

**NORTH BANK JUNCTION
CONDITIONAL ANNEXATION AND ZONING AGREEMENT**

This North Bank Junction Conditional Annexation and Zoning Agreement ("Agreement") is made and entered into this _____ day of _____, 2004, by and between **Roger and Eldonna Schwisow**, husband and wife, hereinafter collectively referred to as "Schwisow", and **Hartland Homes, Inc.**, a Nebraska corporation, hereinafter referred to as "Hartland" [Hartland and Schwisow are collectively referred to as "Owners"] and the **City of Lincoln, Nebraska**, a municipal corporation, hereinafter referred to as "City."

RECITALS

A. Owners have requested the City to annex approximately 214.69 acres more or less of land generally located as lying within an area north of Salt Creek on the south to the south line of Arbor Road on the north and from one-half mile west of North 56th Street on the west to North 56th Street on the east. The approximately 214.69 acres is hereinafter referred to as the "Property" and is legally described as:

Lot 2, Finigan Brothers Addition located in the Southeast Quarter of Section 29, and Lots 7, 10, 11, 20 and 21 I.T., located in the East Half of Section 32, all located in Township 11 North Range 7 East of the 6th P.M., Lancaster County, Nebraska, containing 214 acres, more or less;

B. Owners have requested the City to approve Preliminary Plat No. 03004 for North Bank Junction.

C. Owners have requested the City to approve Special Permit No. 2004 for a 125,000 square foot planned service commercial development.

D. Owners have requested the City to approve Change of Zone No. 3398 to rezone the Property from AG Agricultural District to R-3 Residential District and H-4 Highway Commercial District.

E. 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.

F. 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.

G. The City is willing to annex the Property, approve the preliminary plat, grant the special permit for the planned service commercial center, and approve the change of zone as requested by Owners, prior to a determination as to the validity and enforceability of the Impact Fee Ordinance, provided Owners agree to make certain site-related improvements to the public street system, agree to delay or limit development of the Property until such time as adequate arterial streets, water system water distribution, and wastewater system impact fee facility improvements are available to serve the Property, and agree to contribute to the cost of improving the City's Impact Fee Facilities necessitated by and attributable to future development of the Property.

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

1. **City Approvals**. The City agrees to annex the Property, grant the preliminary plat, grant Special Permit No. 2004, and approve Change of Zone No. 3398.

2. **Restriction on Development**.

(a) **Secondary Access**. Owners understand agree that Owners shall be limited to a maximum of 40 occupancy permits for residential dwellings until such time as Owners, at Owners' own cost and expense, construct a permanent second access to the R-3 Residential District portion of the Property from either Arbor Road or North 56th Street.

(b) **Pavement of Arbor Road**. Owners agree that there will be no intersecting street access to Arbor Road west of North 56th Street where it is now gravel and no buildable lots will be created abutting that portion of Arbor Road until such time as Arbor Road is constructed and paved as a county section line road as provided in paragraph 4(b) below.

3. **Traffic Study.** Owners agree to complete a traffic impact study acceptable to the City's Department of Public Works and Utilities at Owners' own cost and expense prior to submitting an application to final plat any portion of the Property zoned H-4 Highway Commercial District so that a determination may be made about right-of-way widths, turn lanes and signalization of intersections to the reasonable satisfaction of the Department of Public Works and Utilities. The traffic impact study shall reflect Owners' proposed development of the H-4 zoned area and Owners' future commercial development north of Alvo Road and shall specifically include the estimated trip generation and driveway volume for the peak hour.

4. **Site-Related Street Improvements.** The City and Owners covenant and agree that the Owners shall be responsible for the following site-related street improvements:

(a) **Pavement of Arbor Road.** Owners agree at Owners' own cost and expense to grade to City standards that portion of Arbor Road west of North 56th Street where it is now gravel to its full 120-foot width expanding to 130 feet at arterial street intersections to City standards and to construct two lanes of temporary pavement paved with asphalt shifted to one side or the other from the centerline of the right-of-way in order to allow the City to come back later and construct the other two lanes with permanent concrete paving on the other side of the right-of-way. The temporary widening and asphalt paving of the existing Arbor Road rural cross section shall provide left-turn lanes at all intersections at a length acceptable to the City's Department of Public Works and Utilities. Owners further agree that this work shall be completed based on the time frame specified in paragraph 2 above. Owners further agree that there will be no intersecting street access to Arbor Road west of North 56th Street where it is now gravel until such work has been completed by the Owners. If the full 120-foot right-of-way (130 feet at arterial street intersections) is not available, Owners shall grade the existing right-of-way to the fullest extent possible as approved by the Department of Public Works and Utilities.

(b) **Construction of right turn lanes in North 56th Street.** Schwisow agrees, at Schwisow's own cost and expense, to construct a right turn lane in North 56th Street at its intersection with Alvo Road at a length and width determined by the Traffic Study. Hartland agrees, at Hartland's own cost and expense, to construct a right-turn lane in North 56th Street at its intersection with Northbank Drive at a length and width determined by the traffic study.

Owners understand and agree that Owners shall not be entitled to any reimbursement from the City for the cost to construct such temporary widening of Arbor Road or construct right turn lanes in North 56th Street as provided in subparagraphs (a) and (b) above, provided the right-turn lanes are required to address the traffic generated by the use of the Permit.

5. Maintenance Responsibility of Roadway and Ditches. Owners understand that Arbor Road is a gravel and/or paved two-lane county section road and does not meet City of Lincoln standard specifications for street construction. The City is not, as a condition of annexation, requiring the immediate upgrading of Arbor Road to meet City standards, provided Hartland agrees, at Hartland's own cost and expense, to perform the following responsibilities with respect to this street:

(a) General maintenance, i.e. mowing and keeping ditches and driveway pipe free of obstruction, shall be the responsibility of Hartland. This responsibility shall extend to and include that portion of the public right-of-way from the edge of pavement to the right-of-way line.

(b) Should Hartland neglect or be negligent in performing the general maintenance of driveway, driveway pipes and ditches that is required and damages occur to the public roadway or the adjacent property, that Hartland shall be responsible for all damages and liabilities that occur.

(c) When it is determined by the Public Works and Utilities Department that a driveway pipe or pipes has deteriorated or been damaged to a point that replacement is required, Hartland shall replace said driveway pipe within one week of notification or bear the cost of said replacement.

(d) Hartland's maintenance responsibility for roadway and ditches in subparagraph (a) above shall terminate when Arbor Road is constructed with curb and gutter.

6. Conveyance of Right-of-Way. Hartland and Schwisow agree to convey, at no cost to the City, the additional right-of-way for Arbor Road adjacent to the Property to provide 60 feet of right-of-way from the centerline of the roadway.

7. Public Sanitary Sewer.

(a) New Trunk Sewer and Force Main. Owners understand and acknowledge that the Property is not presently serviced by the City's public sanitary sewer system and that in order to make the Property sewerable, a new sanitary sewer trunk needs to be constructed on the north side of Salt Creek with a siphon crossing to the south side of Salt Creek at approximately 68th Street then connected to the existing 60-inch trunk sewer at Holland Road. Owners further understand that the City's fiscal year 2004/2005 six-year capital improvement program does not show funding for the design and construction of this sanitary sewer until years three, four and five of the six-year plan. The City agrees to use its best efforts to construct this sanitary sewer on or before December 31, 2007. However, said best efforts are contingent upon the City Council approving future rate increases: 7% in fiscal year 2004/2005; 7% in fiscal year 2005/2006; 3% in fiscal year 2006/2007; and 3% in fiscal year 2007/2008. For that reason, Owners agree that if Owners desire to be connected to the public sanitary sewer prior to construction of the same by the City, Owners shall construct said siphon and sanitary sewer trunks and mains including acquisition of required right-of-way and easements by executive order construction at Owners' own cost and expense, except that City agrees to reimburse Owners for Owners' cost as provided in paragraph 13 of this Agreement.

(b) Temporary Lift Station and Force Main. Notwithstanding (a) above, if the City Council approves a waiver to the City's Sanitary Sewer Design Standards, Owners may, at Owners' own cost and expense, make the Property sewerable by constructing the following temporary, non-reimbursable privately-owned improvements connecting to the City's public sanitary sewer system: Construct a lift station abutting 56th Street on the north side of Salt Creek and pump wastewater through a force main located in 56th Street right-of-way to the existing 60-inch trunk sewer at Holland Road.

Owners shall, at Owners' own cost and expense, obtain all easements needed to complete the force main and lift station and to connect to the City's sanitary sewer system in the future. The temporary lift station and force main shall be designed and constructed to the satisfaction of the City. The Owners shall retain the City to operate, maintain, and service the

temporary lift station and force main, and said cost shall be borne solely by the Owners and may not be transferred to a homeowners association.

When the new trunk sewer and force main described in (a) above are available to be connected to, Owners shall, at Owners' own cost and expense, properly close, abandon, and remove the lift station. Owners shall have full salvage rights to the lift station building, equipment, and land after the station is closed. In addition, Owners shall, at Owners' own cost and expense, properly abandon the force main and restore property in or adjacent to the easement for the force main.

(b) **Operation and Maintenance Bond.** Owners shall provide the City with a bond, escrow, or security agreement approved by the City Law Department in an amount sufficient to guarantee five years of operating costs for the temporary force main and lift station.

(c) **Conveyance of Easement for Sanitary Sewer.** Owners agree to convey, at no cost to the City, a permanent 100-foot wide sanitary sewer easement to construct a future parallel sanitary sewer to serve this area as shown on the preliminary plat.

8. Public Water Main.

Owners understand and acknowledge that the Property is not presently serviceable with water from the City's public water system and that, in order to provide water service, a 24-inch water main needs to be constructed in North 56th Street from Fletcher Avenue to Alvo Road. Owners further understand that year one of the City's fiscal year 2004/2005 six-year capital improvement program shows funding for the design of these water mains and construction is shown in year two of the six-year plan. For that reason, Owners agree that, if Owners desire to be connected to the public water system prior to the City's construction of said water mains, Owners shall construct the above water mains by executive order construction at Owners' own cost and expense, except that City agrees to reimburse Owners for Owners' cost as provided in paragraph 13 of this Agreement.

9. Contributions for Impact Fee Facility Improvements.

(a) **Water Distribution Impact Fee Facility Contribution.** Owners agree to contribute \$129,532.67 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.

(b) Water System Impact Fee Facility Contribution. Owners agree to contribute \$208,967.33 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. Owners agree to contribute \$169,250.00 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.

(d) Neighborhood Park and Trail Impact Fee Facility Contribution. Owners agree to contribute \$70,756.00 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. Owners agree to contribute \$700,169.00 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.

10. Dedication of Park Land in Lieu of Neighborhood Park and Trail Impact Fee Facility Contribution. Notwithstanding paragraph 9(d) above, the Owners shall, prior to the approval of any final plat of North Bank Junction, identify a potential 2.01 acre park site satisfactory to the City's Department of Parks and Recreation and, if requested by the City, the Owners shall dedicate the same to the City in accordance with Lincoln Municipal Code §26.23.160. In the event the City elects to require Owners to dedicate the park land, the City agrees to release Owners from their obligation to make the Neighborhood Park and Trail Impact Fee Facility Contribution and to guarantee payment of said contribution as provided in paragraphs 9(d) and 12(a) hereof.

11. Future Cost Responsibilities. Owners understand and acknowledge that the Site-Related Street Improvements to be paid for or constructed by Owners under paragraph 4 of

this Agreement are Site-Related Improvements as opposed to Impact Fee Facility Improvements as defined in the Impact Fee Ordinance. Owners further understand and acknowledge that it is the City's position that any executive order construction of the sanitary sewer and/or water mains by Owners under paragraphs 7 and 8 of this Agreement do not address all the impacts future development of the Property will have on the City's water and wastewater impact fee facilities as set forth in the Impact Fee Study prepared by Duncan Associates dated October, 2002. Therefore, Owners understand that future development of the Property shall be subject to the payment of impact fees.

The Owners further agree that, by making the Site-Related Street Improvements and the conveyance of right-of-way outlined in paragraphs 4 and 6 of this Agreement, respectively, Owners 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 will have the effect of causing the need for additional site-related improvements in the immediate area of such development.

12. Guaranteed Payment of Contributions.

(a) Water Distribution, Water System, Wastewater, Neighborhood Park and Trail, and Arterial Street Impact Fee Facility Contributions. Owners shall, prior to the approval of each final plat of the Property, 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 and Trail, and Arterial Street Impact Fee Facility Contributions attributable to full development of the lots within each final plat compared to the approved full development of the Property under this Agreement. Owners' proportionate payments of the Water Distribution, Water System, Wastewater, Neighborhood Park and 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 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 Owners to guarantee the above-described Contributions.

13. Reimbursement for Executive Order Construction of Impact Fee Facility Improvements. In the event the Owners construct by executive order construction any portion of the sanitary sewer and/or water mains described in paragraphs 7 and 8 of this Agreement, the City agrees to use its best efforts to reimburse Owners for said costs by no later than the end of the City's fiscal year 2007-2008 (except for the City's fixed fee for engineering services) in excess of Owners' Water System and Wastewater Impact Fee Facility Contributions provided for in paragraph 9 above without interest. However, said best efforts are contingent upon City Council approving the sanitary sewer rate increases described in paragraph 7 above and the City Council also approving 5% rate increases for water in each of said fiscal years. In addition, in the event the Impact Fee Ordinance is finally determined to be valid and enforceable, the City agrees to reimburse Owners for Owners' remaining cost (i.e., Impact Fee Facility Contribution) (except for the City's fixed fee for engineering services) with interest at the same rate earned by the City on its Impact Fee Accounts, 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) Owners 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.

14. 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.

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

16. **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.

17. **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.

18. **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.

19. **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.

20. **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, Owners, 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.

21. **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.

22. **Default.** Owners and City agree that the annexation, preliminary plat, special permit, and change of zone promote the public health, safety, and welfare so long as Owners fulfill all of the conditions and responsibilities set forth in this Agreement. In the event Owners

default in fulfilling any of their 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.

23. 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.

24. 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 an adequate neighborhood parks and trails as provided for in the Impact Fee Ordinance which is promoted by requiring Owners to pay their 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 Owners under this Agreement. In addition, the City has made an individualized determination and found that the conditions placed upon Owners 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, preliminary plat, special permit, and change of zone would have on the City's Impact Fee Facilities.

25. Reservation of Rights and Waivers. Notwithstanding any other provision of this Agreement, Owners reserve 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 Owners' understanding that Owners' 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 Owners' rights to a judicial determination of the essential nexus, rough proportionality or any other issue of federal or state constitutionality of such requirements and/or the procedure by which Owners' 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, Owners release and discharge 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 Owners may now have with respect to or arising from Owners' request for annexation, preliminary plat, special permit and change of zone approval described in Recitals A through D of this Agreement and the City's negotiations, considerations and actions taken thereon, including but not limited to: a) claims for violation of Owners' 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, preliminary plat, special permit, and/or the change of zone, the City agrees that Owners 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.

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

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

ATTEST:

THE CITY OF LINCOLN, NEBRASKA
a municipal corporation

City Clerk

By: _____
Coleen J. Seng, Mayor

HARTLAND HOMES, INC.
a Nebraska corporation

Witness

By: _____
Duane Hartman, President

ROGER SCHWISOW, an individual

ELDONNA SCHWISOW, an individual

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by Coleen J. Seng, Mayor of the City of Lincoln, Nebraska, a municipal corporation.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by Duane Hartman, President of Hartland Homes, Inc., a Nebraska corporation.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by Roger Schwisow and Eldonna Schwisow, husband and wife.

Notary Public