

BIG THOMPSON CREEK CONDITIONAL ANNEXATION AND ZONING AGREEMENT

This Big Thompson Creek Conditional Annexation and Zoning Agreement ("Agreement") is made and entered into this _____ day of _____, 2003, by and between **Ridge Development Company**, a Nebraska corporation, and **Southview, Inc.**, a Nebraska corporation, 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 46.22 acres more or less of land generally located east of 56th Street and one-half mile north of Yankee Hill Road. The approximately 46.22 acres is hereinafter referred to as the "Property" and is legally described and shown in Attachment "A" which is attached hereto and incorporated herein by this reference.

B. Owner has requested the City to rezone those portions of the Property as legally described in Attachment "B", which is attached hereto and incorporated herein by this reference, from AG Agriculture District to R-3 Residential District.

C. Owner has requested the City to approve Owner's application to preliminarily plat the Property as Big Thompson Creek (Preliminary Plat No. 02012).

D. Owner is the legal owner of that portion of the Property described in Attachment "B".

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 will go into effect on June 2, 2003. This Impact Fee Ordinance will enable 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, rezone the Property from AG Agricultural District to R-3 Residential District, and conditionally approve the preliminary plat for the Property as requested by Owner, prior to a determination as to the validity and enforceability of the Impact Fee Ordinance, provided Owner agrees to make certain Site-Related Street Improvements to South 56th Street which are necessary in order to serve the Property and further agrees to contribute to the cost of improving the City's Arterial, Water System, Water Distribution, Wastewater System, and Neighborhood Park and Trail Impact Fee Facilities necessitated by and attributable to the proposed development of the Property.

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.** The City agrees to rezone the Property from AG Agricultural District to R-3 Residential District as legally described in Attachment "B".
3. **Preliminary Plat.** The City agrees to conditionally approve the Big Thompson Creek Preliminary Plat.
4. **Site-Related Street Improvements.** If streets are final platted in Big Thompson Creek that intersect South 56th Street prior to the City's improvement of South 56th Street as a suburban cross section roadway, the Owner shall be responsible, at Owner's own cost and expense to pay the City's fixed fee for Engineering Services, and to construct temporary widening of the existing South 56th Street rural cross section to provide left turn lanes at those intersections at a length and width determined by the City.
5. **Contributions for the Impact Fee Facility Improvements.**

A. Water Distribution Impact Fee Facility Contribution. Owner agrees to contribute \$45,346 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. Owner agrees to contribute \$73,154 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 \$59,250 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 \$30,494 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 \$234,314 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.

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 Contributions attributable to full development of the lots within each final plat compared to the approved full development of the Property under this Agreement. 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 South 56th Street abutting the Property to a suburban cross section.

B. Water Distribution, Water System, Wastewater, and Neighborhood Park & Trail Impact Fee Facility Contributions. 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 Contributions attributable to

full development of the lots within each final plat compared to the approved full development of the Property under this Agreement.

7. Reimbursement of Impact Fee Facility Contributions. The City agrees to reimburse Owner for the 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. Future Cost Responsibilities. Owner understands and acknowledges that the Site-Related Street Improvements to be paid for or constructed by Owner under paragraph 4 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 Contributions for the Impact Fee Facility Improvements by Owner under paragraph 5 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 4 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.

9. **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.

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

11. **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.

12. **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.

13. **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.

14. **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.

15. **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.

16. **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.

17. **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.

18. **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.

19. **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 Change of Zone from AG Agricultural District to R-3 Residential District and the Big Thompson Creek Preliminary Plat would have on the City's Impact Fee Facilities.

20. 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 19, 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.

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 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.

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 change of zone 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.

21. **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.

ATTEST:

THE CITY OF LINCOLN, NEBRASKA
a municipal corporation

City Clerk

By: _____
Coleen J. Seng, Mayor

SOUTHVIEW, INC.
a Nebraska Corporation

Witness

By: _____
Gerald Schleich, President

RIDGE DEVELOPMENT COMPANY
a Nebraska Corporation

Witness

By: _____
Thomas E. White
President of Development Division

Witness

By: _____
John Brager
President of Construction Division

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2003, 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 _____, 2003, by Gerald L. Schleich, President of Southview, Inc., a Nebraska corporation.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2003, by Thomas E. White, President of Development Division, Ridge Development Company, a Nebraska corporation.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2003, by John Brager, President of Construction Division, Ridge Development Company, a Nebraska corporation.

Notary Public

[code\agr\Big Thompson Creek Annexation 5-13-02]