

# ATTACHMENT 1

## TEMPORARY CONSTRUCTION EASEMENT, ACCESS EASEMENT AND CONSTRUCTION EASEMENT AGREEMENT

THIS TEMPORARY CONSTRUCTION EASEMENT, ACCESS EASEMENT AND CONSTRUCTION EASEMENT AGREEMENT, effective as of the date of attestation thereto by the Duluth City Clerk, by and between the CITY OF DULUTH, a municipal corporation created and existing under the law of the State of Minnesota, hereinafter referred to as "City", and BIGOS-LENOX PLACE, LLC a Minnesota limited liability company hereinafter referred to as "Owner".

WHEREAS, Owner is the owner of that real property, hereinafter referred to as the "Property" legally described on Exhibit A attached hereto and made a part hereof, which Property will be materially impacted by the City's impending Superior Street Reconstruction Project (the "Project") which is anticipated to be constructed from 2018 through 2020; and

WHEREAS, in order for the City to be able to construct the Project on and in the vicinity of the Property, City requires access easements across the Property as herein after described and construction easements on the Property as hereinafter described on and the right to construct certain improvements on and to the Property as hereinafter described; and

WHEREAS, on January 22, 2018, the Duluth City Council adopted Resolution No. 18-0068 establishing the maximum assessment rate for the Superior Street Reconstruction Project at \$50 per front foot fronting on Superior Street which rate will be the rate applicable to the hereinafter-defined Property; and

WHEREAS, the City has requested that the Owner agree to grant temporary easements over the Property so that the Project can be completed and Owner has agreed to grant the referenced access and construction easements and has approved the City constructing the referenced improvements for the consideration and 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

The following terms and phrases shall have the meanings hereinafter ascribed to them:

- A. Access Easement: a temporary easement for access over and across that portion of the Property described on Exhibit B and depicted on Exhibit C, which Exhibits are attached hereto and made a part hereof.
- B. Construction Easement: shall mean a temporary easement for construction purposes over and across that portion of the Property described on Exhibit D and depicted on Exhibit E, which easements are attached hereto and made a part hereof
- C. Engineer: shall mean the Duluth City Engineer or such other person as he may have designated from time to time in writing.
- D. Improvements: shall mean the improvements as shown on the Plans.
- E. Plans: shall mean the plans and specifications for the construction of the improvements to be constructed on or utilizing the Property, which plans and specifications are attached hereto and made a part hereof as Exhibit F.
- F. Project: shall mean the reconstruction of Superior Street from Mesabi Avenue to 4<sup>th</sup> Avenue East including all utilities to be constructed during 2018 through 2020.
- G. Property: shall mean the property in St. Louis County, Minnesota described on Exhibit A.

2. Temporary Access Easement

Owner hereby grants to City the Access Easement for the purpose of allowing the City to have access over that portion of the Property to facilitate the construction of the Project by the City and to the general public for the purpose of allowing the general public to have access to the properties between the Property and Mesaba Avenue during the time from the date of signing of this agreement through December 31, 2020; provided however that the City agrees that it will take all commercially reasonable steps to not materially and unreasonably interfere with Owner's or its tenant's use and enjoyment of the Property. The duration of this temporary Access Easement shall run from the effective date of this Agreement until December 31, 2020 or until the City Engineer certifies in a document in recordable form that the Project has been completed, whichever is sooner; provided that Owner shall have the right but not the obligation to extend the term of said easement for an additional term by written authorization therefor given by an authorized person representing Owner to the City. Unless an extension agreement is executed prior to December 31, 2020, this Agreement will

automatically terminate and the City and Owner will have no further rights or obligations hereunder (except those terms which expressly survive termination).

3. Temporary Construction Easement

Owner hereby grants to City the Construction Easement for the purpose of constructing the Improvements on the Property as shown on the Plans; provided however that the City agrees that it will take all commercially reasonable steps to not materially and unreasonably interfere with Owner's or its tenant's use and enjoyment of the Property. The duration of this temporary Construction Easement shall run from the effective date of this Agreement until December 31, 2020 or until the City Engineer certifies in a document in recordable form that the Project has been completed, whichever is sooner; provided that Owner shall have the right but not the obligation to extend the term of said easement for an additional term by written authorization therefor given by an authorized person representing Owner to the City. Unless an extension agreement is executed prior to December 31, 2020, this Agreement will automatically terminate and the City and Owner will have no further rights or obligations hereunder (provided however that any obligations accruing or resulting from any conduct, event or action occurring prior to termination will not be terminated and the terms of this Agreement will continue to control).

4. City to Construct Improvements

In consideration of the above grants of easements by Owner, City hereby agrees to cause to be constructed the Improvements substantially as described on Exhibit F, provided that City may cause to be made minor modifications to the plans for the Improvements determined to be reasonable and prudent by the City's City Engineer without seeking approval of Owner, so long as Owner's rights under this Agreement are not materially altered. In the event that City wishes to make modifications to the Plan as shown on Exhibit F which would materially adversely affect the Owner or the Property, City shall provide a revised Exhibit F showing such changes. Owner shall have ten (10) business days from the date the City provides a request for such modification and such revised Exhibit F to approve or disapprove such proposed revisions of the Improvements. If Owner approves of the modification in writing or fails to object to such modification within said ten (10) day period, City shall have the right to have the Improvements constructed in accordance with the revised Exhibit F. If the Owner disapproves of the proposed revisions, City and Owner agree to meet as expeditiously as possible and to negotiate in good faith to reach an agreement with regard to modification of Exhibit F. If the Owner and City are not able to reach an agreement on a revised Exhibit F, the City will construct the Improvements in accordance with the prior

approved Exhibit F. All work will be performed in a good and workman like manner and the Property will be kept as clean and organized as reasonably practical during the Project. City will require its contractor or contractors to keep the worksite on the Property in a safe condition in accordance with all recommended safety codes and standards. The City is responsible for all conduct and costs of its contractors and their subcontractors.

5. Construction Costs

City agrees that it will be solely responsible for paying all of the costs of constructing the Improvements as shown on Exhibit F and as the same may be modified by City and approved by Owner as provided for in Paragraph 4 above, including any unforeseen costs associated therewith.

6. Insurance

As part of the City's process of contracting for the construction of the Improvements and prior to entering onto the Property, the City will require that the City's contractor agree to indemnify the Owner and that the Owner be named as additional insureds as to any portion of the work being constructed on their properties respectively and deliver written evidence that the forgoing has been obtained. Such indemnification and insurance shall be the same indemnification and insurance required by the City for its protection.

7. Maintenance and Operation of Improvements

Upon completion of the construction of the Improvements, ownership of and title to the Improvements shall be deemed to be solely in the Owner. Thereafter, City shall have no obligations to maintain or to operate the Improvements or the Property and responsibility for the maintenance and operation thereof shall be solely that of the Owner.

8. Independent Contractor

It is agreed that nothing herein contained is intended or shall be construed in any manner as creating or establishing a relationship of co-partners between the parties hereto or of constituting Owner or City as an agent, representative or employee of the other for any purpose or in any manner whatsoever. Neither party nor any of their officers or employees shall be considered an employee of the other party, and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of either party or their contractors or agents while engaged on the Property and any and all claims whatsoever arising out of employment or alleged employment, including without limitation, claims of discrimination against either party, its officers, agents,

contractors or employees shall be the sole responsibility of that party. Neither party nor their officers, agents, contractors and employees shall not be entitled to any compensation or rights or benefits of any hospital care, sick leave and vacation pay, Workers' Compensation, Unemployment Insurance, disability pay or severance pay from the other party. Notwithstanding the foregoing, the City shall not be responsible to defend, indemnify or save harmless Owner from liability or judgments to the extent caused by the intentional misconduct or negligent acts or omissions of Owner.

9. Default and Remedies

In the event that any party shall fail to perform any obligation of said party owed to another party hereunder, the non-defaulting party may give notice in writing to the defaulting party setting forth the obligation or obligations which the defaulting party shall have failed to perform in conformance with the requirements of this Agreement and upon receipt thereof the defaulting party shall immediately commence to cure any such default or, if cure cannot be reasonably commenced immediately, shall commence such cure as soon as reasonably practicable and shall complete such cure as soon as is reasonably practicable. If cure of such default shall not be so commenced and completed, the non-defaulting party shall be entitled to recover damages resulting from such failure to cure, injunctive relief to compel performance of any obligation under the Agreement with regard to which the defaulting party is in default or both.

10. Notices

Notices to be given hereunder shall be deemed to be sufficient if emailed and deposited in the U.S. Mail, postage prepaid to the address set forth below or if sent by overnight mail to the address set forth below unless a party shall send notice to the other party as herein provided directing that such notices shall be sent to a different address:

In the case of City:            Director of Public Works and Utilities  
   City of Duluth  
   411 West First Street, Room 211B  
   Duluth, MN 55802  
   Email:jbenning@duluthmn.gov

In the case of Owner: Bigos-Lenox Place LLC  
Attention: John Fearing  
8325 Wayzata Boulevard, Suite 200  
Golden Valley, MN 55426  
Email: jfearing@tbigos.com

With copy to: Ravich Meyer Kirkman McGrath Nauman &  
Tansey, PA  
Attention: Will Tansey  
150 S. 5<sup>th</sup> Street, Suite 3450  
Minneapolis, MN 55402

11. Waiver

Any waiver by either party of any provision of this Agreement must be in writing and shall not imply a subsequent waiver of that or any other provision.

12. Applicable Law

This Agreement, together with all of its 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 of Minnesota.

13. Severability

In the event any provision herein shall be deemed invalid or unenforceable, the remaining provisions shall continue in full force and effect and shall be binding upon the parties to this Agreement.

14. Entire Agreement

It is understood and agreed that the entire agreement of the parties is contained herein and that this Agreement supersedes all oral agreements and negotiations

between the parties relating to the subject matter hereof. Any amendment to this Agreement shall be in writing and shall be executed by the same parties who executed the original agreement or their successors in office.

CITY OF DULUTH, a Minnesota  
Municipal Corporation

BIGOS-LENOX PLACE, LLC,  
a Minnesota limited liability  
company

By: \_\_\_\_\_

Emily Larson  
Its Mayor

Attest:

By: \_\_\_\_\_

Its City Clerk

\_\_\_\_\_  
Date

By:   
Theodore J. Bigos  
Its Chief Manager

Approved:

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

Countersigned:

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



## **Exhibit A**

All of Lots 108, 110 and 112, Block 17, Duluth Proper, Third Division, including the Northerly one-half of the vacated alley adjacent thereto, subject to a utility easement in said vacated alley.

Lots 107, 109 and 111, Block 17, Duluth Proper, Third Division, including the Southerly one-half of the vacated alley adjacent thereto, subject to a utility easement in said vacated alley.

AND

Lot 117, Except the Westerly 27 feet thereof, and all Lot 115, Except that part of said Lots taken for highway purposes, and all of Lot 113, Block 16, Duluth Proper, Third Division including the entire vacated 7<sup>th</sup> Avenue West between the Northerly line of West Superior Street and the extended centerline of the vacated alley in Blocks 16 and 17, Duluth Proper, Third Division and including the Southerly one-half of that part of the alley abutting said Lot 113, subject to a utility easement in vacated 7<sup>th</sup> Avenue West.

AND

The Southerly 4.00 feet of Lots 98, 100, 102, 104 and 106, Block 17, Duluth Proper, Third Division, and all of the vacated alley adjacent to Lots 97, 98, 99, 100, 101, 102, 103, 104, 105 and 106, Block 17, Duluth Proper, Third Division, subject to an easement in said vacated alley, reserving, however, to the grantors, their successors and assigns, an easement for access and egress, for the benefit of the owners of the remainder of said Block 17, over the southerly 4 feet of said lots 98, 100, 102, 104 and 106 and over that portion of the vacated alley lying Easterly of the extended Westerly line of lot 108, which easement is perpetual and to run with the land, according to the respective recorded plat thereof.

## EXHIBIT B

### DESCRIPTION:

All of the vacated alley adjacent to Lots 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, and 112, Block 17, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota.

AND

The northwesterly 40.00 feet of vacated 7th Avenue West, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota appurtenant to Lots 113, Block 16 and Lot 111, Block 17 of said Duluth Proper Third Division between the extended centerline of vacated alley in said Blocks 16 and 17 and a line 40.00 feet distant southeasterly thereof.

AND

Northwesterly 30.00 feet of Lot 113, Block 116, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota and vacated 7th Avenue West together with the southerly 1/2 of vacated alley appurtenant thereto.

AND

The southeasterly 12.50 feet of the northwesterly 42.50 feet of the southwesterly 19.50 feet of Lot 113, Block 16, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota.

AND

Lot 115 and Lot 117 EXCEPT the westerly 27.00 feet thereof excepting those parts of said lots taken for highway purposes, all in Block 16, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota.

I hereby certify that this survey, plan, 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.

Paul A. Vogel

Signed

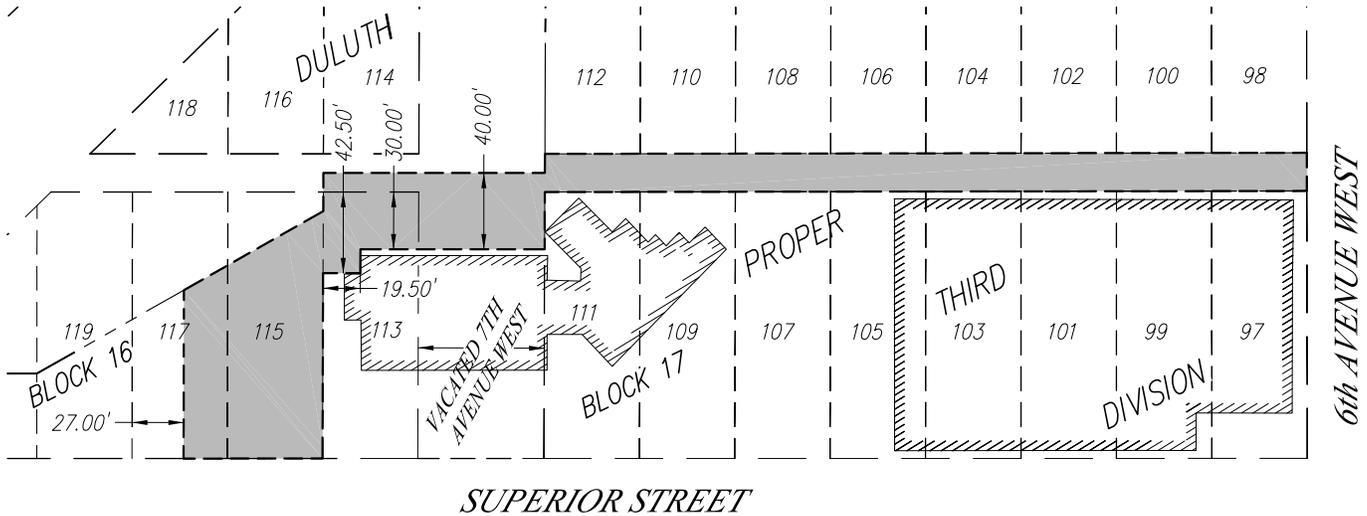
Date

  
11/27/2017 License No. 44075



# EXHIBIT C

BIGOS-LENOX PLACE, LLC



= EASEMENT AREA

**DESCRIPTION:**

All of the vacated alley adjacent to Lots 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, and 112, Block 17, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota.

AND

The northwesterly 40.00 feet of vacated 7th Avenue West, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota appurtenant to Lots 113, Block 16 and Lot 111, Block 17 of said Duluth Proper Third Division between the extended centerline of vacated alley in said Blocks 16 and 17 and a line 40.00 feet distant southeasterly thereof.

AND

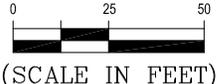
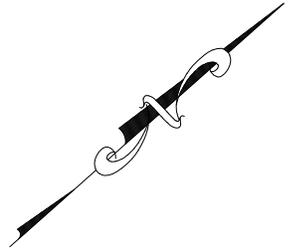
Northwesterly 30.00 feet of Lot 113, Block 116, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota and vacated 7th Avenue West together with the southerly 1/2 of vacated alley appurtenant thereto.

AND

The southeasterly 12.50 feet of the northwesterly 42.50 feet of the southwesterly 19.50 feet of Lot 113, Block 16, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota.

AND

Lot 115 and Lot 117 EXCEPT the westerly 27.00 feet thereof excepting those parts of said lots taken for highway purposes, all in Block 16, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota.



Basis of Bearing is Grid North,  
St. Louis County Transverse  
Mercator 96 Coordinate System.

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.

Print Name: Paul A. Vogel License # 44075

Signature: Date: 11/27/2017

DATE PREPARED: 11/27/17
PROJ NO: 150714
FILE: 150714vSurv
SHEET 1 of 1 SHEETS

**PERFORMANCE  
DRIVEN DESIGN.**  
LHBcorp.com

21 W. Superior St., Ste. 500 | Duluth, MN 55802 | 218.727.8446

## EXHIBIT D

### DESCRIPTION:

Those parts of Block 16 and Block 17, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota described as follows:

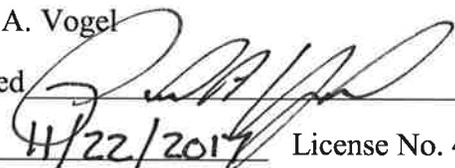
BEGINNING at the most southerly corner of Lot 113, said Block 16; thence North 48 degrees 13 minutes 00 seconds West along the southerly line of said Lot 113, a distance of 46.00 feet; thence North 41 degrees 37 minutes 11 seconds East, a distance 20.02 feet; thence North 48 degrees 22 minutes 49 seconds West, a distance of 22.00 feet; thence North 41 degrees 37 minutes 11 seconds East, a distance of 72.71 feet; thence South 48 degrees 22 minutes 49 seconds East, a distance of 22.00 feet; thence 41 degrees 37 minutes 11 seconds East, a distance of 83.00 feet; thence South 48 degrees 22 minutes 49 seconds East, a distance of 26.00 feet; thence North 41 degrees 37 minutes 11 seconds East, a distance of 89.84 to the most easterly line of Lot 7, said Block 17; thence South 48 degrees 17 minutes 00 seconds East along said easterly line, a distance of 20.00 feet to the most easterly corner of said Lot 107; thence along the southeasterly line of said Blocks 16 and 17 to the POINT OF BEGINNING.

I hereby certify that this survey, plan, 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.

Paul A. Vogel

Signed

Date

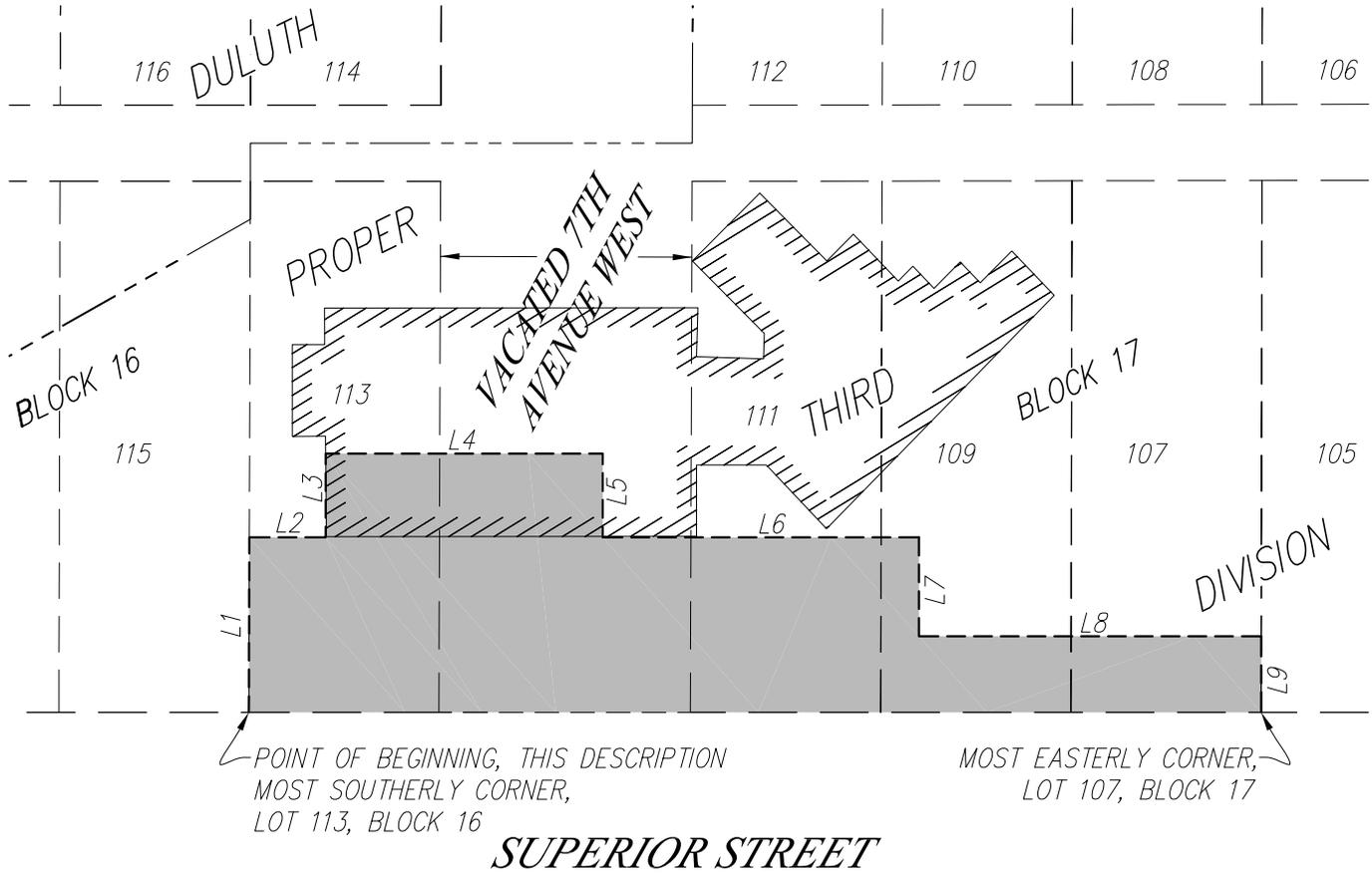
  
\_\_\_\_\_

License No. 44075



# EXHIBIT E

BIGOS-LENOX PLACE, LLC



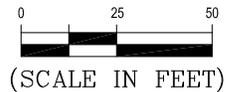
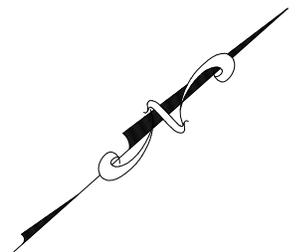
**DESCRIPTION:**

Those parts of Block 16 and Block 17, DULUTH PROPER THIRD DIVISION, according to the recorded plat thereof on record in the Office of the St. Louis County Recorder, St. Louis County, Minnesota described as follows:

BEGINNING at the most southerly corner of Lot 113, said Block 16; thence North 48 degrees 13 minutes 00 seconds West along the southerly line of said Lot 113, a distance of 46.00 feet; thence North 41 degrees 37 minutes 11 seconds East, a distance of 20.02 feet; thence North 48 degrees 22 minutes 49 seconds West, a distance of 22.00 feet; thence North 41 degrees 37 minutes 11 seconds East, a distance of 72.71 feet; thence South 48 degrees 22 minutes 49 seconds East, a distance of 22.00 feet; thence 41 degrees 37 minutes 11 seconds East, a distance of 83.00 feet; thence South 48 degrees 22 minutes 49 seconds East, a distance of 26.00 feet; thence North 41 degrees 37 minutes 11 seconds East, a distance of 89.84 to the most easterly line of Lot 7, said Block 17; thence South 48 degrees 17 minutes 00 seconds East along said easterly line, a distance of 20.00 feet to the most easterly corner of said Lot 107; thence along the southeasterly line of said Blocks 16 and 17 to the POINT OF BEGINNING.

LINE TABLE		
LINE	BEARING	LENGTH
L1	N48°13'00"W	46.00
L2	N41°37'11"E	20.02
L3	N48°22'49"W	22.00
L4	N41°37'11"E	72.71
L5	S48°22'49"E	22.00
L6	N41°37'11"E	83.00
L7	S48°22'49"E	26.00
L8	N41°37'11"E	89.84
L9	S48°17'00"E	20.00

= EASEMENT AREA



Basis of Bearing is Grid North, St. Louis County Transverse Mercator 96 Coordinate System.

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.

Print Name: Paul A. Vogel License # 44075

Signature: Date: 11/22/2017

DATE PREPARED: 11/22/17
PROJ NO: 150714
FILE: 150714vSurv
SHEET 1 of 1 SHEETS



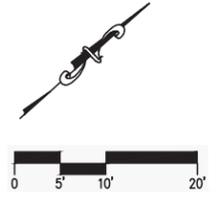
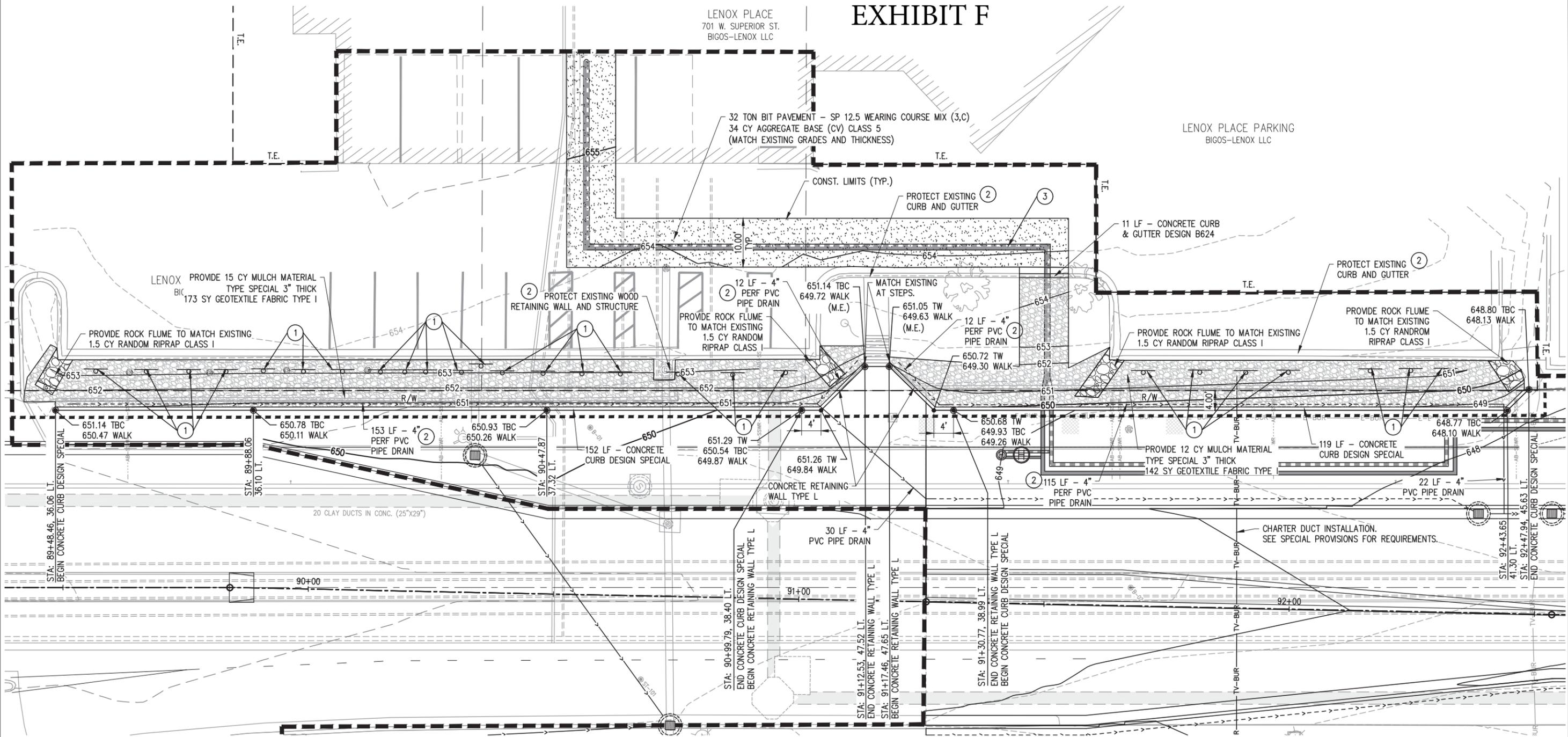
**PERFORMANCE DRIVEN DESIGN.**  
LHBcorp.com

21 W. Superior St., Ste. 500 | Duluth, MN 55802 | 218.727.8446

# EXHIBIT F

LENOX PLACE  
701 W. SUPERIOR ST.  
BIGOS-LENOX LLC

LENOX PLACE PARKING  
BIGOS-LENOX LLC



### LEGEND

- SITE A CONSTRUCTION LIMITS
- P.E. PERMANENT EASEMENT
- T.E. TEMPORARY EASEMENT
- 649 EXST'G CONTOUR
- 649 PROPOSED CONTOUR
- MULCH MATERIAL TYPE SPECIAL
- BITUMINOUS PAVEMENT PATCH

### KEY NOTES

- (1) INSTALL SIGN (INCLUDES POST AND EMBEDMENT).
- (2) INCIDENTAL.
- (3) REFER TO HOT WATER PLANS FOR TRENCH HOT WATER TRENCH AND CONSTRUCTION REQUIREMENTS.

LHB PROJECT NO. 150714

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 Professional Engineer under the laws of the State of Minnesota.

BRAD SCOTT  
PRINTED NAME

\_\_\_\_\_  
SIGNATURE

DATE  
46198  
LIC. NO.

SUPERIOR STREET  
CITY PROJECT NO. 0923TR

S.A.P. NO. 118-171-006

SITE A - LENOX PLACE

CONSTRUCTION DETAILS

SHEET NO. 587 OF 598 SHEETS

PLOT DATE: 10/31/2017 11:58:35 AM FILE: R:\PProj\150714\600 Drawings\C\150714 20 943-3-Lenox Place Surfacing.dwg