

## ANNEXATION AGREEMENT

This Annexation Agreement ("Agreement") is made and entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2009, by and among the City of Gardner, Kansas, a Kansas municipal corporation (the "City"), BNSF Railway Company, a Delaware corporation ("BNSF"), and the Allen Group – Kansas City, LLC, a Delaware limited liability company, and/or its affiliates ("TAG-KC").

### RECITALS:

A. BNSF is the owner of certain real property located in Johnson County, Kansas comprising approximately 1,000 gross acres depicted on **Attachment "A-1"** attached hereto and legally described on **Attachment "A-2"** attached hereto (the "Site").

B. BNSF desires and intends to develop and construct an intermodal facility adjacent to the BNSF rail line ("Intermodal Facility") upon approximately 440 acres of the Site as shown on **Attachment "A-1"** ("Intermodal Site").

C. BNSF and TAG-KC have entered into an Option Agreement, dated as of April 13, 2007, as amended (the "Option") pursuant to which TAG-KC intends to purchase a portion of the Site comprising approximately 560 acres as depicted on **Attachment "A-1"** (the "Logistics Park Site") for the development of an industrial park, including industrial warehouse, distribution, flex and storage facilities and for other supporting commercial uses (the "Logistics Park").

D. Significant public infrastructure improvements (the "Infrastructure Improvements") will be necessary to serve the Intermodal Facility and the Logistics Park, and the parties have agreed that the costs of such Infrastructure Improvements shall be funded by a variety of public and private sources, including without limitation, (i) a contribution from the City, (ii) a contribution from BNSF, (iii) a contribution from TAG-KC, and (iv) other public funding, mechanisms and programs. BNSF, TAG-KC, the City and Johnson County, Kansas (the "County") have, of even date herewith, entered into that certain Infrastructure Financing Plan (the "Financing Plan") to govern the financing of the Infrastructure Improvements.

E. Also, BNSF, TAG-KC and the City have, of even date herewith, entered into that certain Project Agreement (the "Project Agreement") to govern the development, construction and design of the Infrastructure Improvements, among other things.

F. BNSF and TAG-KC desire to have the Site annexed into the City, provided that they are able to obtain the requisite development approvals and funding required for the Infrastructure Improvements in an economically feasible manner.

G. Annexation of the Site is a condition precedent to the City's having jurisdiction to provide the development approvals and certain of the funds provided for in the Financing Plan.

H. In order to facilitate the development of the Intermodal Facility and the Logistics Park, the parties anticipate that the Site shall be re-zoned to accommodate such uses.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, the parties hereto agree as follows:

1. Consent to Annexation. Subject to the terms and conditions set forth herein, the execution of this Agreement will constitute BNSF's consent to the annexation of the Site by the City within the meaning of K.S.A. 12-520(a)(7) and K.S.A. 12-534, and amendments thereto.

2. Annexation Ordinance. The City agrees to pass an ordinance annexing the Site (the "Ordinance"). The Ordinance shall take effect upon publication in accordance with K.S.A. 12-523, as amended. This Agreement is contingent and dependent upon the City's passage and publication of the Ordinance within forty-five (45) days from the date of this Agreement.

3. Extension of Services. Except for and subject to (a) services to be provided by another service provider or to be assumed by either BNSF or TAG-KC, and/or (b) the terms and conditions of the Project Agreement, the parties hereby agree that upon publication of the Ordinance the City agrees to make available to BNSF, TAG-KC, and the Site all usual municipal services in accordance with uniformly applied ordinances, regulations, and policies. The manner of municipal services is set forth on **Attachment "B"** attached hereto.

4. Zoning.

(a) Following publication of the Ordinance, TAG-KC will file an application, as agent of BNSF, to rezone the Logistics Park from its existing Johnson County zoning classification to another classification or district that will satisfactorily provide for TAG-KC's proposed uses. TAG-KC will also submit a development plan for the Logistics Park in accordance with such zoning requirements (as the same may be uniformly applied) and in substantial conformance with the development plan attached hereto as **Attachment "D"**. BNSF agrees to cooperate with TAG-KC in connection with the rezoning application, including the execution of all necessary application forms, coordination with TAG-KC's consultants and provision of testimony at all public hearings in support of the application.

(b) Following publication of the Ordinance, BNSF will also file an application to rezone the Intermodal Site from its existing Johnson County zoning classification to another classification or district that will satisfactorily provide for BNSF's proposed uses. Subject to Section 6 below, BNSF will also submit a development plan for the Intermodal Facility in accordance with such zoning requirements (as the same may be uniformly applied) and in substantial conformance with the development plan attached hereto as **Attachment "C"**.

(c) In recognition of the fact that obtaining satisfactory development entitlements is a condition precedent to TAG-KC's exercise of its rights to purchase the Logistics Park under the Option, and to BNSF's development of the Intermodal Site, the City agrees to use reasonable efforts to expedite the processing of the above-described rezoning applications, including the scheduling of special meetings of the City Council or Planning Commission in the City's reasonable discretion, so as not to unduly hinder or delay the development of the Logistics Park and the Intermodal Site.

5. Deannexation. In the event that (a) the City does not approve the rezoning of the Site in a manner satisfactory to BNSF and/or TAG-KC, (b) the financing contemplated in the Financing Plan is not approved and available for funding the Infrastructure Improvements, (c) TAG-KC and/or BNSF shall exercise the right to deannex because Lawsuit No. 08CV05335 is not conclusively resolved in favor of the City as set forth in Section 8.1(a)(iv) of the Project Agreement, and/or (d) the City denies or reduces any of the "Abatements" contemplated by Section 7.5 of the Project Agreement and Section 6 of the Financing Plan, or fails to perform on its pledge of any of the Sources of Funds in Section 2.d of the Financing Plan in an amount sufficient to fund the Public Infrastructure Improvement Costs (as defined therein), then the City agrees to deannex any portions of the Logistics Park Site which are not subject to Abatement, and/or the Intermodal Site pursuant to K.S.A. 12-504 *et seq.*, or amendments thereto, at the request of the then owner of such portions of the Site for which deannexation is requested, and this Agreement shall automatically terminate and be of no further force and effect. Notwithstanding the foregoing, in the event of deannexation as set forth in the preceding sentence, the City nonetheless agrees to provide the utility services to the Site described in Section 3 of this Agreement and in Section 6.1 of the Project Agreement, provided however, that if deannexation occurs prior to the Stage 1 Commencement Date (as set forth in Section 4.a of the Financing Plan), the City shall not be required to provide such utility services.

6. Federal Regulation. Notwithstanding anything herein to the contrary, the parties acknowledge and agree that the Intermodal Site and BNSF's development of the Intermodal Site are regulated by other state or federal law, including but not limited to the Interstate Commerce Commission Termination Act of 1995. Nothing in this Agreement or by making a zoning application shall be deemed a waiver by BNSF of any rights or remedies it may have under such other state or federal law, or a waiver of the preemptive effect of such other state or federal law.

7. Representations of Parties. The parties each represent that: (a) it has the legal power, right and authority to enter into Agreement; (b) all requisite action has been taken in connection with the entering into this Agreement; (c) the individual executing this Agreement on behalf of the party has the legal power, right and actual authority to bind the party to the terms and conditions of this Agreement; and (d) this Agreement is and shall be valid, legally binding obligations of and enforceable against the party in accordance with its terms.

8. Defaults; Specific Performance. The failure of any party to perform any obligation set forth in this Agreement, after receiving notice and failing to cure, constitutes a default under this Agreement. A party claiming a default ("Claimant") shall give written notice of default to the defaulting party, specifying the default complained of. The Claimant shall not institute proceedings against the defaulting party if the defaulting party within fourteen (14) days from receipt of such notice, with due diligence, commences to cure, correct or remedy such failure and shall complete such cure, correction or remedy within thirty (30) days from the date of receipt of such notice. If a default under this Agreement is not fully cured by the defaulting party, the Claimant at its option may thereafter (but not before) commence an action in the District Court of Johnson County, Kansas for specific performance of the terms of this Agreement. The prevailing party in any such action shall be entitled to collect the expenses of prosecuting or defending such action, including reasonable attorney's fees.

9. Inaction Not a Waiver of Default. Any failures or delays by a party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights and remedies, or deprive such party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert or enforce any such rights or remedies.

10. Notices. Whenever written notice is required to be given under this Agreement, notice shall be sufficient if given by (i) personal service, (ii) successful facsimile transmission, (iii) certified mail, postage prepaid, return receipt requested, or (iv) overnight courier.

To the City:                   City Administrator  
City of Gardner  
City Hall  
120 E. Main  
Gardner, KS 66030  
Phone: (913) 856-0939  
Fax: (913) 856-0997

With a copy to:               Jim Hubbard, Esq.  
Norton, Hubbard, Ruzicka & Kreamer  
130 North Cherry  
P.O. Box 550  
Olathe, Kansas 66051  
Phone: (913) 782-2350  
Fax: (913) 782-2012

To TAG-KC:                   The Allen Group – Kansas City, LLC  
973 East Lincoln Lane  
Gardner, Kansas 66030  
Phone: (913) 660-9445  
Fax: (913) 660-9043  
Attention: William F. Crandall, President

With a copy to:               The Allen Group  
11943 El Comino Real, Suite 200  
San Diego, California 92130  
Attention: Richard S. Allen, CEO  
Phone: (858) 764-6800  
Fax: (858) 764-6809

With a copy to: Todd A. LaSala, Esq.  
Stinson Morrison Hecker LLP  
1201 Walnut, Suite 2600  
Kansas City, Missouri 64106  
Telephone: (816) 842-8600  
Facsimile: (816) 691-3495

To BNSF: BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, Texas 76131  
Attention: Mark Ude  
Phone: (817) 352-6470  
Fax: (817) 352-2398

With a copy to: David Rankin, Esq.  
Senior General Attorney  
BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, Texas 76131  
Phone: (817) 352-2383  
Fax: (817) 352-2398

With a copy to: Lewis A. Heaven, Jr., Esq.  
Lathrop & Gage L.C.  
10851 Mastin Blvd., Suite 1000  
Overland Park, Kansas 66219  
Phone: (913) 451-5100  
Fax: (913) 451-0875

11. Attachments. The Attachments attached hereto are hereby incorporated herein by this reference for all purposes.

12. Entire Agreement. This Agreement constitutes the entire agreement between the parties as to the subject matter hereof. No subsequent agreement, representation or promise made by any party hereto, or by or to an employee, officer, agent or representative of any party hereto shall be of any effect unless it is in writing and executed by the party to be bound thereby.

13. Amendment. The terms of this Agreement may not be modified or amended except by an instrument in writing executed by each of the parties hereto.

14. No Obligations to Third Parties. Except as otherwise expressly provided herein, the execution and delivery of this Agreement shall not be deemed to confer any rights upon, nor obligate any of the parties hereto, to any person or entity other than the parties hereto.

15. Captions. Any captions to, or headings of, the paragraphs of this Agreement are solely for the convenience of the parties hereto, are not a part of this Agreement, and shall not be used for the interpretation or determination of the validity of this Agreement, or any portion thereof.

16. Validity and Severability. It is the intention of the parties that the provisions of this Agreement shall be enforced to the fullest extent permissible under the laws and public policies of the State of Kansas, and that any unenforceability (or modification to conform with such laws or public policies) of any provision hereof shall not render unenforceable, or impair, the remainder of this Agreement. Accordingly, if any provision of this Agreement shall be deemed invalid or unenforceable in whole or in part, this Agreement shall be deemed amended to delete or modify, in whole or in part, if necessary, the invalid or unenforceable provision or provisions, or portions thereof, and to alter the balance of this Agreement in order to render the same valid and enforceable.

17. Time of Essence. Time is of the essence of this Agreement. The parties will make every reasonable effort to expedite the subject matters hereof and acknowledge that the successful performance of this Agreement requires their continued cooperation.

18. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the parties hereto.

19. Construction. The parties hereto acknowledge and agree that (i) each party hereto is of equal bargaining strength, (ii) each such party has actively participated in the drafting, preparation and negotiation of this Agreement, (iii) each party has consulted with such party's own, independent counsel, and such other professional advisors as such party has deemed appropriate, relative to any and all matters contemplated under this Agreement, (iv) each such party and such party's counsel and advisors have reviewed this Agreement, (v) each such party has agreed to enter into this Agreement following such review and the rendering of such advice, and (vi) any rule of construction to the effect that ambiguities are to be resolved against the drafting parties shall not apply in the interpretation of this Agreement, or any portions thereof, or any amendments hereto.

20. Applicable Law. Subject to Section 6 above, this agreement shall be governed by and construed in accordance with the laws of the State of Kansas.

21. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

**CITY OF GARDNER, KANSAS,**  
a Kansas municipal corporation ("City")

By: \_\_\_\_\_  
Carol Lehman, Mayor

State of Kansas                    )  
  ) ss.  
County of Johnson                )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2009, before me, the undersigned, a Notary Public, personally appeared Carol Lehman, Mayor of the City of Gardner, Kansas, to me personally known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the date and year first above written.

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

My appointment expires:

\_\_\_\_\_



**THE ALLEN GROUP – KANSAS CITY, LLC,**

a Delaware limited liability company ("TAG-KC")

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

State of \_\_\_\_\_ )

) ss.

County of \_\_\_\_\_ )

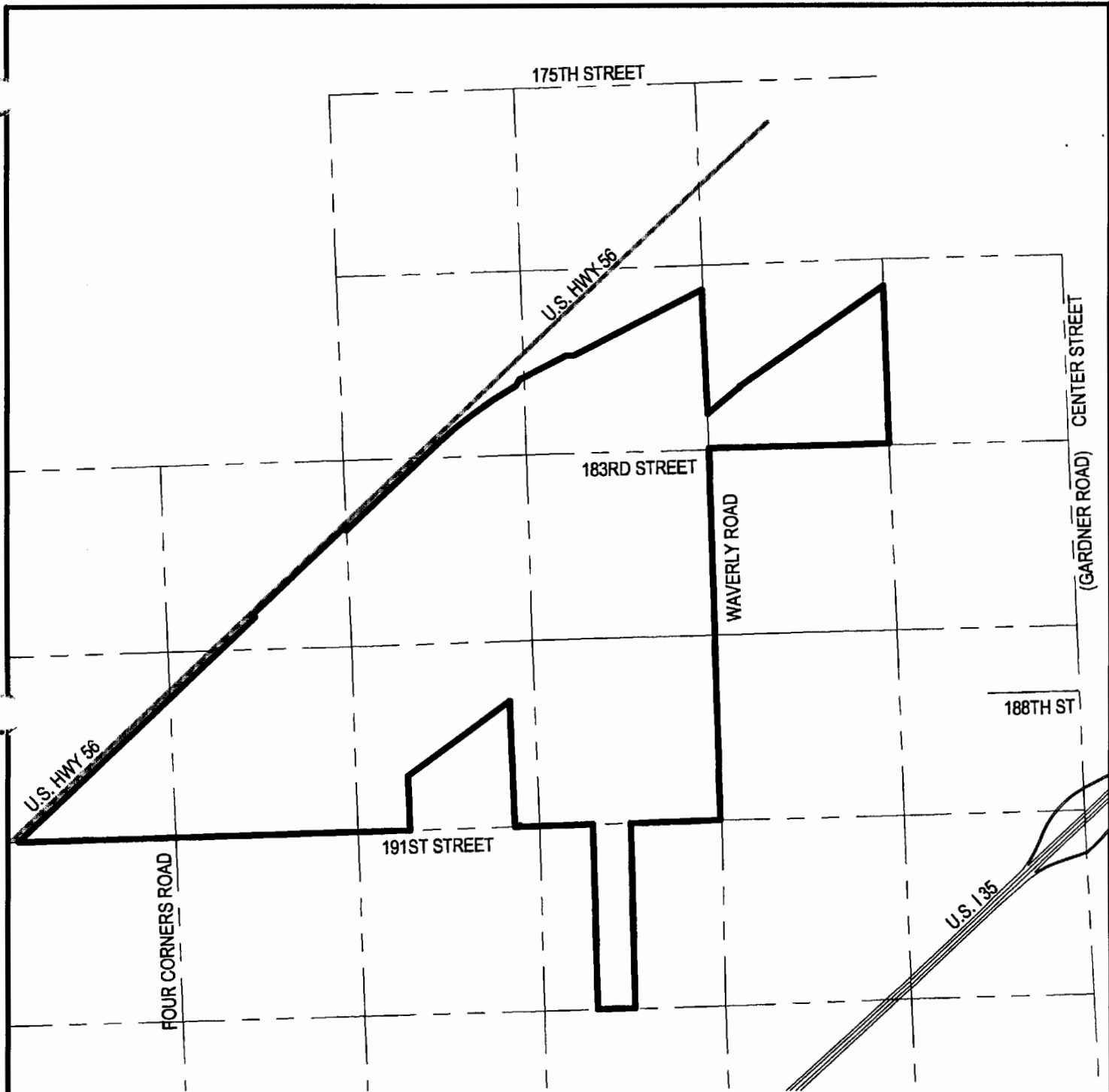
On this \_\_\_\_\_ day of \_\_\_\_\_, 2009, before me, the undersigned, a Notary Public, personally appeared \_\_\_\_\_, \_\_\_\_\_ of The Allen Group of Kansas – Kansas City, LLC, personally known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the date and year first above written.

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

My appointment expires:

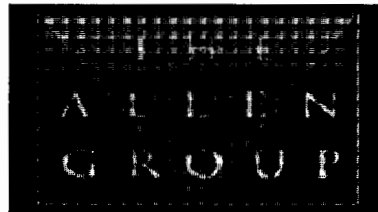
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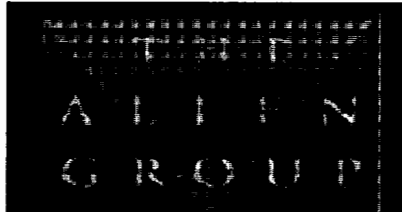
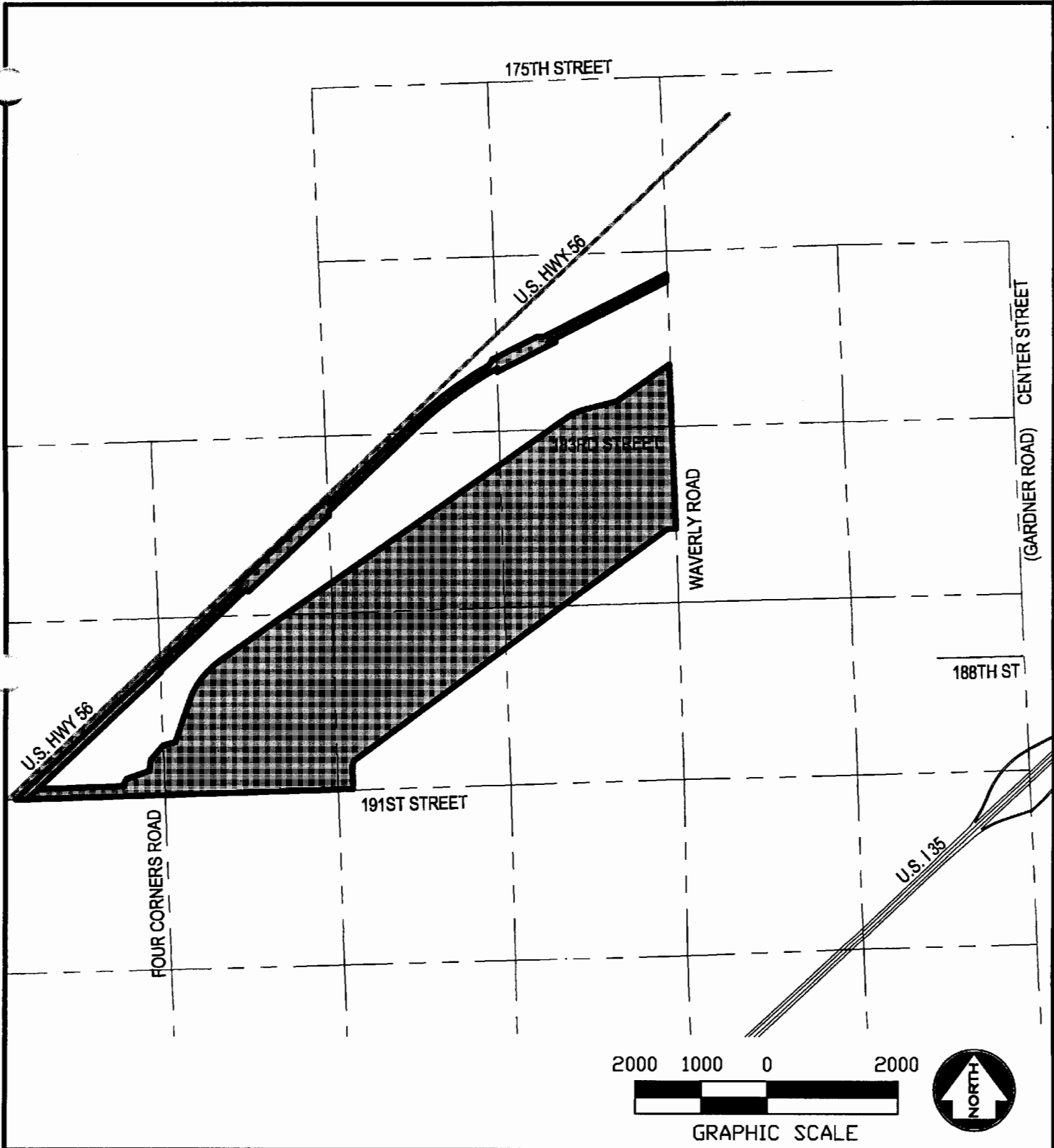
GRAPHIC SCALE



SHAFER, KLINE & WARREN, INC.

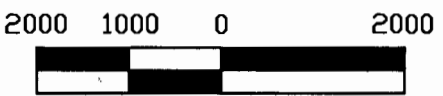
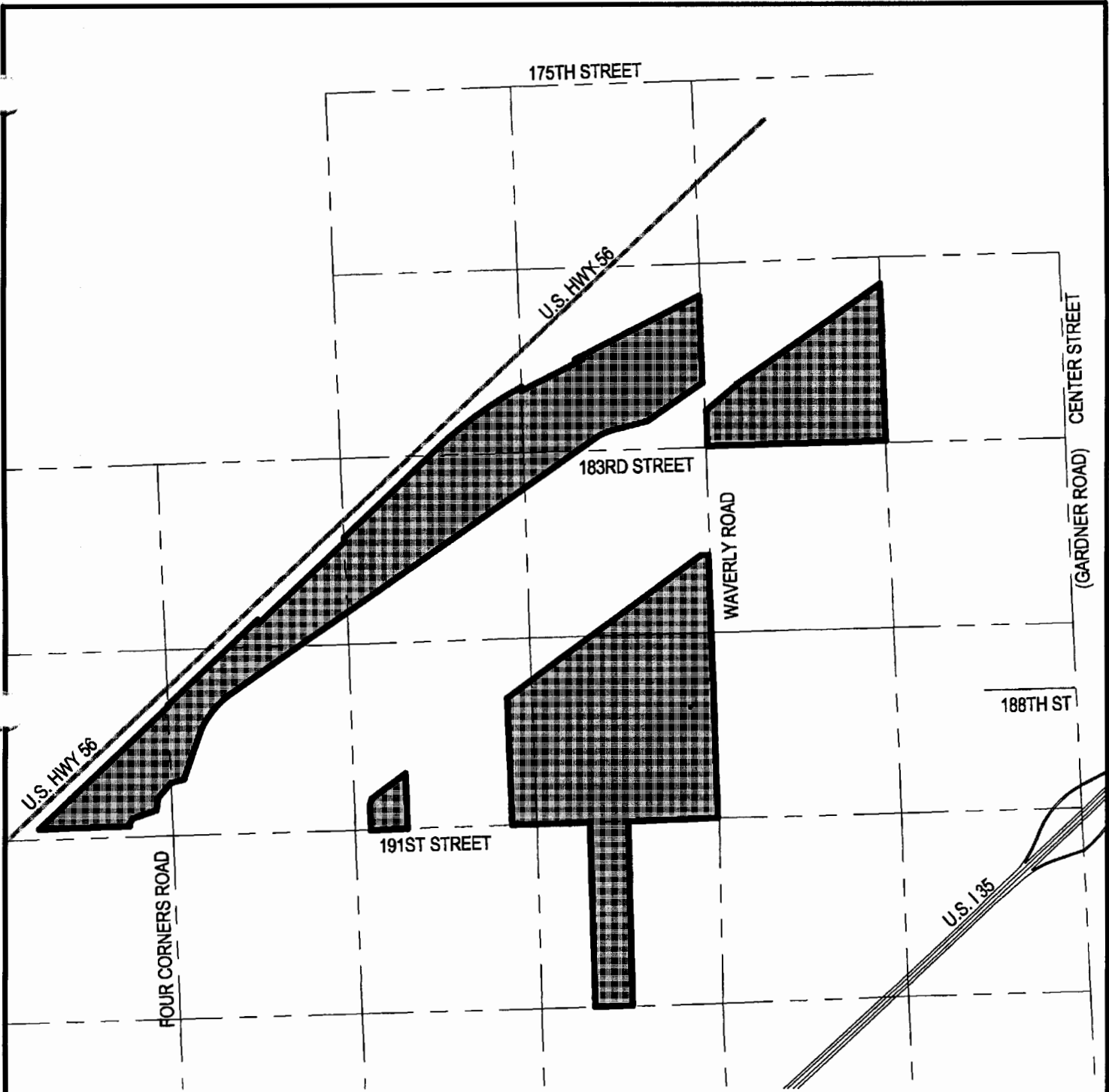
THE SITE - MAP

ATTACHMENT  
A-1

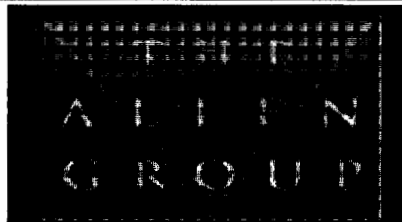


**INTERMODAL SITE**

**ATTACHMENT**  
**A-1.1**



GRAPHIC SCALE



SHAFFER, KLINE & WARREN, INC.

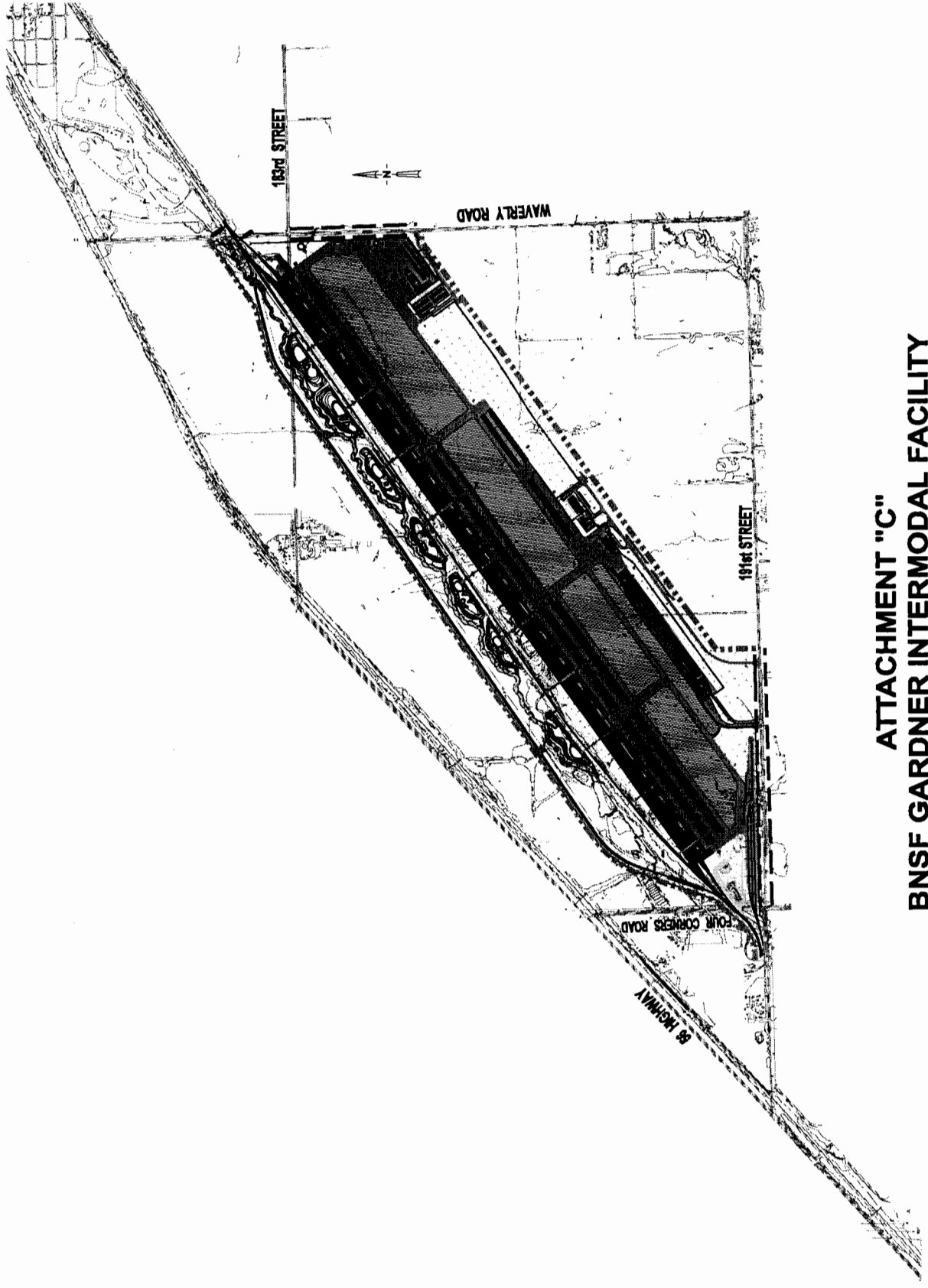
LOGISTICS PARK SITE

ATTACHMENT  
A-1.2

## Attachment B

**Municipal Services** – customarily provided by the City of Gardner include the following, but not limited to;

- City Government
  - Planning Commission
  - Board of Zoning Appeals
  - Building Permitting
  - Business Licensing
  - Development Fees & Incentives
  - City Clerk
  - Administration
  - Community Development
  - Finance & Human Resources
  - Parks & Recreation
  - Public Safety
  - Public Works
  - Utility Services
    - Water (unless provided by Johnson County Water District #7)
    - Waster Water
    - Electrical (subject to 6.1(a) of the Project Agreement)
  
- Police, Fire & Medical
  - Animal Control
  - Public Safety
  - Fire Safety
  - Emergency Medical Services
  - Business Security
  - Child Safety
  - Interactive Programs
  - Municipal Court
  - Neighborhood Safety
  - Pet Licensing & Rules
  - Reporting a Crime
  - Reports
  - Volunteer & Reserve Program



**ATTACHMENT "C"**  
**BNSF GARDNER INTERMODAL FACILITY**  
**GENERAL PLAN**  
**SEPTEMBER, 2008**

**LAND USE SUMMARY**

**RAIL SERVE BUILDINGS**

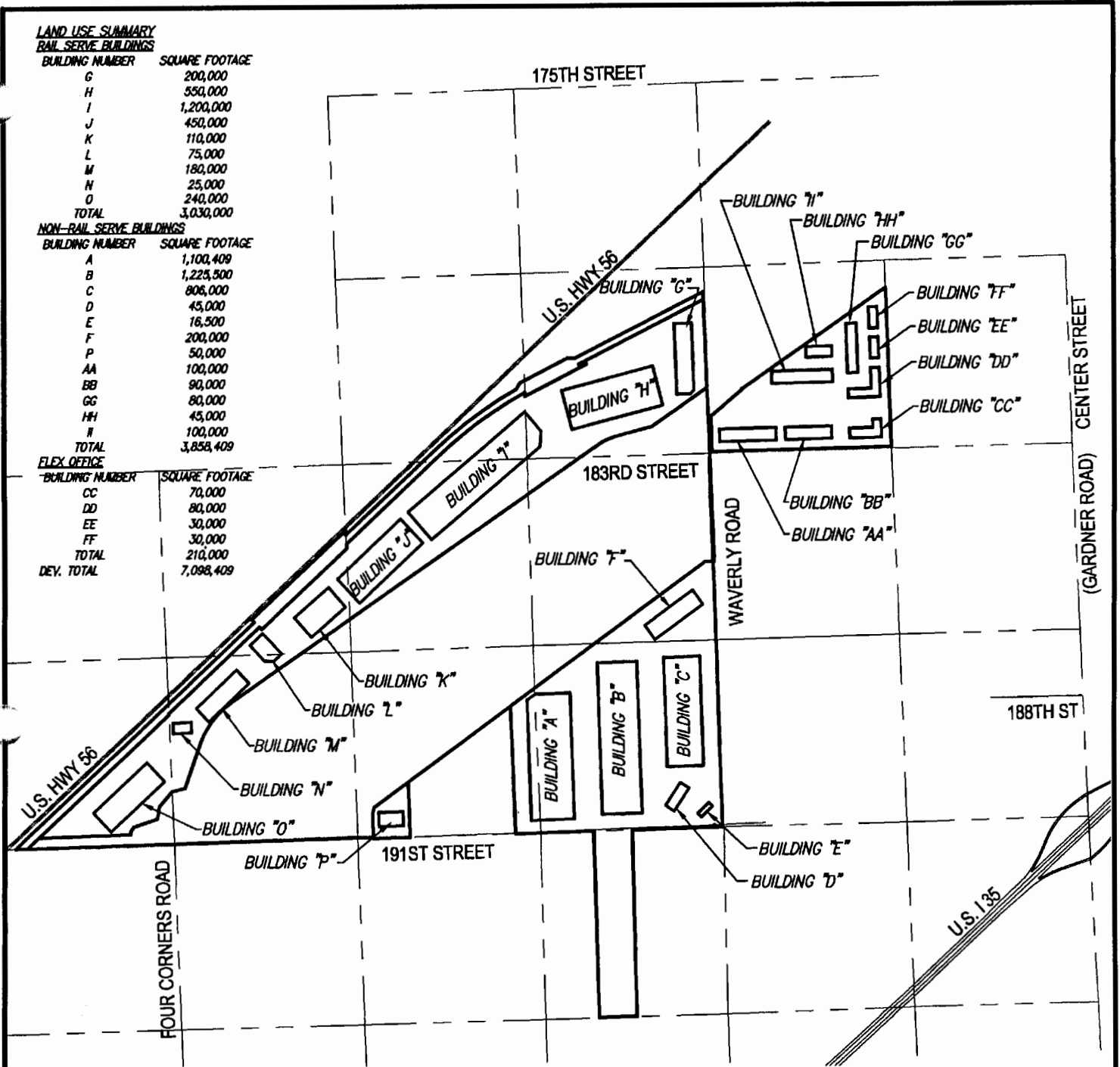
BUILDING NUMBER	SQUARE FOOTAGE
G	200,000
H	550,000
I	1,200,000
J	450,000
K	110,000
L	75,000
M	180,000
N	25,000
O	240,000
TOTAL	3,030,000

**NON-RAIL SERVE BUILDINGS**

BUILDING NUMBER	SQUARE FOOTAGE
A	1,100,409
B	1,225,500
C	806,000
D	45,000
E	16,500
F	200,000
P	50,000
AA	100,000
BB	90,000
CC	80,000
HH	45,000
I	100,000
TOTAL	3,858,409

**FLEX OFFICE**

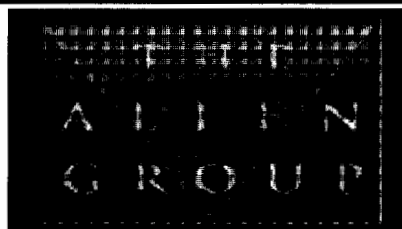
BUILDING NUMBER	SQUARE FOOTAGE
CC	70,000
DD	80,000
EE	30,000
FF	30,000
TOTAL	210,000
DEV. TOTAL	7,098,409



2000 1000 0 2000



GRAPHIC SCALE



SHAFFER, KLINE & WARREN, INC.

**LOGISTICS PARK DEVELOPMENT PLAN**

ATTACHMENT

**D**