

TER93MID

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: DEVELOPMENT IMPROVEMENT AGREEMENT

NAME OF AGENCY OR CONTRACTOR: TERRENCE J. O'CONNOR

STREET ADDRESS/PARCEL NAME/SUBDIVISION/PROJECT: MIDAS MUFFLER AND LUBE
SHOP AT 101 NORTH AVENUE.

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 1993

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

DEVELOPMENT IMPROVEMENTS AGREEMENT1641723 02:12 PM 06/08/93
MONIKA TODD CLK&REC MESA COUNTY CO

1. **Parties:** The parties to this Development Improvements Agreement ("the Agreement") are Terrence J. O'Connor ("the Developer") and **THE CITY OF GRAND JUNCTION**, Colorado ("the City").

THEREFORE, for valuable consideration, the receipt and adequacy of which is acknowledged, the Parties agree as follows:

2. **Effective Date:** The Effective Date of the Agreement will be the date that this agreement is recorded which is not sooner than ~~recording of the~~ ISSUANCE OF A building permit.

RECITALS

The Developer seeks permission to develop property within the City to be known as 101 North Avenue, which property is more particularly described on Exhibit "A" attached and incorporated by this reference (the "Property"). The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the development and limiting the harmful effects of substandard developments. The purpose of this Agreement is to protect the City from the cost of completing necessary improvements itself and is not executed for the benefit of materialmen, laborers, or others providing work, services or material to the development or for the benefit of the purchasers or users of the development. The mutual promises, covenants, and obligations contained in this Agreement are authorized by state law, the Colorado Constitution and the City's land development ordinances.

DEVELOPER'S OBLIGATION

3. **Improvements:** The Developer will design, construct and install, at its own expense, those on-site and off-site improvements listed on Exhibit "B" attached and incorporated by this reference. The Developer agrees to pay the City for inspection services performed by the City, in addition to amounts shown on Exhibit B. The City estimates that \$ 0 will be required for City inspection of the required improvements. The Developer's obligation to complete the improvements is and will be independent of any obligations of the City contained herein.

4. **Security:** To secure the performance of its obligations under this Agreement (except its obligations for warranty under paragraph 6), the Developer will enter into an agreement which complies with either option identified in paragraph 28, or other written agreement between the City and the Developer.

5. **Standards:** The Developer will construct the Improvements according to the standards and specifications required by the City Engineer or as adopted by the City.

6. **Warranty:** The Developer warrants that the Improvements, each and every one of them, will be free from defects for a period of twelve (12) months from the date that the City Engineer accepts or approves the improvements completed by the Developer.

7. **Commencement and Completion Periods:** The improvements, each and every one of them, will be completed within 4 Months from the Effective Date of this Agreement (the "Completion Period").

8. **Compliance with Law:** The developer will comply with all relevant federal, state and local laws, ordinances, and regulations in effect at the time of final approval associated with the development when fulfilling its obligations under this Agreement.

9. **Notice of Defect:** The Developer's Engineer will provide timely notice to the Developer, contractor, issuer of security and the City Engineer whenever inspection reveals, or the Developer's Engineer otherwise has knowledge, that an improvement does not conform to City standards and any specifications approved in the development application or is otherwise defective. The developer will have thirty (30) days from the issuance of such notice to correct or substantially correct the defect.

10. **Acceptance of Improvements:** The City's final acceptance and/or approval of improvements will not be given or obtained until the Developer presents a document or documents, for the benefit of the City, showing that the Developer owns the improvements in fee simple and that there are no liens, encumbrances, or other restrictions on the improvements. Approval and/or Acceptance of any improvements does not constitute a waiver by the City of any rights it may have on account of any defect in or failure of the improvement that is detected or which occurs after the approval and/or acceptance.

11. **Use of Proceeds:** The City will use funds deposited with it or drawn pursuant to any written disbursement agreement entered into between the parties only for the purpose of completing the Improvements or correcting defects in or failure of the Improvements.

12. **Events of Default:** The following conditions, occurrences or actions will constitute a default by the Developer during the Completion Period:

- a. Developer's failure to complete each portion of the Improvements in conformance with the agreed upon time schedule; the City may not declare a default until a fourteen (14) calendar day notice has been given to the Developer;
- b. Developer's failure to demonstrate reasonable intent to correct defective construction of any improvement within the applicable correction period; the City may not declare a default until a fourteen (14) calendar day notice has been given to the Developer;

- c. Developer's insolvency, the appointment of a receiver for the Developer or the filing of a voluntary or involuntary petition in bankruptcy respecting the Developer; in such event the City may immediately declare a default without prior notification to the Developer;
- d. Notification to the City, by any lender with a lien on the property, of a default on an obligation; the City may immediately declare a default without prior notification to the Developer;
- e. Initiation of any foreclosure action of any lien or initiation of mechanics lien(s) procedure(s) against the Property or a portion of the Property or assignment or conveyance of the Property in lieu of foreclosure; the City may immediately declare a default without prior notification to the Developer.

13. **Measure of Damages:** The measure of damages for breach of this Agreement by the Developer will be the reasonable cost of satisfactorily completing the Improvements plus reasonable City administrative expenses. For improvements upon which construction has not begun, the estimated costs of the Improvements as shown on Exhibit "B" will be prima facie evidence of the minimum cost of completion; however, neither that amount or the amount of a letter of credit, the subdivision improvements disbursement agreement or cash escrow establish the maximum amount of the Developer's liability.

14. **City's Rights Upon Default:** When any event of default occurs, the City may draw on the letter of credit, escrowed collateral, or proceed to collect any other security to the extent of the face amount of the credit or full amount of escrowed collateral, cash, or security less ninety percent (90%) of the estimated cost (as shown on Exhibit "B") of all improvements previously accepted by the City or may exercise its rights to disbursement of loan proceeds or other funds under the improvements disbursement agreement. The City will have the right to complete improvements itself or it may contract with a third party for completion, and the Developer grants to the City, its successors, assigns, agents, contractors, and employees, a nonexclusive right and easement to enter the Property for the purposes of constructing, reconstructing, maintaining, and repairing such improvements. Alternatively, the City may assign the proceeds of the letter of credit, the improvements disbursement agreement, the escrowed collateral, cash, or other funds or assets to a subsequent developer (or a lender) who has acquired the development by purchase, foreclosure or otherwise who will then have the same rights of completion as the City if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished improvements and provides reasonable security for the obligation. In addition, the City may also enjoin the sale, transfer, or conveyance of lots within the development, until the improvements are completed or accepted. These remedies are cumulative in nature and are in addition to any other remedies the City has at law or in equity.

15. **Indemnification:** The Developer expressly agrees to indemnify and hold the City, its officers, employees and assigns harmless from and against all claims, costs and liabilities

of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or on account of the performance of work at the development or the Property pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance of work pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance of work pursuant to this Agreement except where such suit is brought by the Developer against the City. The Developer is not an agent or employee of the City.

16. **No Waiver:** No waiver of any provision of this Agreement by the City will be deemed or constitute a waiver of any other provision, nor will it be deemed or constitute a continuing waiver unless expressly provided for by a written amendment to this Agreement signed by both City and Developer; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default or defaults of the same type. The City's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Developer or the acceptance of any improvement.

17. **Amendment or Modification:** The parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the City by the City Manager or his designee and by the Developer or his authorized officer. Such amendment or modification will be properly notarized before it may be effective.

18. **Attorney's Fees:** Should either party be required to resort to litigation to enforce the terms of this Agreement, the prevailing party, plaintiff or defendant, will be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If the court awards relief to both parties, the attorney's fees may be equitably divided between the parties by the decision maker.

19. **Vested Rights:** The City does not warrant by this Agreement that the Developer is entitled to any other approval(s) required by the City, if any, before the Developer is entitled to commence development or to transfer ownership of property in the development.

20. **Third Party Rights:** No person or entity who or which is not a party to this Agreement will have any right of action under this Agreement.

21. **Time:** For the purpose of computing the Abandonment and Completion Periods, and time periods for City action, such times in which war, civil disasters, or acts of God occur or exist will not be included if such times prevent the Developer or City from performing its obligations under the Agreement.

22. **Severability:** If any part, term, or provision of this Agreement is held by the courts to be illegal or otherwise unenforceable, such illegality or unenforceability will not affect the validity of any other part, term, or provision and the rights of the parties will be construed as if the part, term, or provision was never part of the Agreement.

23. **Benefits:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the City. Such approval may not be unreasonably withheld, but any unapproved assignment is void. Notwithstanding the foregoing, the burdens of this Agreement are personal obligations of the Developer and also will be binding on the heirs, successors, and assigns of the Developer, and shall be a covenant(s) running with the Property. There is no prohibition on the right of the City to assign its rights under this Agreement. The City will expressly release the original Developer's guarantee or obligations under the improvements disbursement agreement if it accepts new security from any developer or lender who obtains the Property. However, no other act of the City will constitute a release of the original Developer from his liability under this Agreement.

24. **Notice:** Any notice required or permitted by this Agreement will be deemed effective when personally delivered in writing or three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified, and return receipt requested, and addressed as follows:

If to Developer:

Terrence J. O'Connor
1600 38th Street, Suite 203
Boulder, CO 80301

If to City:

City of Grand Junction
 Community Development Director
 250 N. 5th Street
 Grand Junction, Colorado 81501

25. **Recordation:** Developer will pay for any costs to record a copy of this Agreement in the Clerk and Recorder's Office of Mesa County, Colorado.

26. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the City's sovereign immunity under any applicable state law.

27. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any civil action commenced by either party to this Agreement whether arising out of or relating to the Agreement, letter of credit, improvements disbursements agreement, or cash escrow agreement or any action to collect security will be deemed to be proper only if such action is commenced in Mesa County. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.

28. The **improvements guarantee** required by the City Code to ensure that the improvements described in the improvements agreement are constructed (to city standards) may be in the form of an agreement: (I) between a bank doing business in Mesa County and the City or as described in (II), below. The agreement between a bank and the City

(I) shall provide, among other things, for the bank to guarantee and warrant to the City that it shall:

- a. have available money equal to the estimated costs of the required improvements, in an amount equal to the amount agreed upon in the Improvements Agreement;
- b. only pay such amounts to contractors who have constructed required Improvements;
- c. only pay such amounts after the bank has received the written approval of the City Engineer, or his designee; the City Engineer shall inspect within three (3) working days of request;
- d. in the event the bank disburses without the City Engineer having approved such disbursement, the Bank shall pay, in addition to all other sums it would otherwise be obligated to pay, to the City the amount of the wrongful disbursement if the City Engineer determines that the work is not acceptable, based on the approved plans and specifications. The City shall use such money to cause the work to be constructed in accordance with the approved plans and specifications;

II. An alternative agreement may be executed for a development which is expected to require not more than 10 transactions shall contain the following provisions:

- a. The Finance Department of the City will act as disbursing agent and will account for disbursements to Developer contractors as required improvements are completed and accepted.
- b. The City will accept a cash deposit from the Developer equal to the City approved estimate of the required improvements, for purposes of securing and guaranteeing the construction of the required sewer, water, streets, and on-site improvements in the development plan. Such deposit(s), currently estimated at approximately \$ 11,502⁰⁰ shall be given to the City's Finance Department, commingled with other funds of the City and specifically invested in the short term market. Interest income shall be allocated to the Developer's escrow account monthly, in the same manner as other short-term investments of the city.
- c. Such interest income shall be used to reimburse the General Fund of the City for accounting and transaction costs incurred in making payments to the appropriate contractors. For purposes of this agreement, the City's costs shall be one hundred dollars (\$100.00) for each check disbursement or other transaction which is made. In any event the amount retained by the City for

its transaction costs shall not be less than two percent (2%) of the amount deposited. After all required improvements have been made and accepted by the City, any surplus funds remaining in the account (in excess of the two percent minimum or the calculated transaction costs) shall be returned to the developer within thirty (30) days of said acceptance date. Any transaction costs which are not covered by the amount of the deposit plus accrued interest shall be paid to the City by the Developer in like manner within thirty (30) days of completion of the improvements. No guarantee as to the level of interest income or rate of return on the funds so deposited is either implied or made in this agreement; the City agrees only to keep the funds invested as with other City funds.

- d. in any event, the Developer promises to construct the required improvements to the satisfaction of the City Engineer, in accordance with the approved plans and specifications.
29. a. Conditions of Acceptance: The City shall have no responsibility or liability with respect to any street, or other improvement(s), notwithstanding the use of the same by the public, unless the street or other improvements shall have been accepted by the City.

Prior to requesting final acceptance of streets, storm drainage facilities, or other required improvements, the Developer shall furnish to the City Engineer as-built drawings in reproducible form and copies of results of all construction control tests required by City specifications.

- b. Phased Development: If the City allows a street to be constructed in stages, the Developer of the first one-half street opened for traffic shall construct the adjacent curb, gutter and sidewalk in the standard location and shall construct the required width of pavement from the edge of gutter on his side of the street to enable an initial two-way traffic operation without on-street parking. That Developer is also responsible for end-transitions, intersection paving, drainage facilities, and adjustments to existing utilities necessary to open the street to traffic.



Attest:

City of Grand Junction
250 North Fifth Street
Grand Junction CO 81501

Stephanie Nye
Stephanie Nye
City Clerk

By: Mark K. Achen
Mark K. Achen
City Manager

TYPE LEGAL DESCRIPTION) BELOW, USING ADDITIONAL SHE) AS NECESSARY. USE SINGLE
SPACING WITH A ONE INCH MARGIN ON EACH SIDE.

Exhibit A BOOK 1982 PAGE 703

THAT PART OF LOTS 1,2,3,4, AND 5, BLOCK 11, CITY OF GRAND JUNCTION, DESCRIBED
AS BEGINNING AT THE NORTHWEST CORNER OF SAID LOT 1; THENCE EAST 125 FEET;
THENCE SOUTH 145 FEET; THENCE WEST 125 FEET; THENCE NORTH 145 FEET TO THE
POINT OF BEGINNING. 101 NORTH AVENUE, GRAND JUNCTION, COLORADO

IMPROVEMENTS LIST/DETAIL

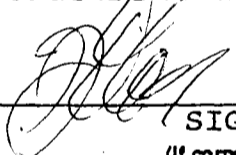
DATE: 01-26-93
 NAME OF DEVELOPMENT: Midas Muffler
 LOCATION: 101 North Avenue
 PRINTED NAME OF PERSON PREPARING: Terry McClain

BOOK 1982 PAGE 704

	UNITS	TOTAL QTY.	UNIT PRICE	TOTAL AMOUNT
I. SANITARY SEWER				
1. Clearing and grubbing	_____	_____	_____	N/A
2. Cut and remove asphalt	_____	_____	_____	N/A
3. PVC sanitary sewer main (incl. trenching, bedding & backfill)	_____	_____	_____	N/A
4. Sewer Services (incl. trenching, bedding, & backfill)	<u>Connected to existing line in Property</u>			
5. Sanitary sewer manhole(s)	<u>Connected to existing line in Property</u>			
6. Connection to existing manhole(s)	_____	_____	_____	N/A
7. Aggregate Base Course	_____	_____	_____	N/A
8. Pavement replacement	_____	_____	_____	N/A
9. Driveway restoration	_____	_____	_____	N/A
10. Utility adjustments	_____	_____	_____	N/A
II. DOMESTIC WATER				
1. Clearing and grubbing	_____	_____	_____	N/A
2. Cut and remove asphalt	_____	_____	_____	N/A
3. Water Main (incl. excavation, bedding, backfill, valves and appurtenances)	_____	_____	_____	N/A
4. Water services (incl. excavation, bedding, backfill, valves, and appurtenances)	<u>Connection to existing line in property</u>			
5. Connect to existing water line	_____	_____	_____	N/A
6. Aggregate Base Course	_____	_____	_____	N/A
7. Pavement Replacement	_____	_____	_____	N/A
8. Utility adjustments	_____	_____	_____	N/A
III. STREETS				
1. Clearing and grubbing	_____	_____	_____	N/A
2. Earthwork, including excavation and embankment construction	_____	_____	_____	N/A
3. Utility relocations	_____	_____	_____	N/A
4. Aggregate sub-base course (square yard)	_____	_____	_____	N/A
5. Aggregate base course (square yard)	_____	_____	_____	N/A
6. Sub-grade stabilization	_____	_____	_____	N/A
7. Asphalt or concrete pavement (square yard)	_____	_____	_____	N/A
8. Curb, gutter & sidewalk (linear feet)	<u>Curb & Gutter</u>	<u>70LF</u>	<u>\$13 PLF</u>	<u>\$ 910.00</u>
	<u>sidewalk</u>	<u>76LF</u>	<u>\$17 PLF</u>	<u>\$ 1,292.00</u>
9. Driveway sections (square yard)	_____	_____	_____	N/A
10. Crossspans & fillets	<u>Entry crossspan</u>	<u>720SF</u>	<u>\$2.50SF</u>	<u>\$1800.00</u>
1. Retaining walls/structures	_____	_____	_____	N/A
2. Storm drainage system	_____	_____	_____	N/A

13. Signs and other traffic control devices	_____	_____	_____	\$2500.00
14. Construction staking	_____	_____	_____	N/A
15. Dust control	_____	_____	_____	N/A
16. Street lights (each)	_____	_____	_____	N/A
IV. LANDSCAPING				
1. Design/Architecture	_____	_____	_____	N/A
2. Earthwork (includes top soil, fine grading, & berming)	_____	_____	See # 4	_____
3. Hardscape features (includes walls, fencing, and paving)	_____	_____	_____	N/A
4. Plant material and planting	_____	_____	_____	\$5000.00
5. Irrigation system	_____	_____	See above #4	_____
6. Other features (incl. statues, water displays, park equipment, and outdoor furniture)	_____	_____	_____	N/A
7. Curbing	_____	_____	_____	N/A
8. Retaining walls and structures	_____	_____	_____	N/A
9. One year maintenance agreement	_____	_____	_____	N/A
V. MISCELLANEOUS				
1. Design/Engineering	_____	_____	_____	N/A
2. Surveying	_____	_____	_____	N/A
3. Developer's inspection costs	_____	_____	_____	N/A
4. Quality control testing	_____	_____	_____	N/A
5. Construction traffic control	_____	_____	_____	N/A
6. Rights-of-way/Easements	_____	_____	_____	N/A
7. City inspection fees	_____	_____	_____	N/A
8. Permit fees	_____	_____	_____	N/A
9. Recording costs	_____	_____	_____	N/A
10. Bonds	_____	_____	_____	N/A
11. Newsletters	_____	_____	_____	N/A
12. General Construction Supervision	_____	_____	_____	N/A
13. Other _____	_____	_____	_____	N/A
14. Other _____	_____	_____	_____	N/A

TOTAL ESTIMATED COST OF IMPROVEMENTS: \$ 11,502.00

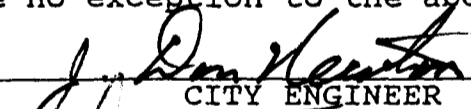


 SIGNATURE OF DEVELOPER
 (If corporation, to be signed by President and attested to by Secretary together with the corporate seals.)


81-25-93

 DATE

I have reviewed the estimated costs and time schedule shown above and, based on the plan layouts submitted to date and the current costs of construction, I take no exception to the above.



 CITY ENGINEER



 COMMUNITY DEVELOPMENT

5-7-93

 DATE

5-7-93

 DATE

Bank One, Boulder, NA
Boulder Banking Center
Broadway & Canyon
Post Office Box 59
Boulder, Colorado 80306-0059

Tel 303 442 6770
Fax 303 447 5708



IRREVOCABLE LETTER OF CREDIT

To: The City of Grand Junction	No.	3803
250 North 5th Street	Date:	06/07/93
Grand Junction, CO 81501	Expiry:	06/07/94
	Amount:	\$11,502.00

Project name: Midas Muffler and Lube Shop at 101 North Avenue

Dear Sirs:

We hereby establish our Irrevocable Letter of Credit in your favor in the amount of \$11,502.00 (Eleven thousand five hundred two and no/100 U.S. Dollars), available by drafts at sight. This Letter of Credit is issued for the account of Boulder Muffler, Inc., 1600 38th Street, Ste 203, Boulder, CO 80301 and is subject to the following terms and conditions:

DRAFTS. All drafts must be drawn on Bank One, Boulder, N.A., must be negotiated or presented to Bank One, Boulder, N.A. during our regular business hours on or before the expiration date stated above and must bear the reference, "Drawn on Bank One, Boulder, N.A. Letter of Credit No. 3803 dated June 7, 1993."

DOCUMENTS. All drafts must be accompanied by the following documents:

1. This original Letter of Credit.
2. A written statement purportedly signed by the City Manager, or the Director of Public Works, or the Director of Community Development of the City of Grand Junction, Colorado stating that such funds represent amounts due and owing.

OTHER TERMS AND CONDITIONS. This Letter of Credit is not transferable. It is subject to Article 5 of the Uniform Commercial Code as in effect in Colorado on the date of its issuance.

OBLIGATION OF ISSUER. Bank One, Boulder, N.A. agrees with the drawers, endorsers, and good faith holders of drafts drawn under and in compliance with the terms and conditions of this Letter of Credit that Bank One, Boulder, N.A. will duly honor such drafts upon presentation to this office.

Sincerely,


Donatella Scanniello, Vice President