

SCHWORER
CONDITIONAL ANNEXATION AND ZONING AGREEMENT
(REMAINING 11.1877 ACRES OF LOT 69, 6-10-7)

This Schworer Conditional Annexation and Zoning Agreement is made and entered into this ____ day of _____, 2006, by and between **Dennis R. Schworer, LLC**, a Nebraska limited liability company, hereinafter referred to as “Owner,” and the **City of Lincoln, Nebraska**, a municipal corporation, hereinafter referred to as “City.”

RECITALS

A. Owner is the owner of Lot 69, Irregular Tract, located in Section 6, Township 10 North, Range 7 East of the 6th P.M., Lancaster County, Nebraska. Lot 69 is generally located on the east side of North 33rd Street and north of Superior Street.

B. Owner has requested the City to annex the remaining approximately 11.1877 acres of Lot 69 that is not currently annexed (“Annexed Property”). The Annexed Property is legally described on Exhibit A attached hereto.

C. Owner has requested a change of zone to rezone the Annexed Property and additional land from R-3 Residential District to H-3 Highway Commercial District for use as an automobile dealership, without submitting a preliminary plat covering all of Lot 69.

D. The City is not willing to approve the annexation and change of zone unless Owner submits a preliminary plat that provides for a future street from the existing street stub into Lot 69 at North 33rd Street extending east to the east boundary of Lot 69.

E. In order to satisfy Owner’s desire and the City’s concerns, the Owner has proposed to divide Lot 69 by deed into a North Lot and South Lot and to preliminary plat the North Lot showing the extension of a local street from the existing street stub into Lot 69 at North 33rd Street, east to the east boundary of Lot 69. Owner further proposes to only final plat the southwest corner of the North Lot needed for the auto dealership, and to request deferral of the construction of the street and other subdivision improvements until the northwest corner of the North Lot is final platted.

F. The City Administration is willing to support the Owner’s proposal provided Owner agrees that no occupancy permit shall be issued for the auto dealership building(s) until the southwest corner of the North Lot is final platted.

G. 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.

H. 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. The District Court held the Impact Fee Ordinance to be valid and enforceable as an excise tax. The decision of the District Court has been appealed to the Nebraska Supreme Court.

I. Pursuant to the North 33rd Street Infrastructure Agreement approved by Resolution No. A-80046, Owner participated in the financing or construction of improvements qualifying Owner to an exemption from Water and Arterial Street Impact Fees.

J. The City is willing to annex the Annexed Property and approve the change of zone prior to the determination as to the validity and enforceability of the Impact Fee Ordinance, provided Owner agrees to pay all wastewater impact fees imposed by the Impact Fee Ordinance necessitated by and attributable to the proposed development of the Annexed Property or pay an equivalent in-lieu-of fee in the event the Impact Fee Ordinance is held invalid and 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 Annexed Property.
2. **Change of Zone.** The City agrees to approve the change of zone rezoning the Annexed Property from R-3 Residential District to H-3 Highway Commercial District.
3. **Issuance of Occupancy Permit.** Owner agrees that no occupancy permits shall be issued for any building to be located on the Annexed Property until Lot 69 has been divided by deed into a North and a South Lot; the North Lot has been preliminary platted showing a local street from the existing street stub into the North Lot at North 33rd Street extended east to the east property line of the North Lot (“East-West Street”); and the southwest corner of the North Lot of the North Lot containing the building has been final platted. Owner further agrees that any buildings constructed on the Annexed Property shall be set back from the East-West Street as shown on the preliminary plat in accordance with the yard setback requirement in Lincoln Municipal Code §27.43.080.
4. **Timing of Improvements.** Owner agrees to install at Owner’s own cost and expense any public or private improvement or facility required by Chapter 26.23 (Development Standards) of the Lincoln Municipal Code. City agrees to support any request of Owner to defer

installation of said improvements until the northwest corner of the North Lot abutting the final plat of the southwest corner of the North Lot is final platted.

5. Contribution for Wastewater Impact Fee Facility Improvement. Wastewater Impact Fee Facility Contribution. Owner agrees to contribute \$10,098 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.

6. Future Cost Responsibilities. Owner understands and acknowledges that it is the City's position that the Impact Fee Facility Contributions 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 that the proposed development of the Property shall be subject to the payment of impact fees.

7. Guaranteed Payment of Contribution.

A. Wastewater Impact Fee Facility Contribution. Owner shall, within 30 days from the date of this Agreement, provide the City a bond, escrow, letter of credit, or other security agreement approved by the City Attorney in an amount equal to the Wastewater Impact Fee Facility Contribution attributable to full development of the Property under this Agreement. Owner's payment of the Wastewater Impact Fee Facility Contribution 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 Wastewater 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. Release of Guarantee. 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 Contribution.

8. 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.

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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. Default. Owner and City agree that the annexation and special permit 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 or take such other remedies, legal or equitable, which the City may have to enforce this Agreement or to obtain damages for its breach.

17. 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.

18. Fair Share. Owner agrees that the City has a legitimate interest in the public health, safety and welfare and in providing for the provision of adequate wastewater service as provided for in the Impact Fee Ordinance which is promoted by requiring Owner to pay its fair

