

This instrument has been prepared by,  
and upon recording return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attn.: \_\_\_\_\_

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**SECOND AMENDMENT TO FIRST AMENDED AND RESTATED LEASE AND  
OPERATING AGREEMENT - BURNHAM YATES CONFERENCE CENTER**

This Second Amendment to First Amended and Restated Lease and Operating Agreement - Burnham Yates Conference Center ("Second Amendment") is made as of \_\_\_\_\_, 2004, by and between the City of Lincoln, Nebraska, a municipal corporation, as Lessor and owner ("City"), and [Cornhusker Square Limited Partnership, a Nebraska limited partnership], as Lessee and operator ("Lessee"), and amends that certain that certain First Amended and Restated Lease and Operating Agreement Burnham Yates Conference Center, dated June 22, 1993, by and between City and Lessee (the "Ground Lease"), as amended by that certain Amendment to First Amended and Restated Lease and Operating Agreement - Burnham Yates Conference Center, dated November 19, 2003, by and between City and Lessee (the "First Amendment") (this Ground Lease, the First Amendment and this Second Amendment are, collectively, referred to herein as the "Lease"). The Lease governs the respective rights of the parties in and to those certain parcels commonly known as "The Cornhusker Conference Center" and further described on Exhibit A hereto (the "Premises"). Terms not defined in this Second Amendment shall have the meaning set forth in the other documents comprising the Lease.

City and Lessee desire to amend the Lease on the terms and conditions set forth in this Second Amendment.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein and certain other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City and Lessee agree as follows:

1. Right to Encumber. Lessee is hereby given the express right, in addition to any other rights herein granted, and without the necessity of obtaining City's prior consent, to mortgage its interest in the Lease, and its leasehold estate in the Premises, or any part or parts thereof, under one or more mortgages and to assign the Lease or Lessee's leasehold estate in the Premises or any part or parts thereof, and any sublease, as collateral security for such mortgages.

2. Mortgagee's Rights. If Lessee shall mortgage the leasehold, or any part or parts thereof in accordance with paragraph 1 above, City agrees that so long as any such

mortgages shall remain unsatisfied of record or until written notice of satisfaction is given by the holders of such mortgage to City, the following provisions shall apply:

(a) There shall be no cancellation, surrender, amendment, alteration or modification of the Lease by joint action of City and Lessee without the prior written consent of senior mortgagee.

(b) City shall, upon serving Lessee with any notice of default, simultaneously serve a copy of the notice upon every mortgagee.

(c) Any mortgagee, and any receiver appointed with respect to the leasehold estate, shall have the right, but not the obligation, at any time prior to termination of the Lease and without payment of any penalty, to pay the Rental due under the Lease, to effect any insurance, to pay any taxes or assessments, to make any repairs or improvements, to do any other act or thing required of Lessee under the Lease and/or to prevent termination of the Lease. Any mortgagee and its agents and contractors and any such receiver shall have full access to the Premises for purposes of accomplishing any of the foregoing. Any of the foregoing done by any mortgagee or receiver shall be as effective to prevent a termination of the Lease as the same would have been if done by Lessee.

(d) Anything contained in the Lease notwithstanding, if any default or any other event shall occur (including, without limitation, the discontinuance of operation of the Hotel prior to the end of the term of the Lease) which, pursuant to any provision of the Lease purportedly entitles City to terminate the Lease, City shall not be entitled to terminate the Lease, and any notice thereof shall be rendered void, if the mortgagee or trustee under any such mortgage, within ninety (90) days after expiration of the period within which Lessee was permitted to cure the default, shall both: (1) either: (A) cure the default or breach if the same is a monetary default or monetary breach; or (B) if the default or breach is not a monetary default or monetary breach, commence or cause any trustee under the mortgage to commence and thereafter to diligently pursue to completion steps and proceedings to foreclose on the interests covered by the mortgage; and (2) perform or cause the performance of all of the covenants and conditions of the Lease which would result in a monetary default or monetary breach under the Lease by Lessee until such time as the leasehold shall be sold upon foreclosure pursuant to the mortgage, shall be transferred upon judicial foreclosure, or shall be transferred under a deed-in-lieu of foreclosure.

(e) All rights of City to terminate the Lease as the result of the occurrence of any default by Lessee shall be subject to, and conditioned upon, City having first given to each mortgagee written notice of the default as required under subparagraph (b) above, and all mortgagees having failed to remedy such default or acquire Lessee's leasehold estate hereunder or commence foreclosure or other appropriate proceedings in the nature thereof as set forth in subparagraph (d) above.

(f) If any mortgagee is prohibited from commencing or prosecuting foreclosure or other similar proceedings by any process or injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or

insolvency proceeding involving Lessee, the times specified in subparagraph (d) above, for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition; provided that the mortgagee shall have fully cured any default in the payment of any monetary obligations of Lessee under the Lease and shall continue to pay currently those monetary obligations as and when the same fall due.

(g) Upon any foreclosure or deed-in-lieu of foreclosure of the leasehold estate, any defaults of Lessee under the Lease which by their nature are not susceptible of cure by the mortgagee or any other person or entity taking title to the leasehold estate upon such foreclosure or deed-in-lieu of foreclosure, shall be deemed cured without further action.

(h) City agrees that the name of the most senior mortgagee shall be added as first loss payee under the "Loss Payable Endorsement" of any and all insurance policies carried with respect to the Premises.

Notwithstanding the provisions of subparagraphs (a) through (h) above or any other thing in the Second Amendment or Lease to the contrary, no mortgagee, or any assignee or transferee of any mortgagee of the Lessee shall be considered to be a mortgagee under the Lease until it has (i) caused to be filed or recorded in the office of the Register of Deeds for Lancaster County, Nebraska its mortgage, together with any amendment, modification, or assignment thereof; (ii) has notified City in writing of the existence and recordation of its mortgage and any amendment, modification, or assignment thereof; and (iii) has provided City the proper and current name and mailing address of such mortgagee or its assignee or transferee.

3. New Lease. City agrees that in the event of termination of the Lease for any reason, including, without limitation, termination by reason of any default by Lessee, the disaffirmance of the Lease by a receiver, liquidator or trustee for Lessee or its property or the rejection of the Lease by Lessee in any bankruptcy proceedings, City, if requested by any mortgagee, will enter into a new lease of the Premises, with the most senior mortgagee requesting a new lease or its designee, for the remainder of the term that existed prior to the subject termination of the Lease, effective as of the date of such termination, at the rent and upon the terms, provisions, covenants and agreements as contained in the Lease and subject to the rights, if any, of any parties then in possession of any part of the Premises, provided:

(a) The mortgagee shall make written request upon City for the new lease within thirty (30) days after the date of termination.

(b) The mortgagee shall pay to City at the time of the execution and delivery of the new lease any and all sums which would, at the time of the execution and delivery thereof, be due and unpaid pursuant to the Lease but for its termination, and in addition thereto any expenses, including reasonable attorneys' fees, to which City shall have been subjected by reason of Lessee's default.

(c) The mortgagee shall perform and observe all covenants contained in the Lease on Lessee's part to be performed, and shall further remedy any other conditions

which Lessee under the terminated Lease was obligated to perform under its terms, to the extent the same are curable or may be performed by the mortgagee.

(d) The Lessee under the new lease shall have the same right, title and interest in and to the buildings and improvements on the Premises as Lessee had under the terminated Lease immediately prior to its termination.

(e) Notwithstanding anything to the contrary expressed or implied elsewhere in the Lease, any new lease made pursuant to paragraph 3 above, shall be prior to any mortgage, deed of trust or other lien, charge or encumbrance on the fee of the Premises, and shall be accompanied by a conveyance of title to the improvements (free of any mortgage, deed of trust, lien, charge or encumbrance created by City) for a term of years equal to the term of the new lease, subject to the reversion in favor of City upon expiration or sooner termination of the Lease. The rights granted to the mortgagees to a new lease shall survive any termination of the Lease.

(f) Nothing herein contained shall require any mortgagee to enter into a new lease pursuant to paragraph 3 above or to cure any default of Lessee referred to above.

4. Foreclosure. Foreclosure of any mortgage, or any sale thereunder, whether by judicial proceedings or by virtue of any power contained in the mortgage, or any conveyance of the leasehold estate under the Lease from Lessee or any mortgagee or its designee through, or in lieu of, foreclosure or other appropriate proceedings in the nature thereof, shall not require the consent of City or constitute a breach of any provision of or a default under the Lease, and upon such foreclosure, sale or conveyance City shall recognize the purchaser or the transferee in connection therewith as the Lessee under the Lease.

5. Liability. In the event any mortgagee or its designee becomes the Lessee under the Lease or under any new lease obtained pursuant to paragraph 3 above, the mortgagee or its designee shall be personally liable for the obligations of Lessee under the Lease or a new lease only for the period of time that the mortgagee or its designee remain the actual beneficial holder of the leasehold estate hereunder. The mortgagee's or its designee's right under the Lease to assign the Lease or the new lease shall not be subject to any restriction.

6. Removal of Lessee. If a mortgagee shall elect to demand a new lease under paragraph 3 above, City agrees, at the request of, and on behalf of and at the expense of the mortgagee, to institute and pursue diligently to conclusion any appropriate legal remedy or remedies to oust or remove the original Lessee from the Premises and those subtenants actually occupying the Premises, or any part thereof, as designated by the mortgagee.

7. Subleases. Unless and until City has received notice from all mortgagees that each mortgagee elects not to demand a new lease as provided in paragraph 3 above, or until the period therefor has expired, City shall not cancel or agree to the termination or surrender of any existing subleases or licenses nor enter into any new sublease or license

without the prior written consent of all of the mortgagees.

8. Condemnation and Insurance Proceeds.

(a) Custody of Condemnation and Insurance Proceeds. Notwithstanding anything in this Second Amendment or the Lease to the contrary, the proceeds from any insurance policies insuring the Premises, and purchased by Lessee, or the proceeds arising from the taking of all or part of the Premises by condemnation or eminent domain, shall be paid to and held by the most senior mortgagee and the proceeds shall be applied in accordance with the provisions of the most senior mortgage.

(b) Condemnation Proceeds. If the whole of the Premises is taken by condemnation or other eminent domain proceedings, or substantially all of the Premises are taken in or by such proceedings, this Lease shall terminate and: (i) City shall be entitled to receive the entire award which is attributable to the value of the unimproved land so condemned, as encumbered by the Lease; and (ii) Lessee shall be entitled to receive the entire award which is attributable to the value of the improvements to the Premises. In addition, Lessee shall be entitled to receive any award made for the taking of Lessee's inventory, movable trade fixtures, machinery and moving expenses and for the value of Lessee's leasehold interest affected by such taking, so long as any award so granted to Lessee does not in any manner whatsoever diminish the maximum award to which City is entitled with respect to provision (i) above. All of the foregoing awards payable to Lessee shall be paid directly to and held by the most senior mortgagee and the proceeds shall be applied in accordance with the provisions of the most senior mortgage.

(c) Partial Condemnation. In the event less than a substantial part of the Premises is taken by condemnation or other eminent domain proceedings, then neither City nor Lessee shall have the right to terminate the Lease, in addition: (i) the Rental shall be reduced from and after the taking by an equitable amount, taking into consideration, among other things, the amount of the Premises remaining after any restoration, and (ii) City shall pay over to Lessee from time to time any moneys which may be received by City on account of the exercise of the power of eminent domain with respect to the Premises; provided, that before paying such moneys over to Lessee, City shall be entitled to reimburse itself therefrom to the extent, if any, of the expenses paid or incurred by City in the collection of such moneys. Such moneys shall be payable to Lessee solely for purposes of the repair and restoration of the Premises, on the terms and subject to the conditions set forth in mortgages, as if, for this purpose, such moneys were insurance proceeds resulting from a casualty to the Premises. Accordingly, all of such moneys payable to Lessee shall be paid directly to and held by the most senior mortgagee and the proceeds shall be applied in accordance with the provisions of the most senior mortgage.

(d) Temporary Condemnation. If the temporary use or occupancy of all or any part of the Premises is taken by condemnation or in any other manner for any public or quasi-public use or purpose during the Term, Lessee shall be entitled to receive that portion of the award for such taking which represents compensation for the use and occupancy of the Premises during the Term and, if so awarded, for the taking of Lessee's

inventory, movable trade fixtures, machinery and for moving expenses, and that portion which represents reimbursement for the cost of restoration of the Premises. The Lease shall be and remain unaffected by such taking, and Lessee shall be responsible for all obligations hereunder not affected by such taking and shall continue to pay in full when due the Rental and all other sums required to be paid by Lessee pursuant to the provisions of the Lease. If the period of temporary use or occupancy extends beyond the expiration of the Term, that part of the award which represents compensation for the use or occupancy of the Premises (or a part thereof) shall be divided between City and Lessee so that Lessee receives so much thereof as represents the period to and including the expiration of the Term and City receives (a) so much thereof as represents the period subsequent to the expiration of the Term and (b) that portion which represents reimbursement for the cost of restoration of the Premises. All of the foregoing awards payable to Lessee shall be paid directly to and held by the most senior mortgagee and the proceeds shall be applied in accordance with the provisions of the most senior mortgage.

9. Notice of Proceedings. City and Lessee shall give all mortgagees notice of any arbitration or condemnation proceedings, or any pending adjustment of insurance claims, and any mortgagee shall have the right to be made a party to such proceedings. City and Lessee hereby consent to the making of any mortgagee a party to such proceedings. In the event that any mortgagee shall not elect to become a party to such proceedings, that mortgagee shall receive notice and a copy of any award or decision made in connection therewith.

10. Separate Agreement. City shall, upon request, execute, acknowledge and deliver to each mortgagee, an agreement prepared at the sole cost and expense of Lessee, in form satisfactory to each mortgagee, between City, Lessee and the mortgagees, agreeing to all of the provisions hereof.

11. Estoppel. City agrees to provide within ten (10) days of written request an estoppel certificate in favor of any mortgagee certifying as to the status of the rent payments, satisfaction of any conditions precedent to commencement of the term of the Lease, the existence of any defaults under the Lease and such other matters as reasonably requested by such mortgagee.

12. Mortgage. The term "mortgage" whenever used herein shall include whatever security instruments are used in the locale of the Premises, such as, without limitation, deeds of trust, security deeds and conditional deeds, as well as financing statements, security agreements and other documentation required pursuant to the Uniform Commercial Code of the State of Nebraska. The term "mortgage" whenever used herein shall also include any instruments required in connection with a sale-leaseback transaction. The term "mortgagee" shall include the holder of the secured position under each of the foregoing types of instruments, including, without limitation, the beneficiary under a deed of trust, the secured party under a security agreement and the lessor in a sale-leaseback transaction.

13. City's Fee. City shall not mortgage or otherwise encumber its interest in the Premises in such a way as to preclude or hinder Lessee, or the subtenants of Lessee, from

obtaining mortgages as provided herein.

14. Term. Paragraph 1 of the First Amendment shall be amended so to that the following is substituted for the last sentence in Paragraph 1, which itself amends Paragraph 2 of the Ground Lease:

“If operation of the Hotel as a hotel is discontinued prior to the end of such Term for a period greater than one hundred and twenty (120) days, then either Party shall have the option to terminate this Lease without further obligation by either party upon thirty (30) days written notice to the other Party. Notwithstanding the foregoing, neither Party shall have the option to terminate this Lease if the operation of the Hotel as a hotel is discontinued due to remodeling, repair or construction affecting the Hotel, a casualty or condemnation affecting the Hotel, or due to a strike, lockout, inability to obtain necessary services or any other event of force majeure affecting the Hotel.”

15. Assignment. Paragraph 15 of the Ground Lease shall be amended in its entirety, to read as follows:

“15. Assignment. The obligations of Lessee hereunder may be freely assigned to the fee owner of the hotel parcel as described on Exhibit B attached hereto (the “Hotel”), which party shall then become the Lessee hereunder. Lessee may not assign this Lease or sublet or sublease any part of the Premises, or assign any of the obligations or rights under this Lease, without the prior written consent of City, which consent shall not be unreasonably withheld, conditioned or delayed, and all mortgagees. Notwithstanding the foregoing, Lessee may freely assign this Lease or sublet or sublease any part of the Premises to (a) an Affiliate of Lessee, (b) to a mortgagee under a mortgage encumbering the Hotel, (c) to Lessee’s property manager and/or licensee to the extent and for so long as such party actively manages the operations of the Hotel on behalf of the Lessee, and (d) to any Affiliate or third party that is facilitating the sale of alcoholic beverages within the Premises solely to the extent necessary to allow such Affiliate or third party to hold a liquor license duly issued under Nebraska law by the appropriate governmental entity and to allow such person or entity to facilitate the sale and distribution of alcoholic beverages on the Premises on behalf of Lessee. For the purposes hereof, “Affiliate” means, any person or entity which: (a) directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, Lessee, (b) owns twenty-five percent (25%) or more of the equity interest of which is held beneficially or of record by Lessee, as the context may require, or (c) that is or becomes a parent, successor or affiliate of Lessee, or is a successor of Lessee by reason of merger, consolidation, public offering, reorganization, dissolution, or sale of stock, membership or partnership interests or assets.”

16. No Merger. At any time during which the Lease is encumbered by a mortgage the fee estate and the leasehold estate arising under the Lease shall not merge.

[Signatures and acknowledgements on following page.]



IN WITNESS WHEREOF, City and Lessee do hereby execute this Second Amendment as of the date first written above.

ATTEST:	City Clerk	CITY CITY OF LINCOLN,
NEBRASKA, a municipal corporation		Mayor

	<b>LESSEE CORNHUSKER SQUARE</b>
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LIMITED PARTNERSHIP, a Nebraska limited partnership By: Cornhusker Square Land Company, a Nebraska corporation its General Partner By:

_____	Name: _____	Its: _____
_____	By: _____	Name: _____
_____	Its: _____	



**EXHIBIT A**

**LEGAL DESCRIPTION OF PREMISES**

**EXHIBIT B**

**LEGAL DESCRIPTION OF HOTEL**