and bonds shall be approved in writing by the CAO prior to the commencement of such construction.

C. Construction of Major Modification or Alteration

Upon approval of the plans and specifications as provided for in Sub-subparagraphs 1 and 2 above and commencement of construction thereof by Owner, Owner shall complete construction the Major Modification or Alteration in conformance with the plans as so approved as expeditiously as is practical.

D. Owner to Bear All Costs

Owner specifically guarantees and agrees to bear all costs related to the construction and installation of said modifications and improvements.

E. Progress Reports

Upon commencement of and until completion of construction of the Major Modifications or Alterations, Owner shall make reports in such detail and at such times as may reasonably be requested by the CAO as to the actual progress of such construction.

F. Certificate of Completion

Promptly upon completion by Owner, in accordance with this Agreement, of the construction any such Major Modification or Alteration, the CAO agrees to furnish to Owner an appropriate certificate so certifying. No such certification shall be issued until all elements of the construction have been completed. Such certification by the CAO shall constitute a conclusive determination of satisfaction of construction obligations of Owner undertaken pursuant to this Agreement.

G. Modification

Owner may modify the location of the Easements at any time subject to approval by the City. Such modified Easements shall be located and structured so as to facilitate pedestrian traffic through the whole Skywalk System and shall be of at least similar area and dimensions as the Easements as the Easements may have from time to time been previously modified as provided for herein. Along with its request for approval of an Easements modification, Owner shall submit to the City complete plans and specifications for said modification showing that the modification will be of at least comparable character, quality and functionality as the current Easements, including but not limited to factors of size, configuration,

materials, signing and furnishings and shall also submit proof of ability and methodology for payment therefore. All costs involved in modifying the Easements of any kind whatsoever, including the costs of removing Skywalk indicia from the old easement shall be born by Owner exclusively.

7. Provision Against Liens

Provision Against Liens

The Owner shall not allow any mechanic's or materialmen's liens or any other involuntary lien to be filed or established or to remain against the Easements, the Property or any part thereof which would materially or adversely affect the City's interest in this Agreement during the term of this Agreement, provided that if Owner shall first notify City of its intention to do so and post such security as City reasonably deems necessary, Owner may, in good faith, contest any such mechanic's or other liens filed or established as long as City does not deem its interest or rights in this Agreement to be subject to foreclosure by reason of such contest.

8. Indemnification

A. Generally

Owner will to the fullest extent permitted by law, protect, indemnify and save City and its officers, agents, servants, employees and any person who controls City within the meaning of Securities Act of 1933, harmless from and against all liabilities, losses, damages, costs, expenses, including attorneys' fees and expenses, causes of action, suits, claims demands and judgments of any nature arising from:

1. Any injury to or death of any person or damage to property in or upon the Easements or the Property, or growing out of or in connection with the use or non-use, condition or occupancy of the Easements or the Property or any part thereof and also, without limitation, any and all acts or operations related to any Major Modification or Alteration on any portion of the Easements or the Property. The foregoing indemnification shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefits payable by or for the Owner, customers, suppliers or affiliated organizations under any Workers' Compensation Act, Disability Benefit Acts or any other Employee Benefit Acts;
2. Any violation by Owner of any provision of this Agreement;
3. Any violation of any contract, agreement or restriction related to Owner's use of the Easements or the Property which shall have existed at the commencement of the Term of this Agreement or shall have been approved by the Owner; and
4. Any violation of any law, ordinance, court order or regulation affecting the Easements or the Property or the ownership, occupancy or use thereof

B. Indemnification Procedures

Promptly after receipt by City of notice of the commencement of any action with respect to which the Owner is required to indemnify such person under this Paragraph, City shall notify the Owner in writing of the commencement thereof, and, subject to the provisions as hereinafter stated, the Owner shall assume the defense of such action, including the employment of counsel and the payment of expenses. In so far as such action shall relate to any alleged liability of the City with respect to which indemnity may be sought against the Owner, City shall have the right to employ separate counsel in any such action and to participate in the defense thereof, and the fees and expenses of such separate counsel shall be at the expense of the Owner.

9. Insurance

Owner shall procure and continuously maintain insurance covering all risks of injury to or death of persons or damage to Property arising in any way out of or as a result of Owner's occupancy of or use of the Property, carried in the names of the Owner, any subtenant and the City as their respective interests may appear, as follows:

A. Insurance During Construction

Owner, prior to entering on the Property for construction work, shall procure or cause to be procured and maintain or require all contractors to procure and maintain the following insurance at not less than the limits of coverage or liability indicated during the period of construction as follows:

1. Property Insurance

Owner shall provide "Special Forms Peril" insurance under a completed value form on all work on the Project, including foundations, permanent fixtures and attachments, machinery and equipment included in or installed under the construction contract, debris removal, architects' and engineers' fees, temporary structures, materials, equipment and supplies of all kinds located on the project, to the full replacement value thereof, except that such policy may provide for a deductible amount not to exceed Fifty Thousand and 00/100ths (\$50,000.00) Dollars per occurrence. Said insurance shall be endorsed to provide consent for occupancy of the Project and shall be maintained in effect until permanent property coverage as provided for hereinafter is in force. Such insurance shall be written in the names of Owner, City, any subtenant and contractor, as their interest may appear. Contractor, all subcontractors, and suppliers and Owner shall waive all rights against City for damages caused by fire or insured perils, except such rights as are set forth hereunder to the proceeds of such insurance payable in the event of such loss.

2. Public Liability Insurance  
Public Liability Insurance written on an "occurrence" basis under a Comprehensive General Liability Form with "Broad Form" property damage liability coverage, with XCU exclusion removed, in limits of not less than One Million Five Hundred Thousand and 00/100ths (\$1,500,000.00) Dollars aggregate per occurrence for personal injury, bodily injury and death, and limits of One Million Five Hundred Thousand and 00/100ths (\$1,500,000.00) Dollars for property damage liability. If per person limits are specified, they shall be for not less than One Million Five Hundred Thousand and 00/100ths (\$1,500,000.00) Dollars per person and be for the same coverages. Contractor shall also require such liability coverage of its subcontractors unless they be insured under contractor's policies. Contractor's and subcontractors' liability coverages shall include:
- a. Contractors' public liability--premises and operations;
  - b. Independent contractors' protective contingent liability;
  - c. Personal injury;
  - d. Owned, non-owned, and hired vehicles;
  - e. Contractual liability covering customary construction contract and subcontract indemnity provisions; and
  - f. Workers' Compensation coverage in required statutory limits.
- Policy shall carry an "all states" endorsement. In addition, employee's liability coverage shall be maintained in limits of One Hundred Thousand and 00/100ths (\$100,000.00) Dollars per employee.

B. Permanent Insurance

1. Property Insurance

During the entire Term of the Agreement, the Property, including all fixtures, equipment and machinery, shall be insured to the full replacement value thereof against all risk of Direct Physical Loss, except that such insurance may provide for a deductible amount not to exceed Fifty Thousand and No/100 Dollars (\$50,000.00) per occurrence. For the purposes hereof, "all risk" means insurance equivalent in scope to Special Forms Peril to protect against all risks of direct physical loss ordinarily insured against in the region. Owner hereby waives any and all claims or causes of action against City for damages caused by an insured peril hereunder, except such rights hereinafter set forth to an interest in the insurance proceeds payable in the event of such loss. In time of war in which the United States of America is a belligerent, the Owner will procure and maintain continuously in effect such insurance as may be available from the United States of America to the extent of the full replacement

value of the project and insuring against loss thereof or damage thereto from the risks and hazards of war, provided that the cost of such insurance is economically reasonable.

2. Liability Insurance

The Owner shall procure and maintain continuously in force Public Liability Insurance written on an "occurrence" basis under a Comprehensive General Liability Form in limits of not less than One Million Five Hundred Thousand and 00/100ths (\$1,500,000.00) Dollars aggregate per occurrence for personal bodily injury and death, and limits of One Million Five Hundred Thousand and 00/100ths (\$1,500,000.00) Dollars for Property damage liability. If person limits are specified, they shall be for not less than One Million Five Hundred Thousand and 00/100ths (\$1,500,000.00) Dollars per person and be for the same coverages. The City shall be named as an additional insured therein. Insurance shall cover:

- a. Public liability, including premises and operations coverage.
- b. Independent contractors--protective contingent liability.
- c. Personal injury.
- d. Owned, non-owned and hired vehicles.
- e. Contractual liability covering the indemnity obligations for injury or death of any person or damage to property set forth herein.
- f. Dram Shop Insurance, if applicable.
- g. Property of Others.

3. Workers' Compensation

Workers' Compensation Coverage in statutory amounts with "all states" endorsement. Employees' liability insurance shall be carried in limits of One Hundred Thousand and No/100 (\$100,000.00) Dollars per employee

C. Requirements for All Insurance

All insurance required in this Paragraph 9 shall be taken out and maintained in responsible insurance companies organized under the laws of the states of the United States and licensed to do business in the State of Minnesota.

D. Policies

The Owner shall be required to supply to the City written copies of all policies required under this Agreement. In addition each insurer providing such policies shall be required to provide evidence satisfactory to the CAO that such policies will require the insurer to give the City thirty (30) days' written notice prior to cancellation or modification of said insurance except for the case of non-payment of premiums in which case ten (10) days notification prior to cancellation shall be provided. In the event that an "accord" form of certification is used, the words,

“endeavor to” shall be stricken from the notification provisions thereof. If it is demonstrated to the reasonable satisfaction of City’s Attorney that any form of insurance specified herein is not reasonably available to Owner or the form or type of protections shall have changed from those existing at time of the signing of the Agreement, Owner agrees that the City’s Attorney may approve an alternative form of insurance providing substantially the same protections as the forms specified herein.

E. Uninsured Loss

In the event the Easements or any improvements related thereto or any portion of the Property necessary to the continued use or operation of the Easement is damaged or destroyed by fire or other casualty covered by insurance, the Owner shall forthwith repair, reconstruct, and restore said portion of the Property and the Easements to substantially the same scale and condition, quality, and value as existed prior to the event causing such damage or destruction, and to the extent necessary to accomplish such repair, reconstruction, and restoration, the Owner shall apply the proceeds of any insurance received by the Owner to the payment or reimbursement of the costs thereof. The Owner shall, however, complete the repair, reconstruction and restoration of such portion of the Property and the Easements whether or not the proceeds of any insurance received by the Owner are sufficient to pay for such repair, restoration, and reconstruction.

10. Owner Defaults and Remedies Therefore

A. General Defaults and Remedies

1. General Events of Default

The following shall be deemed to be general events of default by Owner under the terms and conditions of this Agreement to which the remedies set forth in Sub-subparagraph 2 below shall be applicable as otherwise set forth in this Agreement.

- a. Owner shall fail to observe or perform any of the terms, conditions, covenants or agreements required to be observed or performed by it or any successors or assigns of Owner pursuant to this Agreement and such failure shall continue for a period of thirty (30) calendar days after City has, pursuant to the provisions of this Agreement, given written notice to Owner of such default or, in the event that such default shall be incapable of cure during said thirty (30) day period, shall have failed to commence to cure said default within thirty (30) days of the date of said notice and to diligently pursue the same to completion.
- b. Owner shall permit any liens, including but not limited to mechanic’s or materialmen’s liens or other involuntary liens, on the Easements or the Property with the exception of liens contested in accordance with Paragraph 7 above.

- c. Owner makes an assignment for the benefit of its creditors or admits in writing its inability to pay its debts as they become due; or an adjudication of bankruptcy or insolvency as made as to Owner or its business; or Owner files a petition of bankruptcy or files a petition seeking any reorganization, dissolution, liquidation, or rearrangement, composition, readjustment or similarly under any present or future bankruptcy or insolvency statute, law or regulation; or Owner files an answer admitting to or not contesting to the material allegations of a petition filed against in such proceeding or fails to have dismissed or vacated within thirty (30) days after its filing such a petition or seeks or consents or acquiesces in the appointment of any trustee, receiver or liquidator of a material part of Owner's properties or fails to have dismissed or vacated within thirty (30) days after the appointment without the consent or acquiescence of Owner of any trustee, receiver or liquidator of any material part of Owner's properties.

2. General Remedies

Except as otherwise set forth in this Agreement, City shall have the following remedies in the event of a default by Owner:

- a. Terminate this Agreement and, at its discretion, retake the Easements from Owner, subject to rights conferred on Owner by applicable State Statute.
- b. Seek and be entitled to monetary damages, including consequential damages from Owner for any damages, including consequential damages incurred by City as a result of Owner's default.
- c. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent Owner's violation of the terms and conditions of this Agreement or to compel Owner's performance of its obligations hereunder.
- d. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to City.

B. Non-Waiver

The waiver by City of any default on the part of Owner or the failure of City to declare default on the part of Owner of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of Owner of the same or of any other obligation of Owner hereunder. And, to be effective, any waiver of any default by Owner hereunder shall be in writing by City.

C. Remedies Cumulative

Except as specifically set forth herein, the remedies provided under this Agreement shall be deemed to be cumulative and non-exclusive and the election of one

remedy shall not be deemed to be the waiver of any other remedy with regard to any occasion of default hereunder.

D. Attorneys' Fees

In the event that either party brings an action to enforce this Agreement, the prevailing party, as determined by the court, shall be entitled to reimbursement for its reasonable attorneys' fees and costs and otherwise for its costs and disbursements occasioned by the action.

11. Force Majeure

Under the terms of this Agreement, neither the City nor Owner shall be considered in default or in breach of any of the terms with respect to the performance of their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of contractors or subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

12. Representations by City

City represents and warrants that as of the date hereof:

- A. It is a lawfully constituted municipal corporation under the laws of the State of Minnesota, it is not in material violation of any provisions of State law and that it has full power and authority to enter into this Agreement and perform its obligations hereunder.
- B. There are no actions, suits or proceedings pending, or to the knowledge of City, threatened against City or any property of City in any court or before any Federal, State, municipal or governmental agency which, if decided adversely to City, would have a material adverse effect upon City or any business or property of City and City is not in default with respect to any order of any court or government agency.
- C. City has investigated and has no knowledge that a City Council Member or other member, official, or employee of City is directly or indirectly financially interested in this Agreement or in any transactions concluded in connection with this Agreement.

- D. City shall do such things as are necessary to cause any information, document, certificate, statement in writing, or report required under this Agreement or otherwise delivered to any third parties under this Agreement to be true, correct and complete in all material respects.

13. Owner's Representations and Warranties

Owner represents and warrants that as of the date hereof:

- A. That Owner is a Minnesota limited partnership, that Owner is not in material violation of any provisions of State law and that Owner has full power and authority to enter into this Agreement and to perform its obligations hereunder.
- B. That Owner is fully competent to acquire, operate and re-convey the Easements under all laws, rulings, regulations and ordinances of any governmental authority having jurisdiction and that Owner agrees to comply with all applicable State and Federal at Owner's own expense.
- C. That there are no actions, suits or proceedings pending or, to the knowledge of Owner, threatened against Owner, the Easements, the Property or any other property of Owner in any court or before any Federal, State or municipal or other governmental agency which, if decided adversely to Owner, could have a material adverse affect upon Owner, the Easements or any Property, and that Owner is not in default of any order of any court or governmental agency.
- D. Owner is not in default of the payment of principal of or interest on any indebtedness for borrowed money or in default under any instrument or agreement pursuant to which the indebtedness has been incurred.
- E. Owner shall do such things as are necessary to cause any information, document, certificate, statement in writing, or report required under this Agreement delivered to any third party under this Agreement to be true, correct and complete in all material and respects. If necessary Owner agrees to perform any survey work prior to construction and all descriptions and exhibits hereto and definitions herein shall be subject to such revisions as are necessary after completion of any survey.

14. Runs with the Land

This Agreement shall be deemed to run with the land and shall enure to the benefit of the parties hereto and to their successors and assigns unless terminated as provided for in Paragraph 5 above.

15. Notices

Any notice, demand or other communication under this Agreement by either party to the other shall be deemed to be sufficiently given or delivered if it is dispatched by U.S. mail, postage prepaid to:

In the case of City:

Chief Administrative Officer  
City of Duluth  
Room 402 City Hall  
411 West First Street  
Duluth, MN 55802

In the case of Owner at:

JMM Limited Partnership  
202 West Superior Street  
Suite 800  
Duluth, MN 55802

16. Applicable Law

This Agreement together with all of its Articles, paragraphs, terms and provisions is made

in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first shown above.

CITY OF DULUTH  
a municipal corporation under  
the laws of the State of Minnesota

JMM LIMITED PARTNERSHIP, a  
Minnesota Limited Partnership by  
Labovitz Corporation, its Managing  
General Partner

By \_\_\_\_\_  
Don Ness  
Its Mayor

By: \_\_\_\_\_  
Mark Emmel  
Its Vice President

Attest:

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

Approved:

\_\_\_\_\_  
Assistant City Attorney

Countersigned:

\_\_\_\_\_  
City Auditor

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF ST. LOUIS    )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2012, by Mark Emmel, Vice President of Labovitz Corporation, the managing general partner of JMM Limited Partnership, a Minnesota limited partnership, on behalf of the partnership.

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

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF ST. LOUIS    )

The foregoing instrument was acknowledged before me this \_\_\_\_th day of \_\_\_\_\_, 2012, Don Ness and Jeffrey J. Cox, the Mayor and City Clerk of the City of Duluth, a municipal corporation created and existing under the Laws of the State of Minnesota, on behalf of City.

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

**Consent of Mortgage Holder**

US Bank National Association (“Bank”) is the holder of:

- (i) the Mortgage dated November 10, 1993 and recorded in the office of the St. Louis County Registrar of Titles on November 12, 1993 as Document No. 573969 in the original principal amount of \$10,000,000 as the same may thereafter have been modified;
- (ii) Assignment of Leases and Rents dated November 10, 1993 and recorded in the office of the St. Louis County Registrar of Titles on November 12, 1993 as Document No. 573970 as the same may thereafter have been amended;
- (iii) Assignment of Leases and Rents dated October 12, 2000 and recorded in the office of the St. Louis County Registrar of Titles on October 31, 2000 as Document No. 692073 as the same may thereafter have been amended; and
- (iv) Mortgage dated October 1, 2001 and recorded in the office of the St. Louis County Registrar of Titles on October 10, 2001 as Document No. 709486 in the original principal amount of \$4,000,000, as the same may thereafter have been amended.

Bank consents to the covenants, conditions, restrictions, easements, charges and liens set forth in and created by the Declaration of Agreement to Provide Easement (the “Declaration”). Bank agrees that its interest in the Property will be subject to the covenants, conditions, restrictions, easements, charges and liens set forth in the Declaration.

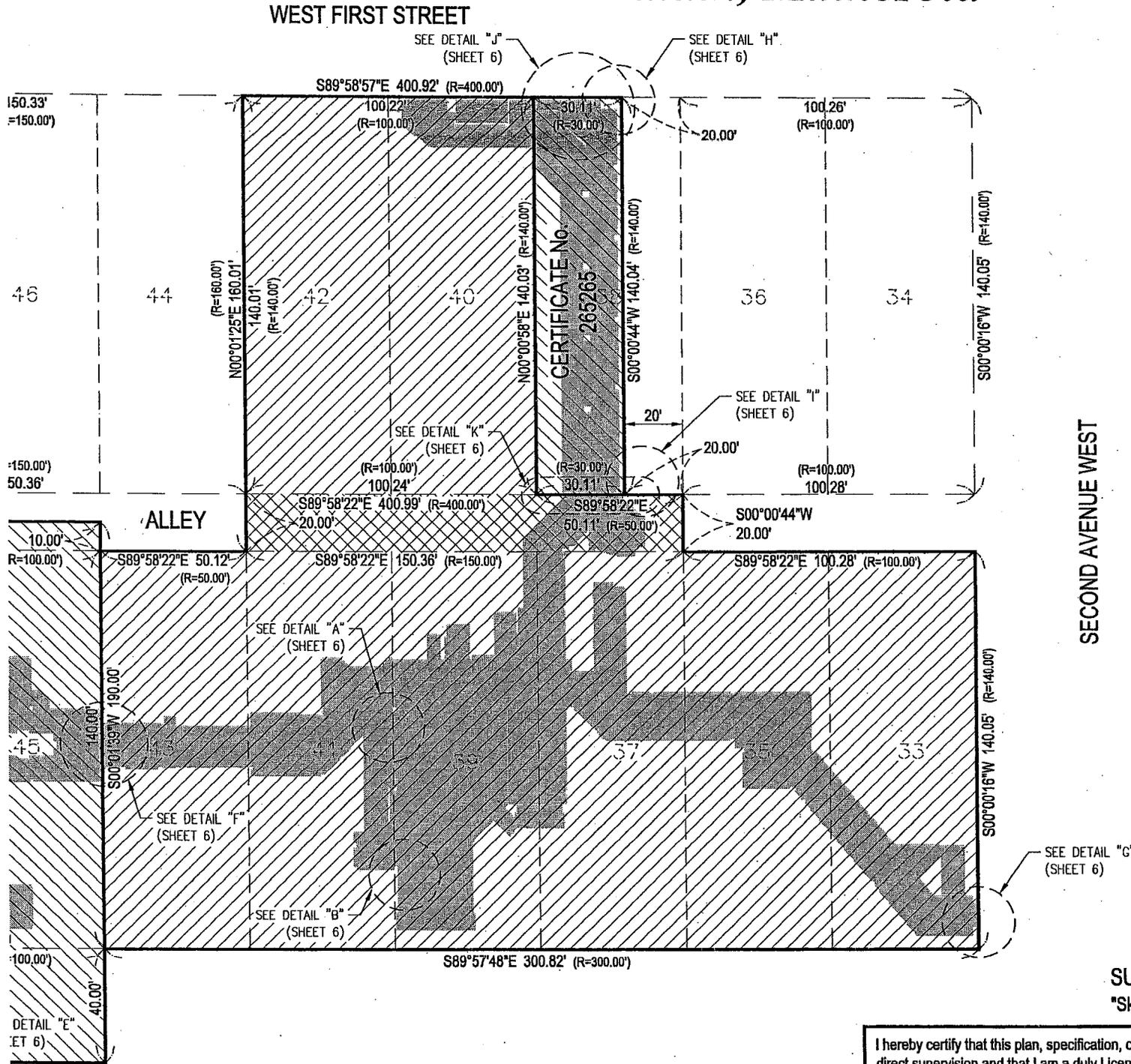
US BANK NATIONAL ASSOCIATION

By \_\_\_\_\_  
Its \_\_\_\_\_



**EXHIBIT A**

# Boundary and Overall Layout Duluth, Minnesota



TOGETHER WITH

That certain tract of land on WEST DIVISION and CENTRAL DIVISION OF plats thereof, on file and of record in Louis County, Minnesota, described the centerline of West Superior Street, DULUTH PLACE OF BEGINNING; thence along said centerline of West Superior Street to the centerline of the alley; thence along the centerline of said alley to a point on the centerline of Third Avenue West; thence along the centerline of Third Avenue West to a point where said centerline intersects the centerline of West Superior Street; thence left along the centerline of West Superior Street to the place of beginning.

TOGETHER WITH

Lots 40 and 42, WEST FIRST STREET, according to the recorded plat thereof; and

TOGETHER WITH

Lots 33, 35, 37, 39, 41 and 43, WEST FIRST DIVISION, according to the recorded plat thereof; and

TOGETHER WITH

That portion of the Alley lying between WEST FIRST STREET and WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, according to the recorded plat thereof, and lying over elevation 663.12' NAVD 88.

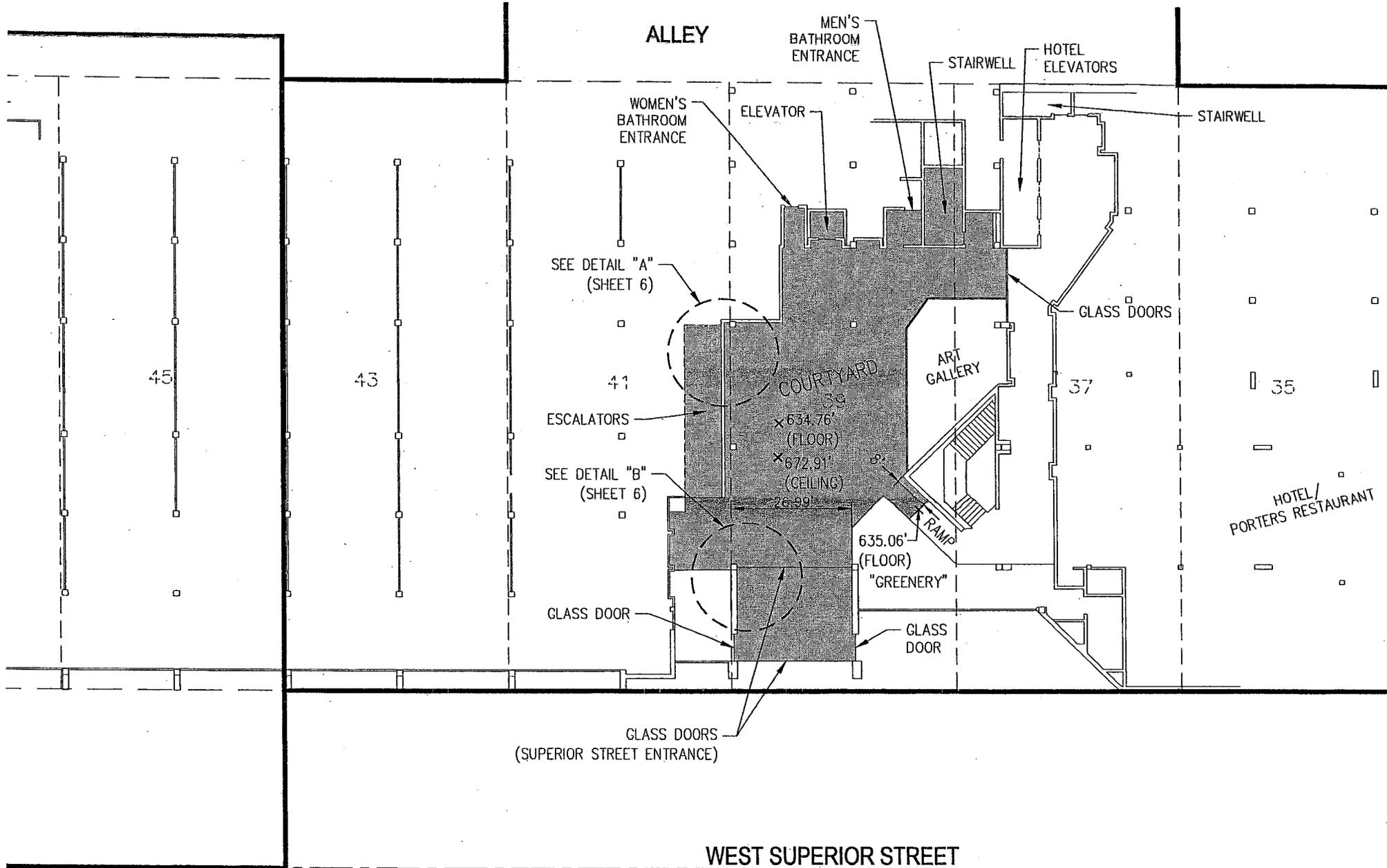
### LEGEND

- PLATTED BLOCK LINE
- PLATTED LOT LINE
- ABSTRACT
- TORRENS
- ABSTRACT LYING ABOVE ELEVATION 63.49' CITY D. (663.12' NAVD 88)
- SKYWALK CORRIDOR

**SURVEYORS NOTE:**  
\*Skywalk corridors multiple levels, see sheets 2 thru 5 - this plan shows only one level.

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State of Minnesota.

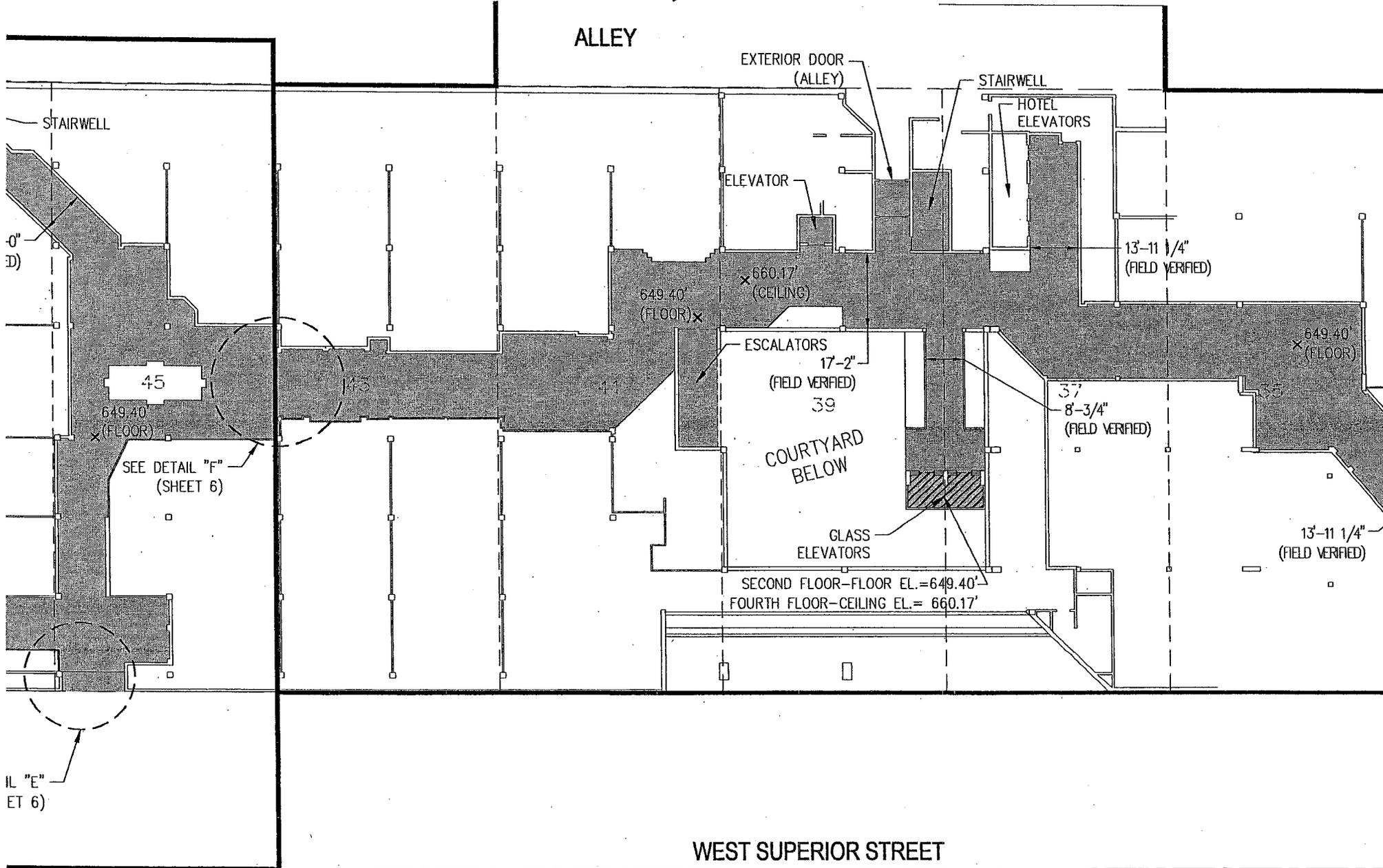
# *Holiday Center - First Floor Skywalk Duluth, Minnesota*



I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

DATE PREPARED

# Holiday Center - Second Floor Skywalk Duluth, Minnesota



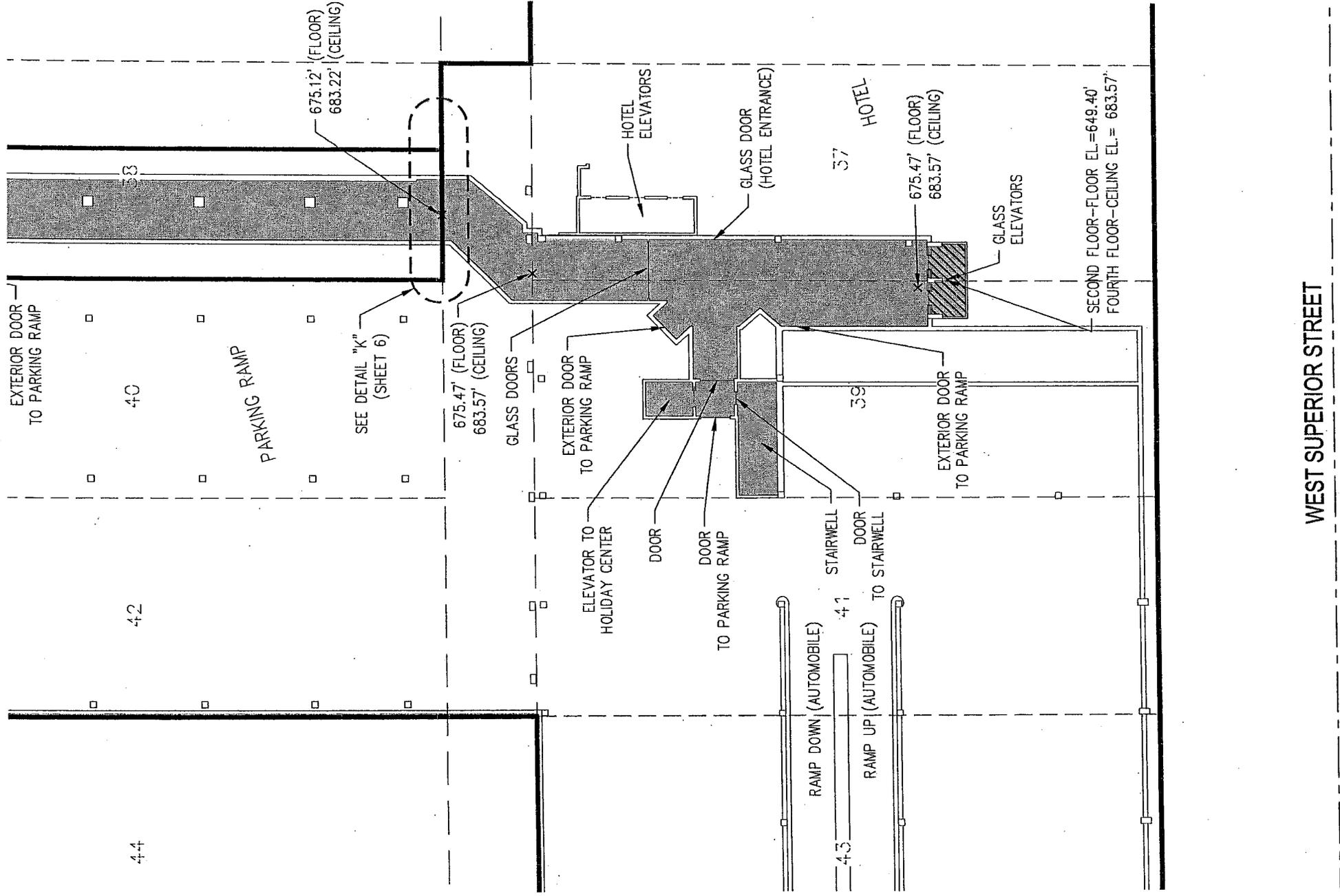
### LEGEND

= SKYWALK CORRIDOR

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State



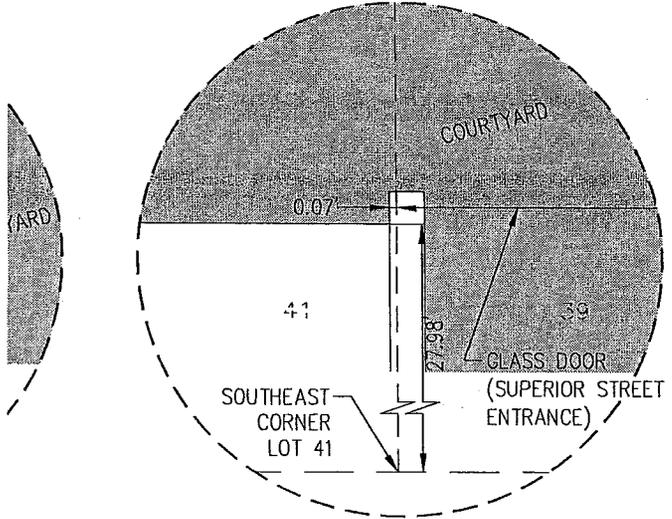
# Holiday Center & Parking Ramp - Fourth Floor Skywalk Duluth, Minnesota



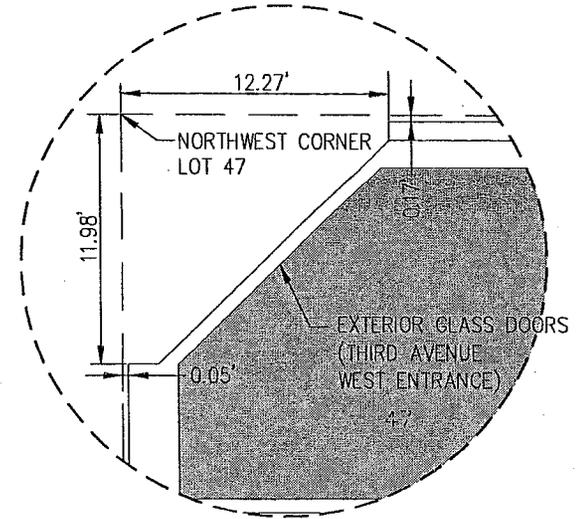
I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

DATE 08/28/2010

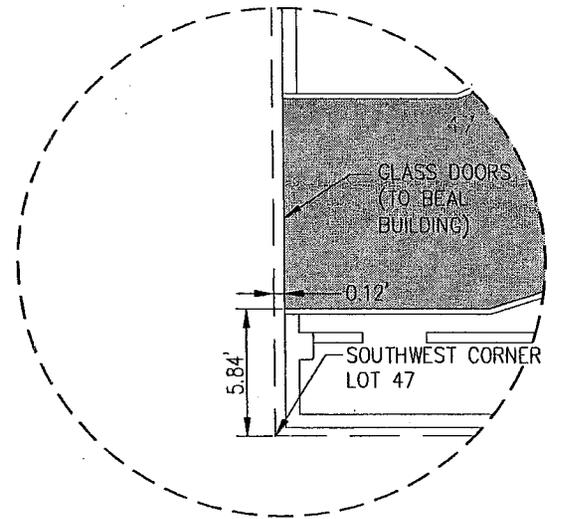
# Holiday Center & Parking Ramp Details - First thru Fourth Floor Skyway Duluth, Minnesota



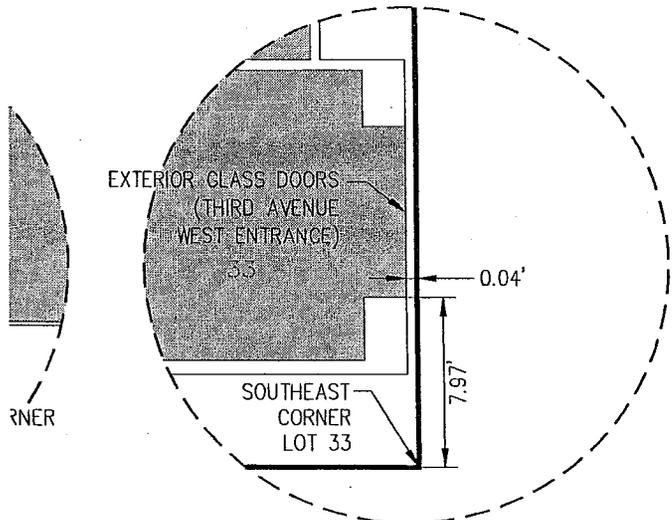
DETAIL "B"  
(NOT TO SCALE)



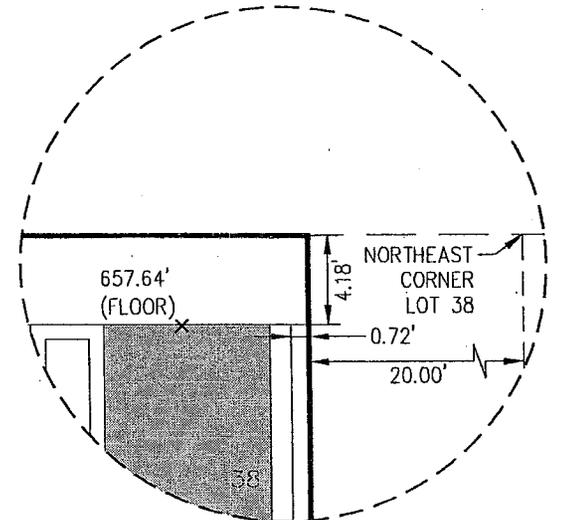
DETAIL "C"  
(NOT TO SCALE)



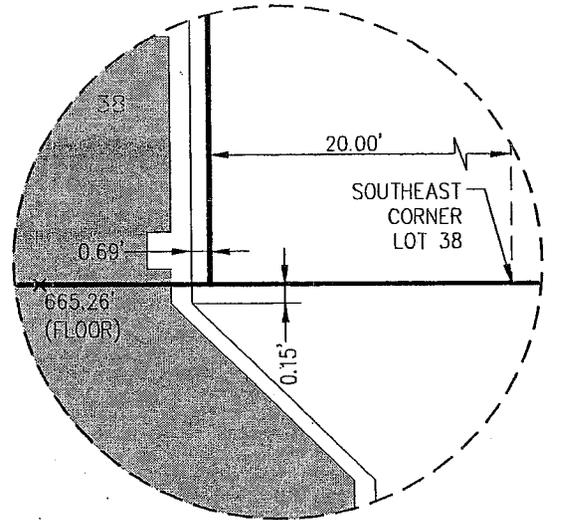
DETAIL "D"  
(NOT TO SCALE)



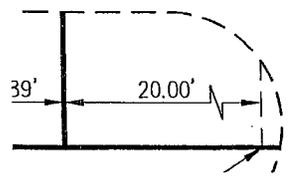
DETAIL "G"  
(NOT TO SCALE)



DETAIL "H"  
(NOT TO SCALE)



DETAIL "I"  
(NOT TO SCALE)



**LEGEND**

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

SW CORNE  
LOT 4

0.1

DATE PREPARED

## EXHIBIT B

### LIST OF EXISTING DOCUMENTS

1. Easement for public pedestrian passageway purposes reserved by the City of Duluth, over that portion of the property shown shaded in gray on sheets 3, 4, 5, 6, 8 and 9 of construction plans attached to and referred to as Attachment 1 in Warranty Deed recorded in the office of the County Recorder on July 28, 1976 as Document No. 236553 and recorded in the office of the Registrar of Titles on July 28, 1976 as Document No. 393318.
2. Supplemental Pedestrian Passageway Agreement by and between Lyric Block Development Corporation and City of Duluth dated January 5, 1982, recorded April 9, 1982, in the office of the Registrar of Titles, as Document No. 444077.
3. Pedestrian Passageway Agreement dated October 29, 1982, recorded December 10, 1982, in the office of the Registrar of Titles as Document No. 448419, and in the office of the County Recorder as Document No. 353264.
4. Pedestrian Passageway Agreement Relating to the Holiday Mall Building Western Expansion dated February 25, 1985, recorded March 31, 1986, in the office of the Registrar of Titles, as Document No. 475122.

Portions of the areas affected by the Easements have previously been vacated as set forth in the following Resolutions and Agreements:

5. Resolution for Vacation of Pedestrian Passageway Easement dated November 22, 1982, recorded March 4, 1983, in the office of the Registrar of Titles, as Document No. 449913, and as Document No. 356394, in the office of the County Recorder, together with the provisions of Public Document No. 82-1025-22 incorporated therein as the same may thereafter have been amended, vacating portions of the pedestrian passageway, subject to conditions set forth in:
  - 5.1 Agreement Regarding Vacated Spaces dated November 1, 1982, recorded December 10, 1982, in the office of the Registrar of Titles, as Document No. 448420, and as Document No. 353265, in the office of the County Recorder, as the same was amended by a First Amendment to Agreement Regarding Vacated Spaces, by and between City of Duluth and Lyric Block Development Corporation, dated February 22, 1983, recorded March 21, 1983, in the office of the Registrar of Titles, as Document No. 450171.
  - 5.2 Agreement for Improvement of Holiday Court Area dated November 1, 1982, recorded December 10, 1982, in the office of the Registrar of Titles, as Document No. 448421, and as Document No. 353266, in the office of the County Recorder.

6. Resolution for Vacation of Pedestrian Passageway Easement dated February 18, 1983, recorded March 4, 1983, in the office of the Registrar of Titles, as Document No. 449914, and as Document No. 356395, in the office of the County Recorder, vacating portions of the pedestrian passageway, subject to conditions.
7. Resolution for the vacation of skywalk easement approved March 22, 1999 and recorded December 16, 2003, in the office of the Registrar of Titles as Document No. 767283 and in the office of the County Recorder as Document No. 928440, together with the provisions of Public Document No. 99-0322-18 incorporated therein as the same may thereafter have been amended.
8. Resolution 95-0821R vacating an 8.5' x 18' portion of the Skywalk Level of the Holiday Center to provide for the expansion of the Thomson Travel offices (Lyric Block Development Corporation). Approved 9/11/1995
9. Resolution 98-0290R vacating a portion of Skywalk Easement in the Holiday Center (Lyric Block). Approved 4/13/1998

**EXHIBIT C**

PEDESTRIAN PASSAGEWAY AGREEMENT  
PERTAINING TO THE HOLIDAY MALL PROPERTY

BY THIS AGREEMENT ("Skywalk Agreement") dated \_\_\_\_\_, 2012, the CITY OF DULUTH, hereinafter referred to as "City," and JMM LIMITED PARTNERSHIP, a Minnesota limited partnership, hereinafter referred to as "Owner," agree to the following terms and conditions of agreement:

INTRODUCTION:

(1) City has constructed a downtown skywalk system providing enclosed pedestrian passageways connecting numerous buildings within the area. The location and nature of said improvements are illustrated in the attached Exhibit A.

(2) City and Owner' predecessor in interest had previously constructed skywalk facilities through the "Building," located on the parcel legally described on Exhibit B attached hereto and made a part hereof, connecting the Building to a number of adjacent properties in the Downtown by means of easements for said Skywalk.

(3) By that Agreement dated \_\_\_\_\_, 2012, on file in the office of the County Recorder for St. Louis County, Minnesota as Document No. \_\_\_\_\_ and in the office the Registrar of Titles for said County as Document No. \_\_\_\_\_ (the "Agreement"), City conveyed its interests in said Skywalk easements to Owner.

(4) As of the effective date of this Skywalk Agreement as provided for in Paragraph 4 of the Agreement, City and Owner have decided that it is in the best interests of the parties and of

the general public to rededicate and re-convey said easements as hereinafter described to the City in trust for the general public for pedestrian passageway purposes.

(5) Upon the occurrence of the events as set forth in Paragraph 4 of the Agreement, Owner does hereby convey to the City and dedicate to the City, in trust for the general public, the easements, described on Exhibit C attached hereto and made a part hereof as the same may have been modified as provided for in the Agreement (the "Easements"), said Easements being conveyed and dedicated for pedestrian passageway purposes.

#### OWNER'S RESPONSIBILITIES:

##### Perpetual Easement

(6) Owner does hereby grant to City, without cost, the Easements having the primary purpose of facilitating pedestrian travel through the Building and connecting to various Skywalk bridges connecting the Building to those buildings generally known as the Wells Fargo Bank Building, the Beal Building, the Garon Jewelers Building and the Northshore Bank of Commerce Building and exiting onto Superior Street and 3<sup>rd</sup> Avenue West. Owner acknowledges that Owner has been informed of its rights under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and hereby knowingly and specifically waives all rights and benefits thereunder.

Said grant of the Easements shall include the grant to City of the right of control and regulation thereof including control and regulation of concurrent uses, activities, traffic, signs, furnishings and decor within said Easements and all powers necessary to carry out the elements of this Skywalk Agreement. Said Easements is further described and illustrated by yellow shading in the attached documents, Exhibit C.

Owner may modify the location of the Easements at any time subject to approval by City, which approval shall not unreasonably be withheld or delayed. Such modified easements shall be located and structured so as to facilitate pedestrian traffic through the whole Skywalk System and shall be of at least similar area and dimensions as the original Easements. Along with its request for approval of an easement modification, Owner shall submit to City complete plans and

specifications for said modification showing that the modification will be of at least comparable character, quality and functionality as the old Easements, including but not limited to factors of size, configuration, materials, signing and furnishings and shall also submit proof of ability and methodology for payment therefor. All costs involved in modifying said easements of any kind whatsoever, including the costs of removing skywalk indicia from the old Easements shall be borne by Owner exclusively.

If City approves said modification, the parties shall join in the execution and delivery of an amendment to this Skywalk Agreement in recordable form designating the modified Easements and terminating the old Easements upon completion of construction approved by City within the modified Easements. Owner shall have the responsibility for the recording of the Easements granted hereunder and shall be responsible for all related fees. Owner will make all necessary title instruments available for such proceedings.

#### Construction

(7) In the event that Owner wishes to make any alteration to the Skywalk or modification to the Easements in the Building, from those existing as of the effective date of the Agreement, Owner will construct or cause to be constructed the improvements within the area of the Easements and Building in conformance with the following:

(a) Design Development. The term, "Design Development Plans," as hereinafter used shall mean all plans, drawings, specifications and related documents necessary for the construction of the public improvements hereunder, together with any and all changes made as provided for herein. All design development plans shall be in conformity with this Skywalk Agreement and with all applicable State and local laws and regulations. In the event that Owner wishes to make any such changes, Owner will have prepared and submit for approval to the City's Director of the Department of Business and Community Development or the successor position designated by the City's Chief Administrative Officer (said position being hereinafter referred to as the "Director"), design development plans with respect to the improvements to be constructed by Owner on the public easement, in sufficient completeness and detail to show that such improvements and the construction thereof will be in accordance with the provisions of this Skywalk Agreement. The Director shall

approve or disapprove in writing such design development plans and approval of such plans shall not unreasonably be withheld or delayed. If said plans are approved, no further filing by Owner or approval by the Director thereof shall be required except with respect to any material change. If the Director rejects said plans in whole or in part as not being in conformity with this Skywalk Agreement, Owner shall submit new or corrected design development plans which are in conformity with this Skywalk Agreement, within fifteen (15) days thereof, after written notification to Owner of the rejection. The provisions of this Section relating to approval, rejection, and resubmission of corrected design development plans hereinabove provided with respect to the originally submitted plans shall continue to apply until the plans have been approved by the Director. No construction of improvements shall commence prior to the approval of said plans by the Director. All work with respect to the improvements to be constructed or provided by Owner on the property shall be in conformity with the design development plans as approved by the Director. The term "improvements," as used in this Skywalk Agreement, shall be deemed to have reference to the improvements as provided and specified in the construction plans as so approved.

(b) Changes in Design Development Plans. If Owner desires to make any change in the design development plans after their approval by the Director, Owner shall submit the proposed change to the Director for his approval. If the plans, as modified by the proposed change, conform to the intent and content of the previously approved construction plans, the Director may approve the proposed change and notify Owner in writing of its approval. In the event of disapproval, the Director shall notify Owner in writing thereof and the reasons therefor. Such approval shall not unreasonably be withheld or delayed.

(c) Progress Reports. Until construction of the improvements has been completed, Owner shall make reports in such detail and at such times as may be reasonably requested by City, as to the actual progress of Owner with respect to such construction.

(d) Bond and Insurance During Construction. Prior to construction, Owner will secure a performance bond large enough to insure completion of the public improvements or provide such other security as may be approved in writing by the Director. Prior to construction, Owner shall have City named as an additional insured for the purposes of this Skywalk Agreement on both

Owner's Commercial General Liability Policy, which shall be kept in full force in the amount of \$1,500,000 during the entire course of construction, and its Special Form Perils Insurance Policy, or have City so named on a Builder's Risk Insurance Policy, which shall be kept in full force during the entire course of construction in an amount sufficient to restore all public and private improvements made pursuant to this Skywalk Agreement on Owner's property. Such policies of insurance shall be written by insurance companies authorized to do business in the State of Minnesota. If it is demonstrated to the reasonable satisfaction of City's Attorney that any form of insurance specified herein is not reasonably available to Owner or the form or type of protections shall have changed from those existing at time of the signing of this Skywalk Agreement, Owner agrees that the City's Attorney may approve an alternative form of insurance providing substantially the same protections as the forms specified herein. Prior to commencement of construction, Owner shall file with the Director a Certificate of Insurance setting forth that all coverages required herein are in full force and effect and providing that City will be given ten (10) days' written notice prior to the termination or cancellation of such coverages

(e) Certificate of Completion. Promptly after completion by Owner in conformance with this Skywalk Agreement, of construction of the improvements, City will furnish Owner with an appropriate instrument so certifying. No such certification shall be issued until all elements of such construction are totally completed and until the provisions of the third and fourth paragraphs of Paragraph 6 hereof have been complied with. Such certification by City shall be (and it shall be so provided in the certification itself) a conclusive determination of satisfaction and termination of the agreements and covenants in the agreements and in the deed with respect to the construction obligations only of Owner and its successors and assigns. The issuance of such certificate shall not unreasonably be withheld or delayed.

(f) Cost for Construction. All costs for construction of improvements contemplated in this Paragraph shall be the responsibility of Owner except as hereinafter set forth.

#### Operation, Repair, Maintenance and Security

(8) Owner agrees to operate, maintain and repair and secure the pedestrian passageways described in this Skywalk Agreement and Owner's property hereinbefore described including joint

responsibility for the pedestrian bridges linking Building to the adjoining properties as such bridges are described in Paragraph 6 above, including but not limited to the provision of adequate heat, lighting and air conditioning to said passageways and the provision of any security deemed desirable by Owner.

Owner covenants and agrees that it will not make or allow to be made in any way, directly or indirectly, any internal or covered connection between Building as it now exists and any other building without the approval of City.

As part of its obligations under this Paragraph, Owner agrees to provide and retain adequate fire and property insurance to restore the pedestrian concourse within Owner's property to the specifications of this Skywalk Agreement taking into account normal wear and tear.

In the event of damage to or destruction of any portion of the skywalk system within Owner's property, Owner agrees that, within ninety (90) days of the date thereof, it will present to City complete construction plans for the restoration of said portion of the skywalk system together with a signed contract with a reputable contractor or reputable contractors for the construction of said restoration and a bond in a form and with a surety approved by City insuring performance of said contracts. Construction plans shall be subject to approval as provided in Paragraph 7 of this Skywalk Agreement, provided that delays occasioned by failure of the Director to approve plans shall not be included in the computation of time in this Section. Should Owner fail to perform its obligations under this Paragraph, City may, at its option, restore said portion of the skywalk system and collect from Owner, by assessment or any other legal means, all of the costs occasioned thereby, including the costs of collection.

Owner further agrees to carry liability insurance in an amount sufficient to indemnify City from any liability occurring within those areas of the pedestrian concourse system wherein Owner has, through this Skywalk Agreement, assumed the sole or joint responsibility for operation, repair, and maintenance. Further, Owner agrees to indemnify and hold harmless City from all possible liability arising from the operation, repair or maintenance of those areas of the pedestrian concourse system where said responsibility is assumed by Owner solely or jointly under the terms of this Skywalk Agreement. Owner will provide to City annual certificates of insurance to evidence said



enemy, acts of the Federal Government, acts of the other party, fires, floods, epidemics, quarantine restrictions, strikes or other similar causes beyond control of a party or delays of subcontractors due to such causes. In the event of such delays, any time for completion or delivery under this Skywalk Agreement will be extended for the period of delay upon written notice of the party seeking extension.

CONTINUING OBLIGATIONS

(12) All parties to this Skywalk Agreement further agree that this Skywalk Agreement, together with all of the terms, covenants and conditions herein contained, shall be deemed to run with the land and to be binding on the respective parties successors and assigns, if any, and that in the event that Owner shall at any time sell the Building or the hereinbefore described Property or both or otherwise assign or transfer its interest therein, any such purchaser, transferor or assignee shall be liable for the performance of the obligations assumed by Owner hereunder, and that Owner shall, in addition, continue to be responsible for such obligations. Further, it is the intent of the parties that the easement granted hereunder and as the same may be modified from time to time as herein provided for, shall be permanent and perpetual and shall survive any event of damage to or destruction of the Building, whether such damage or destruction is caused by man-made causes, accidental causes or any other causes. To that end, it is agreed that in the event of any damage to Building or any destruction or demolition thereof, for any reason or cause whatsoever or by any person or entity whatsoever, the City's easement as described in Paragraph 4 above, and as the same may have been modified, shall survive and continue in perpetuity.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and date first above shown.

CITY OF DULUTH

JMM LIMITED PARTNERSHIP, a Minnesota  
Limited Partnership, by  
Labovitz Corporation, its Managing  
General Partner

\_\_\_\_\_  
Mayor

By: \_\_\_\_\_  
Mark Emmel



**EXHIBIT A**  
**SKYWALK SYSTEM**



## EXHIBIT B

Tract A (Certificate of Title No. 265265)

Lot numbered thirty eight (38) EXCEPT the Northeasterly Twenty (20) feet, front and rear, on WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, according to the plat thereof, on file and of record in the office of the Register of Deeds in and for St. Louis County, Minnesota.

Tract B (Certificate of Title No. 265265)

That certain tract of land on WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION and CENTRAL DIVISION OF DULUTH, according to the respective recorded plats thereof, on file and of record in the office of the County Recorder, St. Louis County, Minnesota, described as follows: Commencing at the intersection of the centerline of West Superior Street and dividing line between Lots 45 and 43, WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, as extended, as the place of beginning; thence along said dividing line to a point where said line intersects the centerline of the alley in the rear of said lots; thence left along the centerline of said alley to a point where said centerline intersects the centerline of Third Avenue West; thence left along the centerline of said Third Avenue West to a point where said line intersects the centerline of West Superior Street; thence left along said centerline of said West Superior Street to the place of beginning

Tract C (Abstract)

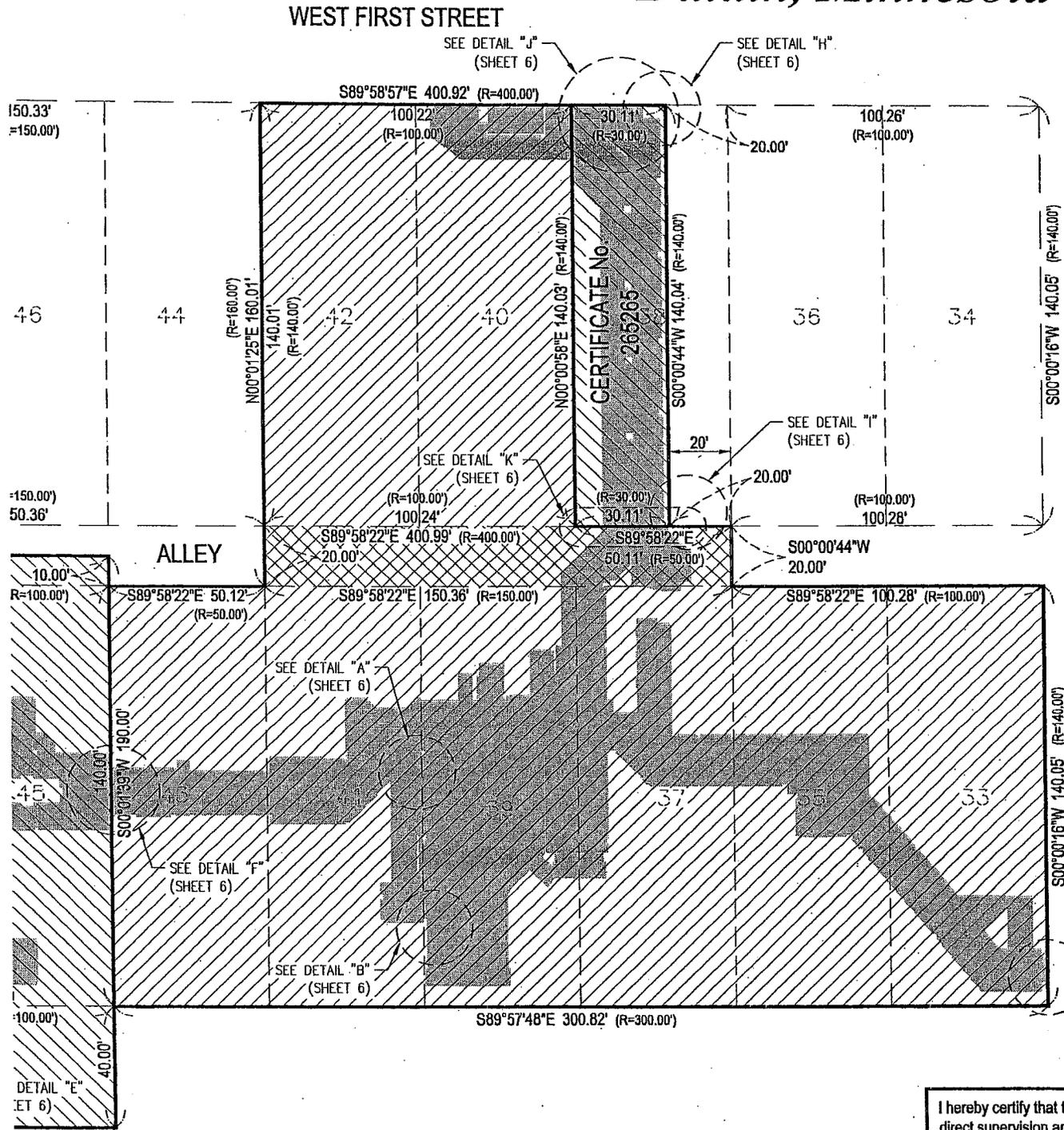
Lots 40 and 42, WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, according to the recorded plat thereof; and

Lots 33, 35, 37, 39, 41 and 43, WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, according to the recorded plat thereof; and

That portion of the Alley lying between Lots 38, 40 and 42, WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, and Lots 37, 39 and 41, WEST SUPERIOR STREET, DULUTH PROPER, FIRST DIVISION, according to the respective recorded plats thereof, and lying over elevation of 63.49 City Datum.

**EXHIBIT C**  
**EASEMENTS**

# Boundary and Overall Layout Duluth, Minnesota



TOGETHER WITH  
That certain tract of land on WEST DIVISION and CENTRAL DIVISION (plats thereof, on file and of record in St. Louis County, Minnesota, describe the centerline of West Superior Street, DULUTH, MINN., from the place of beginning; thence along the centerline of said street to a point where it intersects the centerline of the Alley; thence along the centerline of said alley to a point where it intersects the centerline of Third Avenue West; thence along the centerline of Third Avenue West to a point where it intersects the centerline of Superior Street; thence left along the centerline of Superior Street to the place of beginning.

TOGETHER WITH  
Lots 40 and 42, WEST FIRST STREET, DULUTH, MINN., according to the recorded plat thereof; and

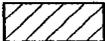
TOGETHER WITH  
Lots 33, 35, 37, 39, 41 and 43, WEST FIRST DIVISION, according to the recorded plat thereof;

TOGETHER WITH  
That portion of the Alley lying between WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, and lying over lots 45, 46 and 48, according to the recorded plat thereof;

TOGETHER WITH  
That portion of the Alley lying between WEST FIRST STREET, DULUTH PROPER, FIRST DIVISION, and lying over lots 45, 46 and 48, according to the recorded plat thereof;

SECOND AVENUE WEST

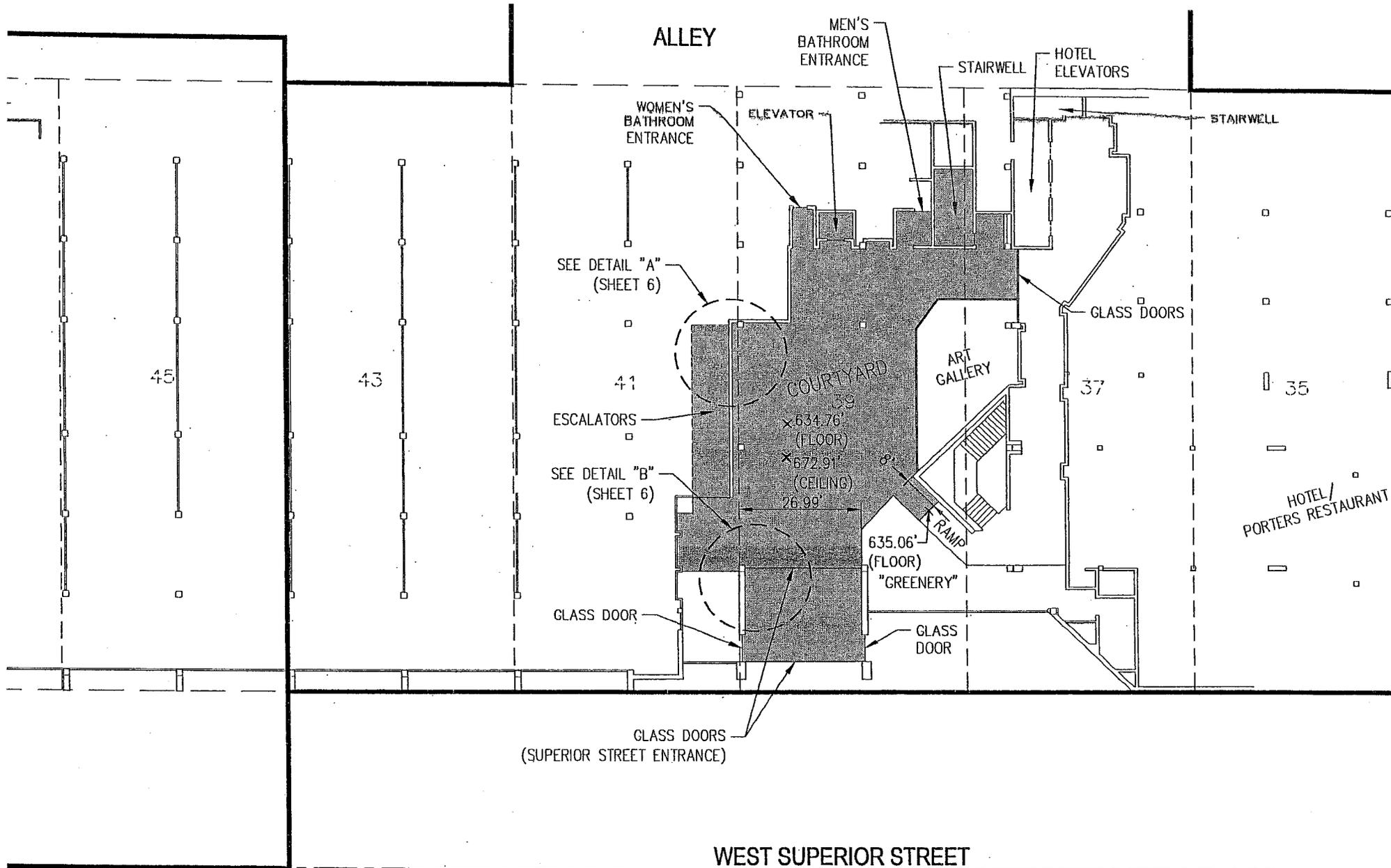
### LEGEND

-  PLATTED BLOCK LINE
-  PLATTED LOT LINE
-  ABSTRACT
-  TORRENS
-  ABSTRACT LYING ABOVE ELEVATION 63.49' CITY (663.12' NAVD 88)
-  SKYWALK CORRIDOR

**SURVEYORS NOTE:**  
\*Skywalk corridors multiple levels, see sheets 2 thru 5 -

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

# Holiday Center - First Floor Skywalk Duluth, Minnesota

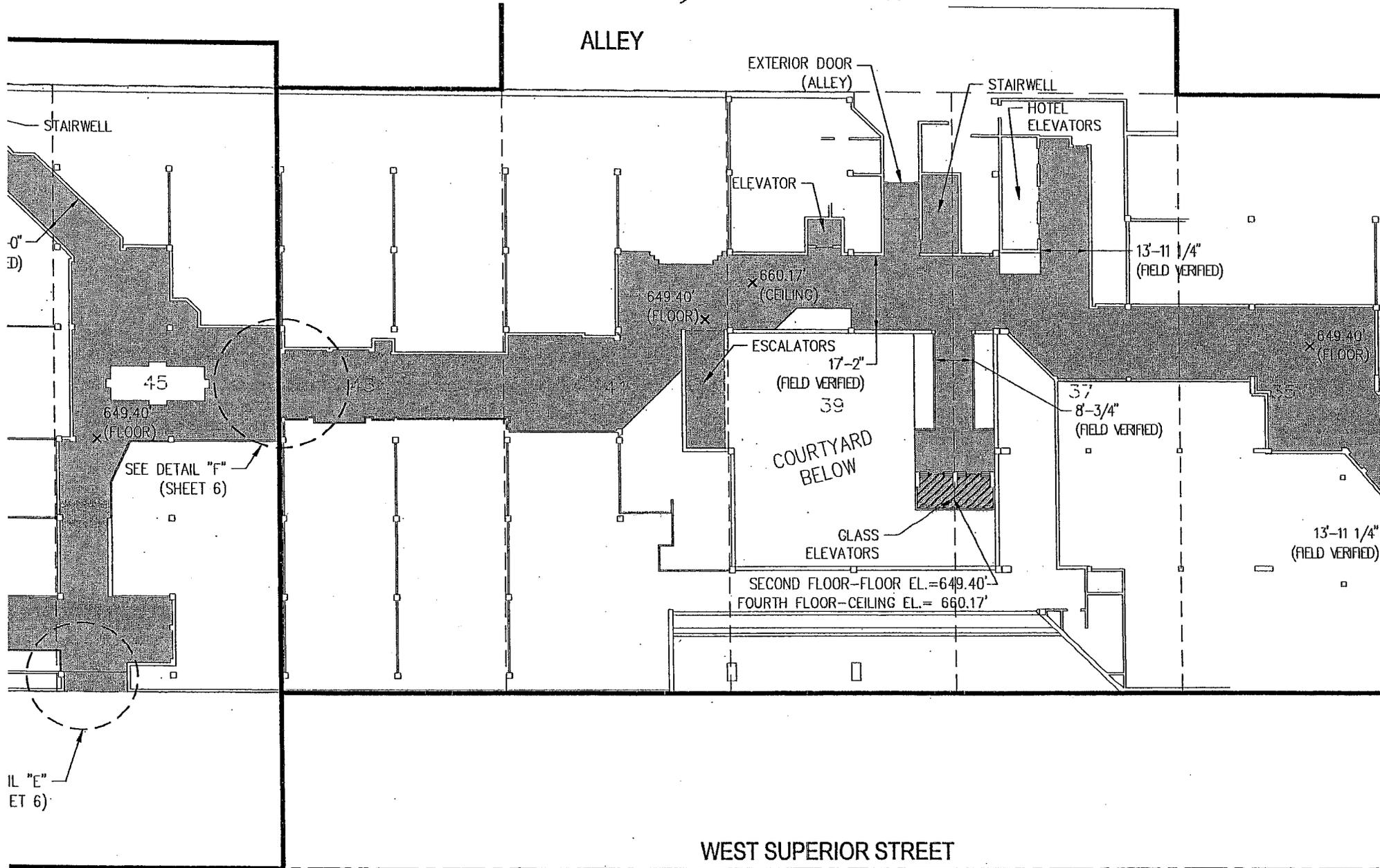


**LEGEND**

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

DATE PREPARED

# Holiday Center - Second Floor Skywalk Duluth, Minnesota

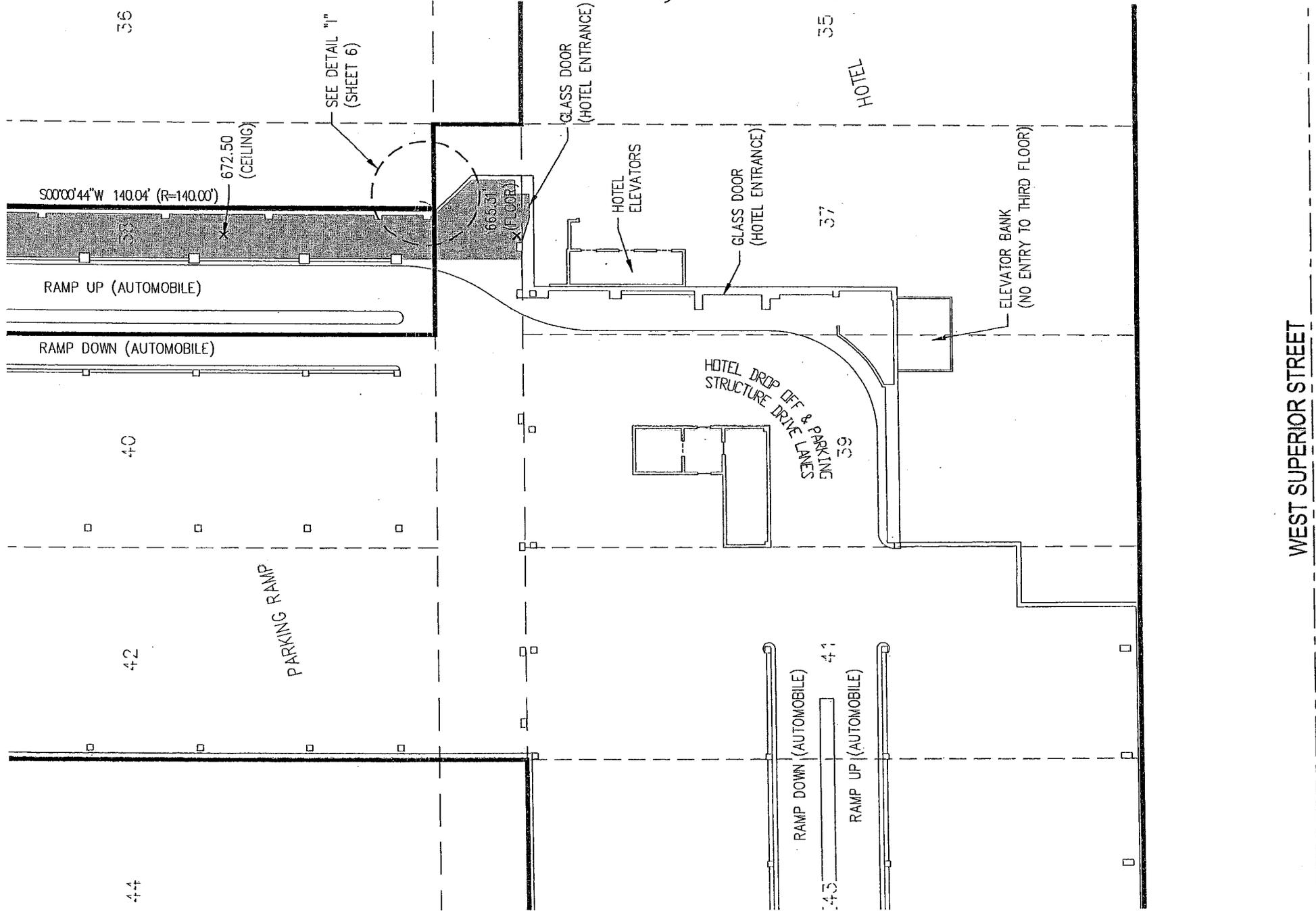


### LEGEND

= SKYWALK CORRIDOR

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

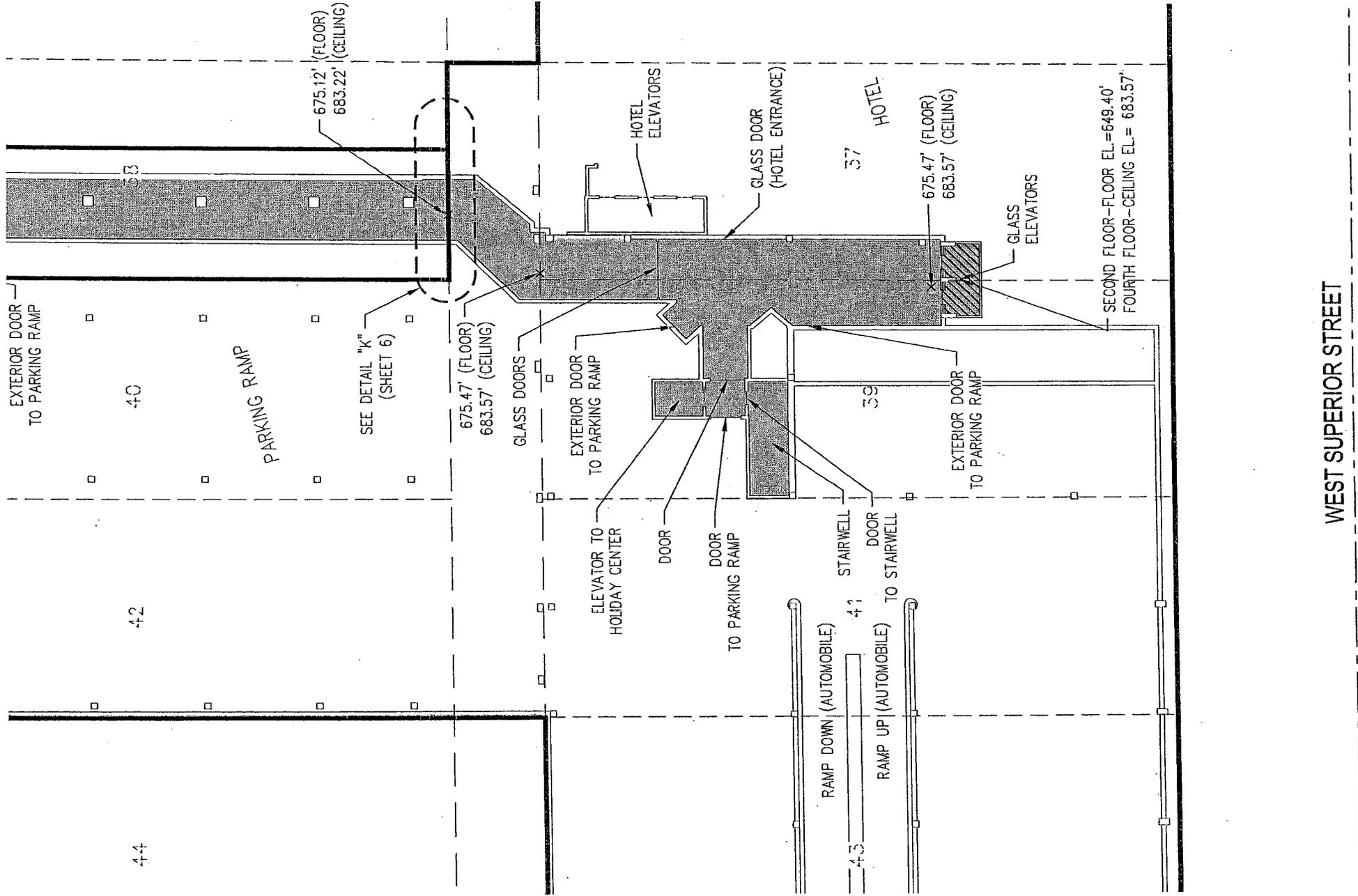
# Holiday Center & Parking Ramp - Third Floor Skywalk Duluth, Minnesota



I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

DATE OPEN

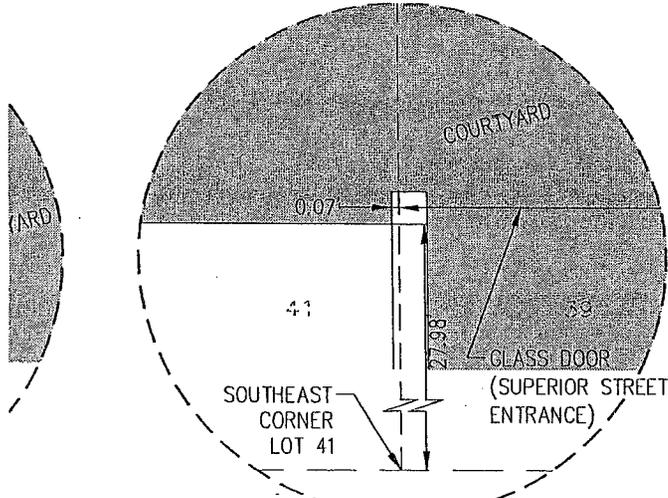
# Holiday Center & Parking Ramp - Fourth Floor Skywalk Duluth, Minnesota



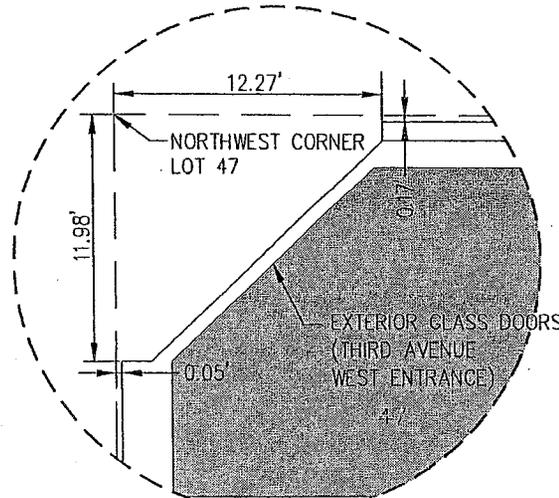
I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

DATE DD/DA

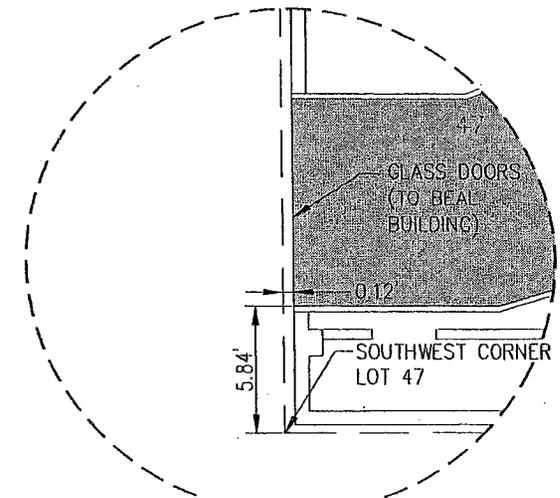
# Holiday Center & Parking Ramp Details - First thru Fourth Floor Skyway Duluth, Minnesota



DETAIL "B"  
(NOT TO SCALE)

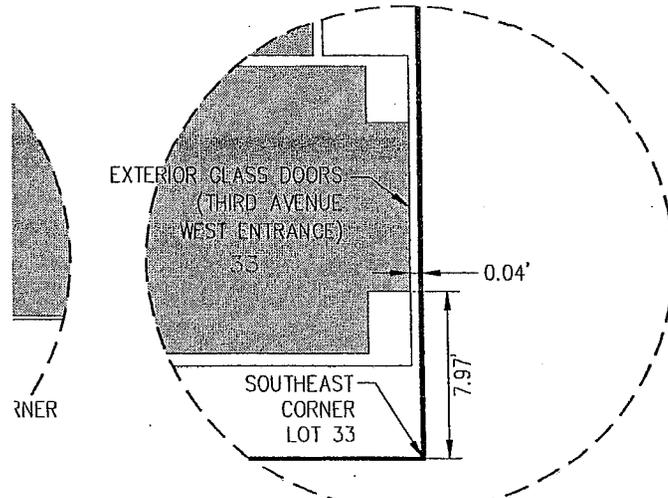


DETAIL "C"  
(NOT TO SCALE)

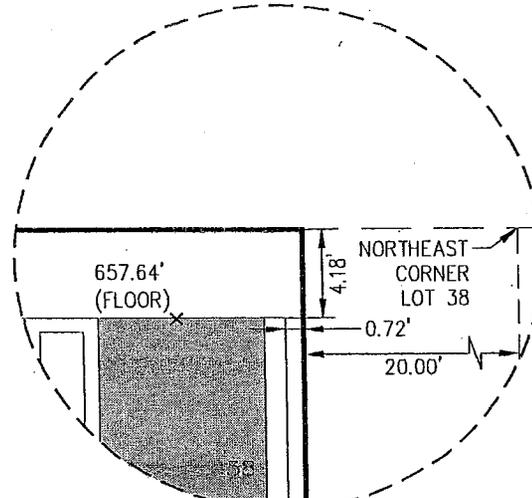


DETAIL "D"  
(NOT TO SCALE)

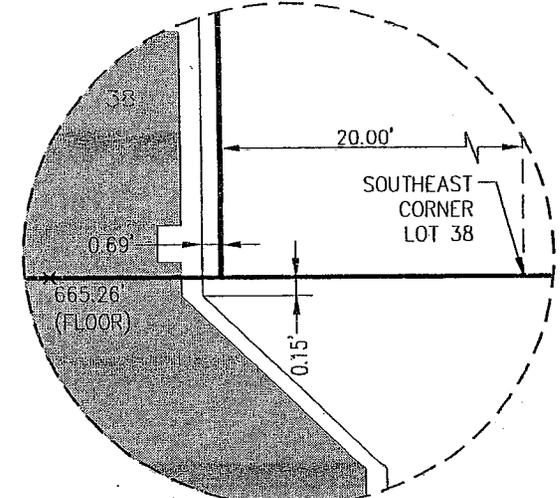
SW COR  
LOT



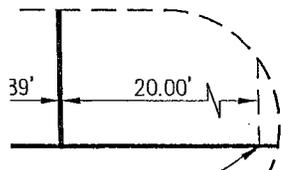
DETAIL "G"  
(NOT TO SCALE)



DETAIL "H"  
(NOT TO SCALE)



DETAIL "I"  
(NOT TO SCALE)



## LEGEND

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State

DATE PREP.

**Consent of Mortgage Holder**

US Bank National Association ("Bank") is the holder of:

(i) the Mortgage dated November 10, 1993 and recorded in the office of the St. Louis County Registrar of Titles on November 12, 1993 as Document No. 573969 in the original principal amount of \$10,000,000 as the same may thereafter have been modified;

(ii) Assignment of Leases and Rents dated November 10, 1993 and recorded in the office of the St. Louis County Registrar of Titles on November 12, 1993 as Document No. 573970 as the same may thereafter have been amended;

(iii) Assignment of Leases and Rents dated October 12, 2000 and recorded in the office of the St. Louis County Registrar of Titles on October 31, 2000 as Document No. 692073 as the same may thereafter have been amended; and

(iv) Mortgage dated October 1, 2001 and recorded in the office of the St. Louis County Registrar of Titles on October 10, 2001 as Document No. 709486 in the original principal amount of \$4,000,000, as the same may thereafter have been amended.

Bank consents to the covenants, conditions, restrictions, easements, charges and liens set forth in and created by the Declaration of Agreement to Provide Easement (the "Declaration"). Bank agrees that its interest in the Property will be subject to the covenants, conditions, restrictions, easements, charges and liens set forth in the Declaration.

US BANK NATIONAL ASSOCIATION

By \_\_\_\_\_  
Its \_\_\_\_\_

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_ day of \_\_\_\_\_, 2012, by \_\_\_\_\_, the \_\_\_\_\_ of US Bank National Association, a national banking association, on behalf of the Bank.

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

This Agreement Drafted by:  
Robert E. Asleson  
Attorney for the City of Duluth  
Room 410 City Hall  
Duluth, MN 55802  
(218) 730-5490