

01R-82

Introduce: 4-9-01

RESOLUTION NO. A- 80788

1 BE IT RESOLVED by the City Council of the City of Lincoln, Nebraska:

2 That the agreement titled Ashley Heights Conditional Annexation and Zoning  
3 Agreement ("Annexation Agreement"), which is attached hereto, marked as Attachment  
4 "A" and made a part hereof by reference, between the City of Lincoln and M & S  
5 Construction and Allan D. and Beth A. Schulz (Owner) outlining certain conditions and  
6 understandings between the City and said Owners relating to the annexation of land  
7 generally located at N.W. 48th Street and West Adams Street is approved.

8 BE IT FURTHER RESOLVED that the Mayor is authorized to execute the  
9 Annexation Agreement on behalf of the City.

10 BE IT FURTHER RESOLVED that the City Clerk is directed to return one fully  
11 executed copy of this Agreement to Rick Peo, Chief Assistant City Attorney, for  
12 distribution to the Owner.

13 BE IT FURTHER RESOLVED that the City Clerk is directed to record the  
14 Annexation Agreement with the Register of Deeds, filing fees to be paid by the Owner.

Introduced by:

Don McRoy

AYES: Camp, Cook, Fortenberry,  
Johnson, McRoy, Seng, Shoecraft;  
NAYS: None.

Approved as to Form and Legality:

Rick Peo  
Chief Assistant City Attorney

Staff Review Completed:

Ann Hansen  
Administrative Assistant

**ADOPTED**

APR 16 2001

By City Council

Approved this 20 day of April, 2001:  
Don Wesley  
Mayor

**ASHLEY HEIGHTS  
CONDITIONAL ANNEXATION AND ZONING AGREEMENT**

This Ashley Heights Conditional Annexation and Zoning Agreement ("Ashley Heights Agreement") is made and entered into this 20 day of April, 2001, by and between M & S Construction and Allan D. and Beth A. Schulz ("Owner"), and the City of Lincoln, Nebraska, a municipal corporation, ("City").

**RECITALS**

A. Owner has requested the City to annex the real estate legally described in Exhibit "A" attached.

B. Owner has requested City to rezone the real estate legally described in Exhibits "B", "C" and "D" attached from 1-2 Industrial Park District to R-3 Residential District, from 1-2 Industrial Park District to B-2 Planned Neighborhood Business District, and from 1-2 Industrial Park District to H-4 General Commercial District, respectively.

C. The City is willing to approve the proposed Preliminary Plat of Ashley Heights, which includes all of the real estate described in Exhibit "A" as requested, provided Owner agrees to dedicate right-of-way to extend West Adams Street as shown on the Preliminary Plat of Ashley Heights and further agrees to construct and maintain an emergency second access to the R-3 Residential zoned property (Exhibit "B") to the satisfaction of the City of Lincoln Fire Department until such time as a permanent second access to the R-3 Residential zoned property is provided.

D. In order to provide adequate sewer service to the real estate described in Exhibit "A", it will be necessary to construct a 15-inch sewer main from the 18-inch main located north of the Ashley Heights Preliminary Plat south to West Huntington Avenue as shown on the Preliminary Plat, and to construct an 8-inch sewer main in West Huntington Avenue and Northwest 45th Street. The City is willing to annex and rezone the Property as requested, provided there is an agreement regarding cost responsibilities for the construction of said sewer mains.

E. The development and operation of a portion of the real estate described in Exhibit "A" as a B-2 Planned Neighborhood Business District will cause increased traffic on the public street system that serves and provides access that may require off-site road improvements. Due to the possible inadequacy of the street system, the City is willing to annex and rezone as requested provided there is an agreement regarding cost responsibilities for improvements to the public street system which serves the Property and provided that Owner agrees to complete a traffic impact study prior to making application for a use permit on that portion of the Property zoned B-2 Planned Neighborhood Business District

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties do agree as follows:

1. Annexation by the City. The City agrees to annex the Property.

2. Rezoning with Restrictions on Use. The City agrees to rezone the Property from 1-2 Industrial Park District to R-3 Residential District, B-2 Neighborhood Business District and H-4 General Commercial District as legally described in Exhibits "B", "C", and "D", respectively. However, use of the south 200 feet of the Property described in Exhibit "C" shall be restricted as follows:

- a. The south 60 feet of the Property shall be subject to a permanent drainage easement;
- b. A landscape screen meeting City design standards shall be established along the north side of the drainage easement, within the easement.
- c. The south 200 feet of the Property described in Exhibit "C" may be used as permitted by the H-4 General Commercial District except for the following uses which shall not be permitted:
  - i. Heavy equipment sales;
  - ii. Commercial storage or sale of farm implements and products used for agriculture, including fertilizer, or toxic or flammable agricultural chemicals;
  - iii. Lumber yards;
  - iv. Truck terminal;
  - v. Ambulance service;
  - vi. Outdoor theater;
  - vii. Open kennels;
  - viii. Sale barns;
  - ix. Drive-through restaurants;
  - x. Service stations;
  - xi. Truck stops;
  - xii. Auctions;
  - xiii. Any use listed under Lincoln Municipal Code 27.45.030, Permitted Special Uses; however, special permits for planned service commercial development, sales of alcoholic beverages for consumption on or off the premises, and early childhood care facilities may be permitted.
- d. There shall be no outdoor storage or dumpsters of any kind, and no roadway or driveway permitted on the south side of any building.

Uses prohibited by this subparagraph may be permitted only by written amendment to this Agreement approved by the City Council of the City of Lincoln and signed by the Mayor.

3. Street Improvements.

A. West Adams Street. Owner agrees to dedicate the necessary right-of way to extend West Adams Street as shown on the Preliminary Plat of Ashley Heights. Prior to final plat approval, Owner shall either grade and construct West Adams Street as a two-lane city street, or provide the City with escrowed funds or other security satisfactory to the City to guarantee such grading and construction. Paving shall be from the present terminus of West Adams at Northwest 46th Street to the point depicted on the Preliminary Plat of Ashley Heights. Said paving shall be completed at the cost and expense of the Owner of Lot 47, Block 8 of the proposed preliminary plat, provided, however, the construction of said paving shall not be required to be completed until such time as (a) any portion of the east 300 feet of Lot 47 is replatted or conveyed to another person, or (b) the land immediately east of Lot 47 is rezoned and subdivided. Notwithstanding the above, the obligation of the Owner of Lot 47, Block 8, of the proposed preliminary plat to extend the paving of West Adams Street shall terminate if neither event described above in (a) and (b) occur within ten (10) years from the date of this Agreement.

B. Emergency Access. Prior to final plat approval, Owner shall construct at Owner's cost and expense an emergency secondary access to the R-3 Residential zoned property from the present terminus of West Adams Street and Northwest 46th Street to the street depicted on the Preliminary Plat of Ashley Heights as West Huntington Avenue. Said emergency access shall have a minimum width of 20 feet and shall be constructed to the satisfaction of the City of Lincoln Fire Department. The emergency access shall be gated or otherwise secured to prevent unauthorized use. The emergency access shall be kept open and maintained at Owner's cost and expense until such time as West Thatcher Lane is construction from Northwest 48th Street to Northwest 46th Street and Northwest 46th Street is extended from the southern boundaries of the Preliminary Plat of Ashley Heights to West Thatcher Lane.

C. West Thatcher Lane and Extension of Northwest 46th Street. Owner agrees, at Owner's cost and expense, to grade West Thatcher Lane from Northwest 48th Street to Northwest 46th Street and Northwest 46th Street from the southern boundaries of the Preliminary Plat of Ashley Heights to its connection with West Thatcher Lane as urban public streets in accordance with the City's design standards and such construction shall be a sufficient width to accommodate future pavement of said streets with curb and gutters. Owner further agrees, at Owner's cost and expense, to gravel West Thatcher Lane and said extension of Northwest 46th Street. West Thatcher Lane and the extension of Northwest 46th Street shall be constructed as two-lane rural streets. Construction of West Thatcher Lane and the extension of Northwest 46th Street shall be completed prior to the approval of a use permit for the B-2 zoned property. In the event the Lincoln Chamber Industrial Development

Corporation and/or Sun-Husker Foods, Inc. or their successors and assigns offer to contribute to the cost of construction of West Thatcher Lane and the extension of Northwest 46th Street in lieu of installing the required improvements in Northwest 45th Street and in the event the City accepts said offer, the City agrees to use such contribution to subsidize Owner's cost to pave West Thatcher Lane and the extension of Northwest 46th Street or to make improvements in Northwest 48th Street between West Thatcher Lane and Adams Street as the City deems appropriate in its sole discretion.

4. Public Sanitary Sewer. Owner understands and acknowledges that the Property will be made sewerable by the construction of a 15-inch sewer main from the 18-inch main located north of the Property south to West Huntington Avenue and the construction of an 8-inch sewer main in West Huntington Avenue and Northwest 45th Street as shown on the Preliminary Plat of Ashley Heights. Owner desires to be connected to public sanitary sewer and therefore agrees to construct the extension of the 15-inch sewer main and the 8-inch sewer mains under the City's executive order process; provided, however, the City agrees to subsidize the cost of such 18-inch over sizing that portion of the 15-inch sewer main over and above the cost of an 8-inch equivalent sewer main upstream from manhole No. 32 as shown on the preliminary plat of Ashley Heights.

5. Water Main. Owner agrees to construct at Owner's cost and expense a six-inch water main in West Thatcher Lane at the same time as West Thatcher Lane is paved.

6. Traffic Impact Study. Owner agrees to complete a traffic impact study acceptable to the Public Works and Utilities Department at Owner's own cost and expense prior to submitting an application for a use permit on the B-2 zoned portion of the Property so that a determination may be made about right-of-way widths and turn lanes to the satisfaction of the Public Works and Utilities Department. The traffic impact study shall reflect Owner's proposed development of the B-2 zoned area and shall specifically include the estimated trip generation and driveway volume for the peak hour.

7. Use Permits. Owner agrees that no use permits shall be issued for use of the B-2 zoned portion of the Property until after Owner has submitted to and the City has approved the traffic impact study referred to in Paragraph 5 above. Owner further agrees to construct the street improvements, if any, identified in the traffic impact study as needed to meet and accommodate the projected adverse effects of the use of the B-2 Planned Neighborhood Business District portion of the Property.

8. Security. Simultaneous with the execution of this agreement by Owner, Owner shall provide the City a bond, escrow, or other security agreement, approved by the City Attorney, as follows:

- a. In the amount of \$180,000 to insure construction of West Adams Street pursuant to paragraph 3A above.

- b. In the amount of \$14,000 to insure construction of the emergency access pursuant to paragraph 3B above.
- c. In the amount of \$50,000 to insure construction of West Thatcher Lane and the extension of Northwest 46th Street pursuant to paragraph 3C above.
- d. In the amount of \$276,000 to insure construction of the 15-inch and 8-inch sewer mains pursuant to paragraph 4 above.
- e. In the amount of \$28,000 to insure construction of the 6-inch water main in West Thatcher Lane.

9. Level of Service and Proposed Land Uses. By acceptance of the construction and/or payment for off-site improvements identified in the traffic impact study, the City in no way warrants or assures any particular level of service on the public streets and roads serving the Property for the development contemplated under the changes of zone.

10. Future Cost Responsibilities. Except as stated herein, it is understood and agreed between the parties. that the provision of the above-described municipal infrastructure improvements and the allocation of cost responsibilities therefor in no way limit the right of the City to impose reasonable conditions or to require reasonable additional dedications, contributions, or construction in conjunction with the approval of future zoning requests, plats and dedications, use permits, special permits, planned unit developments, or community unit plans incorporating therein the Property or any portion thereof which has been subject to annexation or rezoning in conjunction with this Agreement. Such future dedications, contributions and construction may include, but shall not be limited to, local sewers, water mains, paving, trails, detention ponds, storm sewers, or transportation improvements relating to commercial development, including necessary street widening, traffic signals and added turn lanes necessitated, in the opinion of the City, by major commercial development in the area.

11. Essential Nexus. City and Owner agree that the City has a legitimate state interest in the public health, safety, and welfare which is promoted by requiring Owner to pay Owner's fair share of the cost to construct Adams Street and sanitary sewer and to provide for the safe and efficient movement of motor vehicles upon the public street system and that an essential nexus exists between the City's above interest and the conditions placed upon Owner under this Agreement. In addition, the City and Owner have made an individualized determination and agree that the conditions placed upon Owner under this Agreement are related both in nature and extent and are in rough proportionality to the projected adverse effects, full development and operation of the Property under the B-2 Planned Neighborhood Business District, the R-3 Residential District, and the H-4 General Commercial District,

zoning would have on the public sanitary sewer system, water system, and street system that serves the Property.

12. Northwest 45th Street Improvements. City and Owner agree that the necessary improvements in Northwest 45th Street (grading; paving; installation of curb and gutter, curb inlets, and storm drain laterals; the installation of sidewalks; and the planting of street trees) which abuts Lot 1, Block 1, LCIDC Industrial Park, are outside the boundaries of the proposed Preliminary Plat of Ashley Heights, and are the responsibility of the Lincoln Chamber Industrial Development Corporation and Sun-Husker Foods, Inc., or their successors and assigns pursuant to the conditions of approval of the final plat of LCIDC Industrial Park. The City agrees to use its best efforts to require installation of the improvements in Northwest 45th Street. Notwithstanding the above, Owner understands and agrees that the City cannot contract away its police powers and legislative discretion and thus the duty of the City to use its best efforts to require installation of the improvements within Northwest 45th Street does not restrict the City Council for the City from adopting resolutions or ordinances amending the conditions of approval of the final plat of LCIDC Industrial Park to delay or eliminate the construction of improvements within Northwest 45th Street or vacating Northwest 45th Street or otherwise not requiring the Lincoln Chamber Industrial Development Corporation and/or Sun-Husker Foods, Inc., or their successors and assigns, to install such improvements.

13. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, devisees, personal representatives, successors and assigns and shall inure to and run with the Property.

14. Amendments. This Agreement may only be amended or modified in writing signed by the parties to this Agreement.

15. Further Assurances. Each party will use its best and reasonable efforts to successfully carry out and complete each task, covenant, and obligation as stated herein. Each of the parties shall cooperate in good faith with the other and shall do any and all acts and execute, acknowledge, and deliver any and all documents so requested in order to satisfy the conditions set forth herein and carry out the intent and purposes of this Agreement.

16. Governing Law. All aspects of this Agreement shall be governed by the laws of the State of Nebraska. The invalidity of any portion of this Agreement shall not invalidate the remaining provisions.

17. Interpretations. Any uncertainty or ambiguity existing herein shall not be interpreted against either party because such party prepared any portion of this Agreement, but shall be interpreted according to the application of rules of interpretation of contracts generally.

18. Construction. Whenever used herein, including acknowledgments, the singular shall be construed to include the plural, the plural the singular, and the use of any gender shall be construed to include and be applicable to all genders as the context shall warrant.

19. Relationship of Parties. Neither the method of computation of funding or any other provisions contained in this Agreement or any acts of any party shall be deemed or construed by the City, Owner, or by any third person to create the relationship of partnership or of joint venture or of any association between the parties other than the contractual relationship stated in this Agreement.

20. Assignment. In the case of the assignment of this Agreement by any of the parties, prompt written notice shall be given to the other parties who shall at the time of such notice be furnished with a duplicate of such assignment by such assignor. Any such assignment shall not terminate the liability of the assignor to perform its obligations hereunder, unless a specific release in writing is given and signed by the other parties to this Agreement.

21. Default. Owner and City agree that the annexation and changes of zone promote the public health, safety, and welfare so long as Owner fulfills all of the conditions and responsibilities set forth in this Agreement. In the event Owner defaults in fulfilling any of its covenants and responsibilities as set forth in this Agreement, the City may in its legislative authority rezone the Property to its previously designations or such other designations as the City may deem appropriate under the then existing circumstances, or take such other remedies, legal or equitable, which the City may have to enforce this Agreement or to obtain damages for its breach.

22. Recordation. This Agreement shall be filed in the Office of the Register of Deeds of Lancaster County, Nebraska at Owner's cost and expense.

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

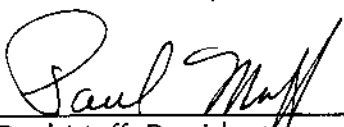
ATTEST:

  
\_\_\_\_\_  
Joan E. Ross  
City Clerk

THE CITY OF LINCOLN, NEBRASKA  
A Municipal Corporation

By:   
\_\_\_\_\_  
Don Wesely, Mayor

M & S CONSTRUCTION,  
A Nebraska Corporation

By:   
\_\_\_\_\_  
Paul Muff, President



