

(SUBSTITUTE NO. 3)
PINE LAKE PLAZA
CONDITIONAL ANNEXATION AND ZONING AGREEMENT

This Pine Lake Plaza Conditional Annexation and Zoning Agreement ("Agreement") is made and entered into this _____ day of _____, 2003, by and between **Pine Lake Development, L.L.C.**, a Nebraska limited liability company, **Stanley L. Portsche and Grace A. Portsche**, husband and wife, and **Mid-American Union Conference Association of Seventh Day Adventists**, a Nebraska nonprofit corporation, hereinafter collectively referred to as "Owners," and the **City of Lincoln, Nebraska**, a municipal corporation, hereinafter referred to as "City."

R E C I T A L S

A. Owners have requested the City to annex approximately 41 acres more or less of land generally located west of 84th Street and north of Highway 2 and legally described as Lots 49, 50, 51, 52, and 53, of Irregular Tracts located in Section 22, Township 9 North, Range 7 East of the 6th P.M., Lancaster County, Nebraska. The approximately 41 acres is hereinafter referred to as the "Property."

B. Owners have requested the City to rezone those portions of the Property from AGR Agricultural Residential District to R-3 Residential District and O-3 Office Park District as legally described in Change of Zone No. 3373.

C. Owners have requested the City to approve Owners' application to preliminarily plat the Property as Pine Lake Plaza.

D. Owners have requested the City to approve Use Permit No. 145 for the O-3 designated portion of the Property.

E. Pine Lake Development, L.L.C. is the legal owner of Lot 53, I.T.; Stanley and Grace Portsche are the legal owners of Lots 50, 51, and 52; and Mid-American Union Conference Association of Seventh Day Adventists is the legal owner of Lot 49, I.T., all located in the Northeast Quarter of Section 22, Township 9 North, Range 7 East of the 6th P.M., Lancaster County, Nebraska.

F. 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 City's water and wastewater systems arterial streets and neighborhood parks and trails necessitated by and attributable to new development.

G. The City is willing to annex the Property, rezone the Property from AGR Agricultural Residential District to R-3 Residential District and O-3 Office Park District, and conditionally approve the preliminary plat and use permit for the Property as requested by Owners, prior to the June 2, 2003 effective date of the Impact Fee Ordinance, provided Owners agree to make certain site-related improvements to the public street system and water system which are necessary in order to serve the Property and further agree to contribute to the cost of improving 84th Street from relocated Pine Lake Road south to Highway 2 (an Arterial Street Impact Fee Facility) and contribute to the cost of improving the City's Water Distribution 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 portions of the Property from AGR Agricultural Residential District to R-3 Residential District and O-3 Office Park District as legally described in Change of Zone No. 3373.
3. **Preliminary Plat and Use Permit.** The City agrees to conditionally approve the Pine Lake Plaza Preliminary Plat and Use Permit No. 145.
4. **Owners' Street Improvements.**
 - A. Arterial Street Impact Fee Facility Contribution. Owners agree to contribute to the City Two Hundred Thousand Dollars (\$200,000.00) toward the cost of improving South 84th Street from relocated Pine Lake Road south to Highway 2.

B. Site-Related Street Contributions. Owners agree to contribute to the City 100% of the costs of the following site-related street improvements:

- i. A 150-foot northbound to westbound left-turn lane on 84th Street at Eiger Drive.
- ii. A 150-foot southbound to westbound right-turn lane on 84th Street at Eiger Drive.

In addition to being responsible for 100% of the cost of the above-described street improvements, Owners shall be responsible for 50% of the cost for installation of a site-related traffic signal at 84th and Eiger Drive. The Owners' estimated share of the site-related street improvements and traffic signal is \$102,000.00.

C. Site-Related Street Construction. Owners agree, as part of the platting process, to design and construct the following site-related street improvements under the City's executive order construction process:

- i. Construct a 250-foot westbound to northbound right-turn lane on Highway 2 at Pine Lake Road.
- ii. Urbanize the south side of Pine Lake Road as shown on the preliminary plat of Pine Lake Plaza.
- iii. Reconstruction of the future Eiger Drive (existing Pine Lake Road)/Highway 2 intersection to permit left in and right in and right out vehicle turning movements only.
- iv. Construct Eiger Drive from South 84th Street west to Highway 2.

The actual cost of the design and construction of said improvements, including payment of the City's fixed fee for Engineering Services shall be contracted for and paid by Owners.

D. Payment of Contributions. Owners' payment of the Arterial Street Impact Fee Facility Contribution and the Site-Related Street Contributions 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 construction of said improvements and traffic signal.

5. **City's Street Improvements.** The City covenants and agrees that the City shall be responsible for 100% of the cost of the following street improvements:

A. A 150-foot southbound to westbound right-turn lane on 84th Street at proposed Pine Lake Road.

B. Reconstruction of the proposed roadway from the intersection of relocated Pine Lake Road to existing Pine Lake Road.

6. **Owners' Water Improvements.**

A. Water Distribution Impact Fee Facility Contribution. Owners agree to contribute \$14,819.64 toward the cost of making Impact Fee Facilities Improvements to the City's Water Impact Fee Facilities attributable to this proposed development of the Property.

B. Site-Related Water Main Improvements. Owners agree, as part of the platting process, to construct by executive order a 16-inch water main in Eiger Drive from South 84th Street west to Highway 2 and an 8-inch water main in Pine Lake Road from South 84th Street west to Pine Lake Court. The actual cost of the design and construction of said water mains, including payment of the City's fixed fee for Engineering Services shall be contracted for and paid by Owners, except that the City agrees to subsidize Owners for all cost attributable to oversizing the 16-water main in Eiger Drive with pipe, valves, fittings, and all other accessories that are larger than 8 inches. The estimated cost of the 16-inch water main in Eiger Drive is \$107,000. The City's estimated cost for oversizing the water main in excess of 8 inches is \$43,000. Because the amount of the City subsidy exceeds \$10,000, Owners agree that the contract for construction of this 16-inch main shall be awarded only after competitive bidding in accordance with City procedures.

C. Payment of Contributions. Owners' payment of the Water Distribution 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 construction of said improvements. Said obligation shall cease and terminate if said work is not included in year one of a six-year capital improvements program and funded for on or before the City's fiscal year 2010-2011.

7. **Reimbursement of Impact Fee Facility Contributions.** The City agrees to reimburse the Owners for the Arterial Street and Water Distribution Contributions with interest at the rate earned by the City subject to the following conditions: (1) said reimbursements shall be repaid from Impact Fees received from development of the Property from the type of Impact Fee Facility for which the contribution was received; (2) in no event shall each reimbursement exceed the impact fees for that type of Impact Fee Facility that would otherwise be due from the entire development of the Property; (3) Owners shall not be entitled to a refund of any such contribution in excess of the impact fees imposed; (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. **Water Service.** Owners understand and acknowledge that on an interim basis the Property will be serviceable off the 24-inch water main in Pine Lake Road until such time as the City can connect into the Booster Cheney System which is anticipated to happen with the realignment of 84th Street on or about August, 2003.

9. **Sanitary Sewer Service.** Owners understand and acknowledge that the area will not be sewerable until the Beals Slough trunk sewer is extended from approximately the Home Depot property at 70th Street and Highway 2 north to the subject Property.

10. **Security.** Owners shall provide the City a bond, escrow, or other security agreement approved by the City Attorney in the amount of Two Hundred Thousand and 00/100ths Dollars (\$200,000.00) to insure Owners' Arterial Street Impact Fee Facility Contribution described in Paragraph 4A above; in an amount to be determined by the Department of Public Works and Utilities to insure Owners' share of the cost of the Site-Related Street Improvements described in Paragraphs 4B and 4C above; in the amount of Fourteen Thousand Eight Hundred Nineteen and 64/100ths Dollars (\$14,819.64) to insure Owners' Water Distribution Impact Fee Facility Contribution described in Paragraph 6A above; and in the amount of Sixty-four Thousand and 00/100ths Dollars (\$64,000.00) to insure Owners' share of the cost of the Site-Related Water Main Improvements described in

Paragraph 6B above. Said bond, escrow, or other security agreement shall be provided at the time of final platting of the Property or any part thereof.

11. Future Cost Responsibilities. Owners understand and acknowledge that Site-Related Street Contributions, Site-Related Street Construction, and Site-Related Water Main Contributions, to be paid for or constructed by Owners under Paragraphs 4B, 4C, and 6B above are site-related improvements as opposed to Impact Fee Facility improvements as defined in the Impact Fee Ordinance. Owners further acknowledge and agree that the Arterial Street and Water Distribution Impact Fee Facility Contributions described in Paragraphs 4A and 6A above do not address all the impacts the proposed development of the Property will have on those Impact Fee Facilities as set forth in the Impact Fee Study prepared by Duncan Associates dated October, 2002. Therefore, Owners understand and agree that the proposed development of the Property shall be subject to the payment of impact fees pursuant to the Impact Fee Ordinance.

The Owners further agree that, by making the Site-Related Street Contribution, Site-Related Street Construction, and Site-Related Water Main Contribution as outlined in this Agreement, 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 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.

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 Preliminary Plat 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. Owners and City agree that the annexation, change of zone, preliminary plat, and community unit plan 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 its covenants and responsibilities as set forth in this Agreement, the City may in its legislative authority rezone the Rezoned Property to its previous 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.

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 purpose 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. Owners 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 streets and the provision of adequate water which is promoted by requiring Owners to pay their fair share of the cost to construct such Impact Fee Facility Improvements and that an essential nexus exists between the City's legitimate interests and the conditions placed upon Owners under this Agreement. In addition, City and Owners have made an individualized determination and agree 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, Change of Zone from AG Agricultural District to R-3 Residential District and O-3 Office Park District, and Use Permit No. 145 would have on the City's Impact Fee Facilities.

23. 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' 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 22, shall have the effect of waiving Owners' 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 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 and applications for change of zone, preliminary plat and use permit approval described in Recitals A, B, C, and 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.

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.

ATTEST:

City Clerk

Witness

THE CITY OF LINCOLN, NEBRASKA
a municipal corporation

By: _____
Coleen J. Seng, Mayor

PINE LAKE DEVELOPMENT, L.L.C.,
a Nebraska limited liability company

By: _____
Robert D. Hampton, Manager

Witness

STANLEY L. PORTSCHE

Witness

GRACE A. PORTSCHE

**MID-AMERICAN UNION CONFERENCE
ASSOCIATION OF SEVENTH DAY
ADVENTISTS**, a Nebraska nonprofit
corporation

Witness

By: _____
Title: _____

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 Robert D. Hampton, Manager of Pine Lake Development, L.L.C., a Nebraska limited liability company on behalf of said limited liability company.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2003, by Stanley L. Portsche and Grace A. Portsche, husband and wife.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

The foregoing instrument was acknowledged before me this _____ day of _____, 2003, by _____, _____ of Mid-American Union Conference Association of Seventh Day Adventists, a Nebraska nonprofit corporation, on behalf of said corporation.

Notary Public