

B. **Water System Impact Fee Facility Contribution.** Owner agrees to contribute \$111,124 toward the cost of making *Impact Fee Facility Improvements to the City's Water System Impact Fee Facilities* attributable to the proposed development of the Property.

C. **Wastewater Impact Fee Facility Contribution.** Owner agrees to contribute \$90,003 toward the cost of making *Impact Fee Facility Improvements to the City's Wastewater Impact Fee Facilities* attributable to the proposed development of the Property.

D. **Neighborhood Park and Trail Impact Fee Facility Contribution.** Owner agrees to contribute \$45,482 toward the cost of making *Impact Fee Facility Improvements to the City's Neighborhood Park and Trail Impact Fee Facilities* attributable to the proposed development of the Property.

E. **Arterial Street Impact Fee Facility Contribution.** Owner agrees to contribute \$295,304 toward the cost of making *Impact Fee Facility Improvements to the City's Arterial Street Impact Fee Facilities* attributable to the proposed development of the Property.

The Contributions for the above-described *Impact Fee Facility Improvements* reflect the amounts attributable to 100% development of the proposed development of the Property in 2004 based upon the 2004 Impact Fee Schedules for said Impact Fee Facilities.

**5. Future Cost Responsibilities.** Owner understands and acknowledges that the *Site-Related Street Improvements* to be paid for or constructed by Owner under paragraph 3 of this Agreement are *Site-Related Improvements* as opposed to *Impact Fee Facility Improvements* as defined in the Impact Fee Ordinance. Owner further understands and acknowledges that the *Impact Fee Facility Contributions* by Owner under paragraph 4 of this Agreement do not address all the impacts the proposed development of the Property will have on the City's *Impact Fee Facilities* as set forth in the *Impact Fee Study* prepared by Duncan Associates dated October, 2002. Therefore, Owner understands and agrees that the proposed development of the Property shall be subject to the payment of impact fees.

The Owner further agrees that, by making the *Site-Related Street Improvements* outlined in paragraph 3 of this Agreement, Owner shall not be relieved of any future obligation to dedicate land for, contribute to the cost of construction of, or to construct additional site-related public facilities or improvements which are attributable to proposed

changes in land use, zoning, or intensity of development which have the effect of causing the need for additional site-related improvements in the immediate area of such development.

**6. Payment of Contributions.**

A. Arterial Street Contribution. Owner shall, prior to the approval of each final plat of the Property, pay to the City a proportionate share of the Arterial Street Impact Fee Facility Contribution attributable to full development of the lots within each final plat compared to the approved full development of the Property under this Agreement. Notwithstanding the above, Owner's entire payment of the Arterial Street Impact Fee Facility Contribution shall be made to the City within thirty days following written notice from the City that the City has awarded a bid and entered into a contract for the improvement of North 14th Street abutting the Property to a suburban cross section.

B. Water Distribution, Water System, Wastewater, and Neighborhood Park & Trail Impact Fee Facility Contribution. Owner shall, prior to the approval of each final plat of the Property, pay to the City a proportionate share of the Water Distribution, Water System, Wastewater, and Neighborhood Park & Trail Impact Fee Facility Contribution attributable to full development of the lots within each final plat compared to the approved full development of the Property under this Agreement.

C. Refund of Contribution. Notwithstanding subparagraphs A and B above, the City agrees to refund Owner for each contribution paid for an Impact Fee Facility Improvement with interest at the rate earned by the City if such contribution has not been spent or encumbered within eight years after the date on which the contribution was paid.

**7. Reimbursement of Impact Fee Facility Contributions.** In the event a contribution paid for Impact Fee Facility Improvements described in paragraph 6A and 6B above has been spent or encumbered within eight years after the date on which the contribution was paid, the City agrees to reimburse Owner for said Contributions for the Impact Fee Facility Improvements with interest at the same rate earned by the City, subject to the following conditions: (1) each type of reimbursement shall be repaid from the corresponding impact fees imposed against the entire development of the Property; (2) in no event shall reimbursement exceed the impact fees that would otherwise be due for the entire development of the

Property; (3) Owner shall not be entitled to any reimbursement of said contribution in excess of impact fees actually received; (4) any reimbursement to be paid from such impact fees shall not constitute a general obligation or debt of the City; and (5) no reimbursement shall be made prior to and unless the Impact Fee Ordinance is finally determined to be valid and enforceable.

8. **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.

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

10. **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.

11. **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.

12. **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.

13. **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.

14. **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.

15. **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.

16. **Default.** Owner and City agree that the annexation, change of zone, and preliminary plat 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 Rezoned Property to its previous designation 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.

17. **Definitions.** For purposes of this Agreement, the words and phrases "cost" or "entire cost" of a type of improvement shall be deemed to include all design and engineering fees, testing expenses, construction costs, publication costs, financing costs, and related miscellaneous costs. For the purposes of this Agreement the words and phrases "building permit", "development", "Impact Fee Facility", "Impact Fee Facility Improvement", and "site-related improvements" shall have the same meaning as provided for said words and phrases in the Impact Fee Ordinance.

18. **Fair Share.** Owner and City agree that the City has a legitimate interest in the public health, safety and welfare and in providing for the safe and efficient movement of vehicles on the public arterial streets and the provision of adequate water and wastewater service an adequate neighborhood parks and trails as provided for in the Impact Fee Ordinance which is promoted by requiring Owner to pay its fair share of the cost to construct such Impact Fee Facilities and that an essential nexus exists between the City's legitimate interests and the conditions placed upon Owner under this Agreement. In addition, 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 of the Property under the annexation, Pinecrest Preliminary Plat, and Pinecrest Community Unit Plan would have on the City's Impact Fee Facilities.

**19. Reservation of Rights and Waivers.** Notwithstanding any other provision of this Agreement, Owner reserves the right to sue the City to determine the validity of the provisions of this Agreement which relate to Impact Fee Facilities. No provision of this Agreement which recites Owner's agreement to be subject to payment of impact fees, or acknowledges that Impact Fee Facility Contributions required by this Agreement do not address all the impacts the proposed development of the Property will have on Impact Fee Facilities, or any of the provisions of paragraph 18, shall have the effect of waiving Owner's rights to a judicial determination of the essential nexus, rough proportionality or other issue of federal or state constitutionality of such requirements and/or the procedure by which Owner's applications were approved, or the validity of such requirements under the Statutes of Nebraska, the Lincoln City Charter, or Lincoln Municipal Code. In consideration of the foregoing reservation of rights, and notwithstanding such reservation, Owner releases and discharges the City, all past, present and future members of the City Council of the City, in their official and individual capacities, the past or present Mayor or any department director, and all other officers agents, and employees of the City in their official and individual capacities from any and all causes of action for money damages, penalties or attorneys fees which Owner may now have with respect to or arising from Owner's request for annexation and applications for special permit and preliminary plat permit approval described in Recitals A, B, and C of this Agreement and the City's negotiations, considerations and actions taken thereon, including but not limited to: a) claims for violation of Owner's rights under the United States Constitution, under 42 U.S.C. section 1983 and attorneys fees under 42 U.S.C. section 1988; b) claims for just compensation for a temporary taking of the Property pursuant to the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Nebraska Constitution; and c) claims under the City's home rule charter, ordinances and regulations.

**20. Recordation.** This Agreement or a memorandum thereof shall be filed in the Office of the Register of Deeds of Lancaster County, Nebraska at Owner's cost and expense.

**AMENDMENT TO 03R-123 RESOLUTION NO. A-82140**

To be inserted at the end of Section 19:

City acknowledges that City had included substantially identical provisions regarding Impact Fee Facilities in other "Conditional Annexation and Zoning Agreements" which also included this reservation of rights to sue the City to determine the validity of such provisions. If a lawsuit is brought challenging such provisions under any other "Conditional Annexation and Zoning Agreement" and the provisions in such agreement which relate to Impact Fee Facilities are held invalid due to lack of authority to require such provisions in exchange for annexation and/or the change of zone, the City agrees that Owner shall be entitled to the benefit of such judgment without the necessity of bringing a separate lawsuit challenging the Impact Fee Facility provisions in this Agreement.

