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Introduce: 2-7-05

RESOLUTION NO. A- 83227

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

That the agreement titled Anderson's Place Conditional Annexation and Zoning Agreement, which is attached hereto, marked as Attachment "A" and made a part hereof by reference, between the City of Lincoln and Scott C. Anderson ("Owner"), outlining certain conditions and understandings relating to the annexation of approximately 19.41 acres of property generally located south of Leighton Avenue and east of North 84th Street, is approved.

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

BE IT FURTHER RESOLVED that the City Clerk is directed to return two fully executed copies of this Agreement to Rick Peo, Chief Assistant City Attorney, for distribution to the Owner.

BE IT FURTHER RESOLVED that the City Clerk is directed to record the Annexation Agreement or a summary memorandum thereof with the Register of Deeds, filing fees to be paid by the Owner.

Introduced by:

Jonathan Cook

AYES: Camp, Cook, Friendt,  
McRoy, Newman, Svoboda,  
Werner; NAYS: None.

Approved as to Form and Legality:

[Signature]  
City Attorney

Approved this 2nd day of March, 2005:  
[Signature]  
Mayor

**ADOPTED**  
FEB 28 2005  
BY CITY COUNCIL

**ANDERSON'S PLACE**  
**CONDITIONAL ANNEXATION AND ZONING AGREEMENT**

This Anderson's Place Conditional Annexation and Zoning Agreement ("Agreement") is made and entered into this 2<sup>nd</sup> day of March, 2005, by and between **Scott C. Anderson**, a single person, hereinafter referred to as "Owner," and the **City of Lincoln, Nebraska**, a municipal corporation, hereinafter referred to as "City."

**RECITALS**

A. Owner has requested the City to annex approximately 19.409 acres more or less of land generally located south of Leighton Avenue and east of North 84th Street. The approximately 19.409 acres is hereinafter referred to as the "Property" and is legally described as:

Lot 100, Irregular Tracts, located in the Southwest Quarter of Section 14, Township 10 North, Range 7 East of the 6th P.M., Lancaster County, Nebraska, and more particularly described as follows:

Commencing at the west quarter corner of Section 14, Township 10 North, Range 7 East of the 6th P.M.; thence south 89 degrees 24 minutes 54 seconds east (an assumed bearing) on the north line of the Southwest Quarter, a distance of 1326.42 feet to a found 5/8" rebar for the north 1/16 corner of the Southwest Quarter; thence south 00 degrees 02 minutes 38 seconds west, on the west line of Lot 10, I.T. extended, a distance of 33.00 feet, to the northwest corner of Lot 10 I.T., and the POINT OF BEGINNING; thence continuing on the previous bearing of south 00 degrees 02 minutes 38 seconds west, on the east line of said Lot 100 I.T., a distance of 675.99 feet to the northeast corner of Morning Glory Estates Addition; thence south 89 degrees 57 minutes 47 seconds west, on the north line of said Addition, a distance of 1235.35 feet to the northwest corner of Morning Glory Estates Addition, said point being on the east right-of-way of North 84th Street; thence north 00 degrees 02 minutes 13 seconds west on the east right-of-way of North 84th Street, a distance of 105.38 feet; thence north 00 degrees 59 minutes 41 seconds west, on said right-of-way, a distance of 299.12 feet; thence north 00 degrees 02 minutes 13 seconds west, on the east right-of-way of North 84th Street, a distance of 245.00 feet; thence north 26 degrees 39 minutes 06 seconds east on the southeasterly right-of-way of North 84th Street, a distance of 44.53 feet to a point on the south right-of-way of Leighton Avenue; thence south 89 degrees 24 minutes 55 seconds east on said south right-of-way, a distance of 1221.36 feet to

the POINT OF BEGINNING, and containing a calculated area of 845,456.48 square feet or 19.409 acres more or less.

B. Owner has requested the City to approve Special Permit No. 04009 for 86,120 square feet of floor area for planned service commercial.

C. Owner has requested the City to approve Change of Zone No. 04011 rezoning the Property from AG Agriculture District to R-3 Residential District and H-3 Highway Commercial District.

D. The City has adopted Ordinance No. 18113, hereinafter referred to as the "Impact Fee Ordinance" based upon an Impact Fee Study prepared by Duncan Associates dated October, 2002, that went into effect on June 2, 2003. This Impact Fee Ordinance enables the City to impose a proportionate share of the cost of improvements to the water and wastewater systems arterial streets and neighborhood parks and trails necessitated by and attributable to new development.

E. A Complaint for Declaratory and Injunctive Relief has been filed in the District Court of Lancaster County, Nebraska. This Complaint prays for judgment of the district court declaring the Impact Fee Ordinance invalid and unenforceable and for injunctive relief enjoining the imposition of impact fees.

F. Pursuant to the Conditional Annexation and Zoning Agreement for Regent Heights 1st Addition and Northern Lights Addition (Regent Heights Agreement), the City and the developers of Regent Heights 1st Addition and Northern Lights Addition constructed certain sanitary sewer trunk lines (hereinafter "Sewer A" and "Sewer B") to sewer 254 acres of land within the preliminary plat of Regent Heights 1st Addition and Northern Lights Addition. Said Sewer A and Sewer B can also sewer 746 acres of land outside of the boundaries of the preliminary plat for Regent Heights 1st Addition and Northern Lights Addition, including the Property.

G. In the Regent Heights Agreement, the City agreed to charge owners of land outside the boundaries of the preliminary plats for Regent Heights 1st Addition and Northern Lights Addition who benefit from the extension of Sewer A and Sewer B into an entirely new area, including the Property, a fair share of the cost of Sewer A and Sewer B based upon a per-acre formula or some other fair share formula approved by the City.

H. Resolution No. A-79736 adopted by the City Council of the City of Lincoln on September 20, 1999 established a connection fee of \$1570.00 per acre for those other property owners whose land is included within the 746 acres of land outside the preliminary plats for Regent Heights 1st Addition and Northern Lights Addition and sewerable by Sewer A and Sewer B.

I. Pursuant to the Conditional Annexation and Zoning Agreement for Prairie Village (Prairie Village Agreement), the City and developers agreed to construct a 16-inch water main approximately 964 lineal feet in length from the west side of 84th Street to the east side of 87th Street and a 12-inch water main approximately 400 lineal feet in length in Leighton Avenue from the east side of 87th Street east which would provide water to the land within the preliminary plat of Prairie Village. Said water mains can also provide water to land outside the boundaries to the preliminary plat of Prairie Village, including the Property. The 16-inch water main has been constructed and 33 feet of the 12-inch main has been stubbed to the east.

J. In the Prairie Village Agreement, the City agreed to charge owners of land outside the boundaries of the preliminary plat for Prairie Village Addition who connect to the 16-inch water main and/or 12-inch water main one-half the cost of an 8-inch water main for the portion of the main that abuts commercial uses and one-half the cost of a 6-inch water main for the portion of the main that abuts residential uses.

K. The City is willing to annex the Property as requested by Owner provided Owner agrees (1) to contribute \$30,472.13 as Owner's fair share of the cost to construct Sewer A and Sewer B based upon the cost of \$1,570. per acre times 19.409 acres being annexed and (2) to pay a water connection fee for connecting to the existing 16-inch water main in Leighton Avenue as described in Recital J above.

L. The City is willing to annex the Property, grant the special permit, grant the use permit and approve the change of zone as requested by Owner, prior to a determination as to the validity and enforceability of the Impact Fee Ordinance, provided Owner agrees to make a guaranteed nonrefundable contribution to the cost of improving the City's Water System, Water Distribution, Wastewater System, Neighborhood Park & Trail, and Arterial Street Impact Fee Facilities necessitated by and attributable to the proposed development of the Property in the event the Impact Fee Ordinance is held invalid or is otherwise unenforceable.

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. **Special Permit.** The City agrees to approve Special Permit No. 04009 for 86,120 square feet of commercial floor area for planned service commercial.
3. **Change of Zone 04011.** The City agrees to approve Change of Zone No. 04011.
4. **Contributions for Impact Fee Facility Improvements.**

A. Water Distribution Impact Fee Facility Contribution. Owner agrees to contribute \$25,338.00 toward the cost of making Impact Fee Facility Improvements to the City's Water Distribution Impact Fee Facilities attributable to the proposed development of the Property. However, the City understands and acknowledges that Owner will be paying a connection fee ("Connection Fee") to connect to the 16-inch water main in Leighton Avenue as provided in paragraph 6 below. The City agrees that the 16-inch water main is a Water Distribution Impact Fee Facility, and that the Connection Fee qualifies as a Water Distribution Impact Fee Facility Contribution. The City further agrees Owner may apply the amount of the Connection Fee toward satisfaction of the above Water Distribution Impact Fee Facility Contribution. In addition, in the event that the Impact Fee Ordinance is finally determined to be valid and enforceable, the City agrees to reimburse Owner for said Connection Fee subject to the following conditions: (1) the reimbursement shall be repaid from water distribution impact fees collected from the same benefit district the Property is located in; (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 the Connection Fee in excess of impact fees actually received from development of the Property; (4) any reimbursement to be paid from 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. The 12-inch water main in Leighton Avenue is not a Water Distribution Impact Fee Facility Improvement.

B. Water System Impact Fee Facility Contribution. Owner agrees to contribute \$40,836.00 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 \$32,718.00 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. However, the City understands and acknowledges that Owner will be paying a connection fee ("Connection Fee") to connect to Sewer A and Sewer B as provided in paragraph 5 below. The City agrees that Sewer A and Sewer B are a Wastewater Impact Fee Facility, and that the Connection Fee qualifies as Wastewater Impact Fee Facility Contribution. The City further agrees Owner may apply the amount of the Connection Fee toward satisfaction of the above Wastewater Impact Fee Facility Contribution. In addition, in the event that the Impact Fee Ordinance is finally determined to be valid and enforceable, the City agrees to reimburse Owner for said Connection Fee subject to the following conditions: (1) the reimbursement shall be repaid from wastewater impact fees collected from the same benefit district the Property is located in; (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 the Connection Fee in excess of impact fees actually received from development of the Property; (4) any reimbursement to be paid from 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.

D. **Neighborhood Park and Trail Impact Fee Facility Contribution.** Owner agrees to contribute \$12,855.00 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 \$197,016.53 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 2005 based upon the 2005 Impact Fee Schedules for said Impact Fee Facilities.

5. **Sewer A and Sewer B Connection Fee.** Owner understands and acknowledges that the Property was made sewerable by the construction of Sewer A and Sewer B described in Recital F above and that Owner did not participate in, nor contribute Owner's fair share of the cost of

construction of Sewer A and Sewer B to serve the Property. Owner therefore agrees to pay prior to annexation a connection fee of \$1,570.00 per acre times the 19.409 acres being annexed for a total connection fee of \$30,472.13.

6. **Water Main Connection Fee.** Owner understands and acknowledges that portion of the Property to be zoned commercial was provided water service by the construction of the 16-inch water main in Leighton Avenue described in Recital I above and that Owner did not participate in, nor contribute Owner's fair share of the cost of construction of the 16-inch water main. Owner therefore agrees, prior to connection to the 16-inch water main, to pay a connection fee of \$18,000 which is equal to one-half the equivalent cost of an 8-inch water main for the portion of the main abutting the H-3 Highway Commercial District.

7. **12-Inch Water Main.** Owner understands and acknowledges that the 12-inch water main in Leighton Avenue will need to be extended east approximately 370 feet to provide water service to that portion of the property zoned residential. Owner agrees that Owner shall be responsible to pay toward construction of said water main a connection fee equal to the equivalent cost of a 6-inch water main which is estimated to be \$15.00 per lineal foot. Said connection fee shall be paid prior to Owner connecting to the 12-inch water main.

8. **Site-Related Street Improvements.**

A. Left-turn Lane. Owner agrees that Owner shall at his own cost and expense design and lengthen the south-to-east southbound left turn lane in 84th Street at its approach to Leighton Avenue to 250 feet. Owner further agrees at his own cost and expense to design and construct a 250-foot left-turn lane in Leighton Avenue at its approach to 84th Street.

9. **Restrictions on Development.** Owner agrees that Leighton Avenue abutting the Property must be improved to urban standards through the creation and adoption of a paving district as provided for in the Prairie Village Agreement or through the executive order process before the City will approve any final plat of Anderson's Place.

10. **Future Cost Responsibilities.** Owner understands and acknowledges that it is the City's position 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 that the proposed development of the Property shall be subject to the payment of impact fees.

**11. Guaranteed Payment of Contributions.**

A. Water Distribution, Water System, Wastewater, Neighborhood Park & Trail, and Arterial Street Impact Fee Facility Contributions. (1) Owner shall, prior to the approval of each final plat of the Property zoned residential, provide the City a bond, escrow, letter of credit, or other security agreement approved by the City Attorney in an amount equal to a proportionate share of the Water Distribution, Water System, Wastewater, Neighborhood Park & Trail, and Arterial Street Impact Fee Facility Contributions attributable to full development of the residential lots within each final plat compared to the approved full residential development of the Property under this Agreement. (2) Owner shall, prior to approval of the first final plat of the Property zoned commercial, provide the City a bond, escrow, letter of credit or other security agreement approved by the City Attorney equal to the full amount of the Water Distribution, Water System, Wastewater, and Arterial Street Impact Fee Facility contributions attributable to full commercial development of the Property under this Agreement. Notwithstanding the above, the amount of the bond, escrow letter of credit, or other security agreement for the Water Distribution and Wastewater Impact Fee Facility Improvement Contributions may be reduced by the amount of the Connection Fee provided for in paragraph 4A and paragraph 5 above, respectively.

Except as required in paragraph 4A above, the above required payments of the Water Distribution, Water System, Wastewater, Neighborhood Park & Trail, and Arterial Street Impact Fee Facility Contributions shall be paid to City within thirty days written notice from the City that the following two events have occurred: (i) the City has constructed or awarded a bid and entered into a contract for the improvement of an eligible Water Distribution, Water System, Wastewater, Neighborhood Park and Trail, and/or Arterial Street Impact Fee Facility Improvement, and (ii) a final judgment of a court of competent jurisdiction has declared the Impact Fee Ordinance invalid and unenforceable.

B. In the event a final judgment of a court of competent jurisdiction has declared the Impact Fee Ordinance valid and enforceable, the City agrees to release the bond, escrow, letter of credit, or other security agreement provided by Owner to guarantee the above-described Contributions.



12. **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.

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

14. **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.

15. **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.

16. **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.

17. **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.

18. **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.

19. **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.

20. **Default.** Owner and City agree that the annexation, special permit, and change 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 rescind said special permit and 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.

**21. 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.

**22. Fair Share.** The City believes that it 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 and adequate neighborhood parks and trails as provided for in the Impact Fee Ordinance which is promoted by requiring Owner to pay his 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 has made an individualized determination and found 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 and Special Permit No. 04009 and Change of Zone No. 004011 would have on the City's Impact Fee Facilities.

**23. 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 understanding that Owner's development will 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, 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 change of zone 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.

City acknowledges that City has 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, special permit, use permit 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, provided that the statute of limitations in which to bring said lawsuit has not expired.

**24. 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.

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

