

APPIAN WAY CONDITIONAL ANNEXATION AND ZONING AGREEMENT

This Appian Way Conditional Annexation and Zoning Agreement ("Second Annexation Agreement") is made and entered into this _____ day of _____, 2004, by and between **Eiger Corp.**, 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 53.52 acres more or less of land generally located at South 91st Street and Highway 2. The approximately 53.52 acres is hereinafter referred to as the "Property" and is legally described on Attachment A attached hereto and incorporated herein by reference.

B. All of the Property, except for Lots 108 and 109, Irregular Tracts, located in Section 23, Township 9 North, Range 7 East, was part of the land governed by the Conditional Annexation and Zoning Agreement for 84th Street and Highway 2 ("First Annexation Agreement"). A portion of Lot 108 is combined with land which was part of the land governed by the First Annexation Agreement to create Lot 4, Block 2, as shown on Appian Way Regional Center Phase II Use Permit and Special Permit Site Plan. The remaining portion of Lot 108 is shown as Lot 5, Block 2 on the Site Plan. Lot 109 is designated on the Site Plat as a non-buildable outlot.

C. Owner has requested the City to approve Special Permit No. 2046 for that portion of the Property located in the H-4 General Commercial District for a planned service commercial development for 67,500 square feet of floor area. Under Special Permit No. 2046, Lot 4, Block 2, is approved for 22,500 square feet of commercial retail space and Lot 5, Block 2, is approved for 10,000 square feet of mini-warehouse.

D. Owner has requested the City to approve Use Permit No. 150 for that portion of the Property located in the B-5 Planned Regional Business District to allow 290,00 square feet of commercial floor area.

E. Owner has requested the City to approve Change of Zone No. 3411 rezoning Owner's property from AG Agriculture District and AGR Agricultural Residential District to B-5 Planned Regional Business District and H-4 General Commercial District.

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 water and wastewater systems, arterial streets and neighborhood parks and trails necessitated by and attributable to new development.

G. 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.

H. The City is willing to annex the Property, grant the use permit, grant the special 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, and Arterial Street Impact Fee Facilities necessitated by and attributable to the proposed development of that portion of Lot 4, Block 2 and all of Lot 5, Block 2, which were not part of the land governed by the First Annexation Agreement, under Special Permit No. 2046 in the event the Impact Fee Ordinance is held invalid or is otherwise unenforceable. The amount attributable to Lot 4, Block 2, shall be based upon the percentage of Lot 4, Block 2 (43.7%) which was not part of the land governed by the First Annexation Agreement.

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. **Use Permit and Special Permit.** The City agrees to approve Use Permit No. 150 and Special Permit No. 2046 for a Planned Service Commercial Development.

3. Change of Zone. The City agrees to approve Change of Zone No. 3411, rezoning the Property from AG Agriculture District and AGR Agricultural Residential District to B-5 Planned Regional Business District and H-4 General Commercial District.

4. Contributions for Impact Fee Facility Improvements.

A. Water Distribution Impact Fee Facility Contribution. Owner agrees to contribute \$418.06 and \$478.33 toward the cost of making Impact Fee Facility Improvements to the City's Water Distribution Impact Fee Facilities attributable to the proposed development of Lots 4 and 5, Block 2, respectively, which were not part of the land governed by the First Annexation Agreement.

B. Water System Impact Fee Facility Contribution. Owner agrees to contribute \$674.44 and \$771.67 toward the cost of making Impact Fee Facility Improvements to the City's Water System Impact Fee Facilities attributable to the proposed development of Lots 4 and 5, Block 2, respectively, which were not part of the land governed by the First Annexation Agreement.

C. Wastewater Impact Fee Facility Contribution. Owner agrees to contribute \$546.25 and \$625.00 toward the cost of making Impact Fee Facility Improvements to the City's Wastewater Impact Fee Facilities attributable to the proposed development of Lots 4 and 5, Block 2, respectively, which were not part of the land governed by the First Annexation Agreement.

D. Arterial Street Impact Fee Facility Contribution. Owner agrees to contribute \$21,415.19 and \$2,210.00 toward the cost of making Impact Fee Facility Improvements to the City's Arterial Street Impact Fee Facilities attributable to the proposed development of Lots 4 and 5, Block 2, respectively, which were not part of the land governed by the First Annexation Agreement.

The Contributions for the above-described Impact Fee Facility Improvements reflect the amounts attributable to 100% development of the proposed development of those portions of Lots 4 and 5, Block 2, respectively, which were not part of the land governed by the First Annexation Agreement, in 2004 based upon the 2004 Impact Fee Schedules for said Impact Fee Facilities, provided the amount attributable to Lot 4, Block 2 is based upon the percentage

of Lot 4, Block 2 (43.7%) which was not part of the land governed by the First Annexation Agreement.

5. Future Cost Responsibilities. Owner understands and acknowledges that it is the City's position that the Impact Fee Facility Contributions by Owner under paragraph 3 of this Agreement do not address all the impacts the proposed development of Lots 4 and 5, Block 2 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 Lots 4 and 5, Block 2 shall be subject to the payment of impact fees. Owner and City further agree that the actual development of Lots 4 and 5, Block 2 may be different than the generic designation approved by Special Permit No. 2046 and that said actual development may increase or lessen the assumed impact on the City's Water Distribution, Water System, Wastewater, and Arterial Street Impact Fee Facilities under Special Permit No. 2046. Therefore, Owner and City agree that the contributions for Impact Fee Facility Improvements required under paragraph 4 above shall be adjusted by written amendment to this Second Annexation Agreement to conform to the Impact Fees charged for the actual uses developed upon Lots 4 and 5, Block 2.

6. Guaranteed Payment of Contributions.

A. Water Distribution, Water System, Wastewater, and Arterial Street Impact Fee Facility Contributions. Owner shall, prior to the approval of each final plat of Lots 4 and 5, Block 2, 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, 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 Lots 4 and 5, Block 2, under this Second Annexation Agreement. Owner's proportionate payments of the Water Distribution, Water System, Wastewater, 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, 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.

7. **Binding Effect.** This Second Annexation 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.

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

9. **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 Second Annexation Agreement.

10. **Governing Law.** All aspects of this Second Annexation Agreement shall be governed by the laws of the State of Nebraska. The invalidity of any portion of this Second Annexation Agreement shall not invalidate the remaining provisions.

11. **Interpretations.** Any uncertainty or ambiguity existing herein shall not be interpreted against either party because such party prepared any portion of this Second Annexation Agreement, but shall be interpreted according to the application of rules of interpretation of contracts generally.

12. **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.

13. **Relationship of Parties.** Neither the method of computation of funding or any other provisions contained in this Second Annexation 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 Second Annexation Agreement.

14. Assignment. In the case of the assignment of this Second Annexation 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 Second Annexation Agreement.

15. Default. Owner and City agree that the annexation, use permit, 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 Second Annexation Agreement. In the event Owner defaults in fulfilling any of its covenants and responsibilities as set forth in this Second Annexation Agreement, the City may in its legislative authority rescind said use permit and 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 Second Annexation Agreement or to obtain damages for its breach.

16. Definitions. For purposes of this Second Annexation 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 Second Annexation 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.

17. 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 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 Second Annexation Agreement. In addition, City has made an individualized determination and found that the conditions placed upon Owner under this Second Annexation Agreement are related both in nature and extent and are in rough proportionality to the projected adverse effects full development of Lots 4 and 5, Block 2 under the annexation, Use Permit No. 150, Special Permit No. 2046, and Change of Zone No. 3411, would have on the City's Impact Fee Facilities.

18. Reservation of Rights and Waivers. Notwithstanding any other provision of this Second Annexation Agreement, Owner reserves the right to sue the City to determine the validity of the provisions of this Second Annexation Agreement which relate to Impact Fee Facilities. No provision of this Second Annexation 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 Second Annexation Agreement do not address all the impacts the proposed development of Lots 4 and 5, Block 2 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 Use Permit No. 150, Special Permit No. 2046, and Change of Zone No. 3411 approval described in Recitals A, C, D, and E of this Second Annexation 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. §1983 and attorneys fees under 42 U.S.C. §1988; b) claims for just compensation for a temporary taking of Lots 4 and 5, Block 2 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, use permit, special 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 Second Annexation Agreement, provided the statute of limitations in which to bring said lawsuit has not expired.

19. Recordation. This Second Annexation 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 Second Annexation Agreement on the day and year first written above.

ATTEST:

City Clerk

THE CITY OF LINCOLN, NEBRASKA
a municipal corporation

By: _____
Coleen J. Seng, Mayor

EIGER CORP.
a Nebraska corporation

By: _____
_____, President

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 _____, President of Eiger Corp., a Nebraska corporation, on behalf of said corporation.

Notary Public